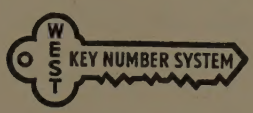
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85 P.2d – 86 P.2d

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CALIFORNIA REPORTER

IN VOLUME

85 PACIFIC REPORTER

SECOND SERIES

CAL.REP.85–86 P.2d—1

12 Cal.2d 365

PROVIDENT LAND CORPORATION v. ZUMWALT et al.

Sac. 5133.

Supreme Court of California.

Nov. 28, 1938.

As Modified on Denial of Rehearing Dec. 22, 1938.

1. Waters and water courses ⇐230(6)

Where wholesale delinquencies in irrigation district assessments and wholesale bond defaults resulted in pyramiding of assessments on more valuable land and in the district's acquiring large tracts which it could not sell, district could not give preference to holders of unmatured bonds by leasing such land and buying unmatured bonds with proceeds of the leases, as against contention that assessments only were pledged to payment of matured bonds. Gen.Laws 1931, Act 3854, §§ 29, 33, 39, 40, 43, 47, 52, 55, 67.

2. Waters and water courses ⇐230

The statute governing irrigation districts manifests intent to secure the bonds by the proceeds of the land in the district, though bonds themselves are not a lien on the land. Gen.Laws 1931, Act 3854.

3. Waters and water courses ⇐231

Land acquired by irrigation district because of delinquency in assessments, which comes into private ownership again, is liable for assessments. Gen.Laws 1931, Act 3854, § 33.

4. Waters and water courses ⇐231

Land coming into the possession of irrigation district because of delinquency in assessments should be sold again, if possible, so that it may produce the required revenue. Gen.Laws 1931, Act 3854, § 33.

5. Waters and water courses ⇐228

It is within the discretion of directors of irrigation district to use some portion of money derived from land acquired by the district for delinquencies, for running expenses, and their discretion will be upheld when such use is necessary. Gen.Laws 1931, Act 3854.

6. Waters and water courses ⇐230(6)

Where directors of irrigation district declare that a surplus exists in money derived from land acquired by the district because of delinquency in assessments over and above the district's operating needs, such surplus should not be given to junior bondholders in preference to those with prior claims, but should be paid on past due bonds and coupons in the order of their registration. Gen.Laws 1931, Act 3854.

7. Waters and water courses ⇐231

In dealing with a situation not contemplated by the statute governing irrigation districts, and not covered by any clear provision thereof, wherein wholesale delinquencies resulted in the district's acquiring large tracts of land which it could not resell, court need not find any express direction in the statute setting forth the exact procedure, but must construe the statute's general provisions in the light of equitable principles. Gen.Laws 1931, Act 3854.

8. Waters and water courses ⇐228½, 231

Land acquired by irrigation district because of delinquencies in assessments is trust property, held for the uses and purposes of the statute governing irrigation districts, and proceeds of lease thereof have the same character. Gen.Laws 1931, Act 3854.

9. Waters and water courses ⇐231

Repayment of irrigation district's bondholders is only one among several purposes of the statute governing irrigation districts, for which the proceeds of land acquired by district because of delinquency in assessments are held in trust. Gen.Laws 1931, Act 3854.

10. Waters and water courses ⇐230(6), 231

Under statute governing irrigation districts, the land in the district is the ultimate and only source of payment of the bonds, which can never be permanently released from the obligation of the bonds until bonds are paid, and release from liability while the district holds title is temporary only. Gen.Laws 1931, Act 3854.

11. Waters and water courses ⇐230(6)

In administration of affairs of irrigation district, any practice which removes the land from its position as ultimate security for the bonds, or places its proceeds beyond the reach of the bondholders, destroys the general plan of the statute governing irrigation districts and is contrary to the spirit of such statute. Gen. Laws 1931, Act 3854.

12. Waters and water courses ⇐230(6)

Where irrigation district, without authority, purchased unmatured bonds with proceeds of lease of lands acquired by the district, to the prejudice of holders of ma-

tured bonds, the sales must be set aside and the consideration therefor returned.

In Bank.

Appeal from Superior Court, Glenn County; Warren Steel, Judge.

Action by the Provident Land Corporation against I. G. Zumwalt and others, to set aside purchases by an irrigation district of its own bonds. From a judgment for defendants, plaintiff appeals.

Reversed, with directions.

Prior opinion, 71 P.2d 825.

Louis Bartlett, of San Francisco (W. S. McGuire, of San Francisco, of counsel), for appellant.

George R. Freeman, of Willows, for respondents other than I. G. Zumwalt.

Rutledge & Rutledge and Thomas Rutledge, all of Colusa (Elmer Laine, of Willows, of counsel), for respondent I. G. Zumwalt.

Hankins & Hankins, of San Francisco, C. F. Metteer, of Sacramento, Harry W. Horton, and George R. Kirk, both of El Centro, Arvin B. Shaw, Jr., of Los Angeles, A. L. Cowell, of Stockton, and Thomas C. Boone, of Modesto, amici curiae for Irrigation Districts Ass'n of California.

PER CURIAM.

This is an action by a bondholder to set aside purchases by an irrigation district of its own bonds from other bondholders.

Provident Irrigation District was organized in April, 1918, under the provision of the California Irrigation District Act, Deering's Gen.Laws 1931, Act 3854, p. 1948, with an area of some 22,805 acres. Two bond issues were sold, one in 1918 and the second in 1921, in the total aggregate sum of $1,190,000. In common with most of the other irrigation districts, it suffered considerable delinquencies in its assessments in recent years, and much of the land was taken over by the district for nonpayment. For reasons hereinafter mentioned, this did not relieve the district's financial difficulties, and in January, 1936, its outstanding bonds were in the sum of $900,000, with $152,000 in instalments of principal past due. Unpaid interest coupons in the approximate sum of $225,000 were also past due.

From 1933 to 1936 the district acquired title to over 10,000 acres of land by collector's deed after sale for delinquent assessments. Being unable to find a buyer for any of the land, it leased a portion of it during these years, and deposited the proceeds in its general fund. On January 7, 1936, the directors passed a resolution declaring that the sum of $10,000 in the general fund constituted a surplus, and ordered that it be set aside for the purchase of bonds of the district in the open market. The secretary was instructed to inform the bondholders that they would be bought from the one making the lowest offer. On February 4, 1936, the district by another resolution purchased from three bondholders, I. G. Zumwalt, defendant herein, the Capital National Bank, and L. M. Benoit, a total of 50 outstanding bonds and attached coupons, of the par value of $1,000 each, for said sum of $10,000.

Plaintiff is the holder of bonds past due in the sum of $86,000 and coupons past due in the sum of $125,000. Its bonds were due and registered prior to those of the aforementioned parties. On the theory that the purchases by the district were in violation of the provisions of the Irrigation District Act, plaintiff sued to set aside the sales and to restore to the treasury of the district the sum of $10,000 paid for the bonds. Three separate actions were brought against each of the three sellers mentioned above, joining as defendants the district and its officers and directors. The complaints in each case are practically the same, and the decision in the instant case will be determinative of the other actions, namely, Provident Land Corporation v. Provident Irrigation District et al., Cal.Sup., 85 P.2d 122, and Provident Land Corporation v. Benoit et al., Cal.Sup., 85 P.2d 122.

The complaints allege that the resolution setting aside the sum of $10,000 for the purchase of bonds did not specify any time or place, and that no notice of such intended purchase was given. It is further set forth that Benoit, now deceased and represented in the action by his administratrix, was the secretary of the district; and that each of the three purchases was at the identical fixed price of 20 per cent of the par value of the bonds, determined in advance. The complaints do not allege fraud or collusion, nor do they attempt to show that other bonds could have been bought at a lower price. The theory of the actions is simply that the sales were beyond the powers of the district and in violation of the rights of bondholders.

The trial court sustained general demurrers to these complaints, and upon failure to amend, judgments by default followed, from which plaintiff appealed. The precise question raised by the appeals is whether the purchases were valid, that is, whether the district had power to buy unmatured bonds at a discount with funds derived from rentals of land acquired by sale for delinquent assessments, despite the existence of unpaid bonds and coupons which are prior in registration to those so purchased. There is a broader question, however, which underlies this group of actions and several other cases now pending in this court. That question, stated simply, is whether unpaid bondholders, in the unusual situation where there is wholesale delinquency in assessments, wholesale default in bond payments, and acquisition of substantial portions of the land by the district itself, have any special equitable rights or remedies, in addition to those expressly stated in the statute. These questions will become clearer by a brief review first, of the relevant provisions of the statute, and second, of the economic background of the present controversy.

The basic provision indicating the normal remedy of the bondholders is section 33 of the act, which read prior to 1935: "Said bonds and the interest thereon shall be paid from revenue derived from an annual assessment upon the land within the district; and all the land within the district shall be and remain liable to be assessed for such payments as hereinafter provided." Section 39 provides that the directors shall levy an assessment upon the lands in an amount sufficient to raise the interest and principal coming due on the bonds. The assessment is a lien against the property assessed (sec. 40), and upon delinquency, the property must be sold to the district (sec. 43). It may be redeemed within three years or at any time thereafter before a deed has been delivered. (Sec. 47.) Section 52 provides for payment of matured bonds and interest coupons, and for additional interest of 1 per cent from the time of presentation, if not so paid.

The ordinary method of payment of bondholders is clearly indicated by these provisions. The directors must levy assessments in a sufficient amount to meet principal and interest payments. If delinquency occurs a higher assessment may be levied thereafter to make up the loss, and meanwhile the district may proceed to sell the land of the delinquent owner and buy it in. If a heavy delinquency occurs, the remaining land bears a correspondingly heavy burden, for every parcel is liable ultimately for the entire bonded indebtedness, and assessments may therefore be "pyramided" on the land which is not in default. It would ordinarily follow, however, that the land taken in by the district would be resold, and some money would be realized from the sale; and that thereafter the land thus returned to private ownership and liable again for assessments would prove a sufficient source of revenue to keep the assessments at a reasonable figure.

But economic conditions have prevented the working out of this plan in the contemplated manner. Farmers in the agricultural area embraced by various irrigation districts have found it increasingly difficult to meet the obligations of mortgages, taxes and district assessments. When delinquencies began to mount, it became impossible to stop them because of the fact that the remaining land faced continually rising assessments. Moreover, there were no purchasers for the lands taken in by the districts, because a new landowner would immediately become liable for assessments, which could be pyramided to any extent. As a result, some districts now own practically all the land within their boundaries, which they are unable to sell. The land thus owned is of course not subject to assessments, and therefore produces no revenue in this manner. These districts have long been in default in bond payments.

Having title to this enormous acreage which they are unable to sell, these districts have turned to leasing of the land as a means of raising some revenue. In the case of defendant Provident Irrigation District this was done for several years, and a total income of $57,578.30 was produced for the years 1933, 1934 and 1935. This money was placed in the district's general fund, and it was from this fund that the directors took the sum of $10,000 to buy the 50 bonds from the other defendants in these cases. It thus appears that the land, which is the normal source of the funds with which to meet the obligation of the bonds, is not only not producing funds for that purpose, but is actually being used to produce funds for other purposes. It is not difficult to per-

ceive that if the procedure followed herein is approved, bondholders may be left entirely without a practical remedy to obtain any payments. It is further apparent that the district's method of buying outstanding unmatured bonds at a discount is in effect the giving of a preference to bondholders who are not legally prior in time to others.

The defendants contend, however, that the directors of the district acted in strict compliance with the statutory requirements, and they point out that the sole remedy of the bondholders under the terms of the act is to compel the levy of assessments, and the enforcement of the same by sale of the land for delinquency. See Mulcahy v. Baldwin, 216 Cal. 517, 525, 526, 15 P.2d 738. They further contend that lands acquired by the district may properly be used for any of the purposes for which the district was formed, and that the use of the rentals to retire bonds at a discount is a proper use thereof, and within their discretion. It may be observed here that the benefit to the landowners resulting from the retirement of any part of the outstanding indebtedness is largely illusory because of the virtual disappearance of the landowner. The true situation seems to be that the directors of the district, by their present policy, are administering the land for the benefit of lessees who are able to rent the land at exceptionally low prices, and for those particular bondholders whose bonds are purchased and retired. The delinquencies have gone too far in this and other districts to save the landowners.

Insofar as the act itself is relied upon as a justification for this use of the district's funds, the strongest argument in favor of defendants is based upon certain amendments passed after the bonds were issued. Section 29 of the act contains the general provision that title to property acquired by the district "shall be held by such district, in trust for, and is hereby dedicated and set apart to the uses and purposes set forth in this act", and the board of directors is empowered to sell or lease the same. Section 47, as amended in 1927, St.1927, p. 190, provides that where property is purchased by the district, "such district shall have the same rights thereto, and to the rents, issues and profits thereof, as a private purchaser". Section 52, at the time the bonds were issued, St.1919, p. 667, provided that when the bond fund contained $10,000 in excess of the amount necessary to pay bonds and interest, the directors could advertise for sealed offers to redeem bonds not yet due, and should accept the lowest offer. As amended in 1931, St.1931, p. 172, this section provides that whenever there is "in any fund of the district money in excess of that required for the purposes of such fund", the directors "may purchase with such surplus money, or any part thereof, any of its bonds not then due". The requirements of notice and acceptance of the lowest sealed offer were eliminated. Section 67, as amended in 1931, St.1931, p. 173, reads: "The following funds are hereby created and established, to which the moneys properly belonging shall be apportioned, to wit: bond principal fund, bond interest fund, construction fund, general fund."

The position of defendants is that the district has fulfilled its entire duty to the bondholders by levying assessments and selling the land for delinquency. Thereafter, they contend, the title to the land acquired by the district is held for all of the purposes of the act, and not for the benefit of the bondholders (sec. 29, supra); that the district has the same rights in these lands as a private purchaser, and may lease them and use the rentals for any of the purposes of the act (sec. 47, supra); and that consequently, in their discretion, the directors may place these rentals in the general fund, to meet general obligations of operation and maintenance of the district; and thereafter, if there is a surplus in this fund, they may use the same to retire bonds not yet due (sec. 52, supra).

[1-7] Although the question is a difficult one upon which we find no directly controlling authority, we are unable to agree with defendants' position which, as already pointed out, has the effect of giving a preference to bondholders inferior in right, and may result in a complete cessation of any payments to bondholders generally. Defendants place such strong reliance upon the language of amended sections, particularly sections 47 and 52, supra, that a problem of constitutionality is suggested by what may appear to be a legislative impairment of substantial rights of bondholders. But upon a careful examination of the act as a whole, we have concluded that the real issue is rather one of interpretation. In our opinion, the statute was intended to secure the bonds by the proceeds of the land

in the district. It is true that the bonds themselves are not a lien on the land. But the assessment is a lien (sec. 40), and the district is required to collect the assessment or sell the land. Land coming into other private ownership is again liable for assessments (sec. 33), and land in possession of the district should, if possible, be sold again, so that it may produce the required revenue. There is nothing in the nature or the terms of the act which sanctions the extraordinary procedure attempted herein, where the holders of matured bonds are unpaid, and the only revenue produced by the land is diverted to a few selected holders of unmatured bonds. It is no answer to say that with legislative aid, the legislation being subsequent to the making of the bondholders' contract, a classification of "funds" has been made, and a method of declaring a "surplus" has been devised, with the effect of destroying the sole intended source of payment of the bonds. We do not understand how a debtor owing $360,000, long overdue, can have a surplus of $10,000. Nor do we understand how the district can be entitled to take all of the money derived from the land, whether by sale or lease, and use it for purposes other than payment of the primary obligations of holders of overdue bonds. It is within the discretion of the directors to use some portion of it for running expenses, and where this use is necessary, their discretion will be upheld on familiar principles. But when the directors themselves declare that a surplus exists, over and above the operating needs of the district, two things should be clear: first, that this money should go to the bondholders; and second, that in any event, it should not be given to junior bondholders in preference to those with prior claims but should be paid on past due bonds and coupons in the order of their registration. And to reach this conclusion we need not find any express direction setting forth the exact procedure in the statute. The situation is one not contemplated by the act, not covered by any clear provision, and calls for a construction of its general provisions in the light of equitable principles.

[8] These principles find an appropriate foundation in section 29 of the act, which provides that property acquired by the district under its provisions shall be held "in trust for, and is hereby dedicated and set apart to the uses and purposes set forth in this act". This express statement that the lands are impressed with a trust must be kept in mind in considering the amendment to section 47, purporting to give the district the rights of a private purchaser. Reading the two sections together, the only reasonable interpretation is that the district may freely transfer, lease or otherwise deal with the lands, in so far as its power is concerned, but the lands remain in trust, and the district exercises its powers, however broad, as a trustee. Once it is made clear that the lands are held in trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust. It would be manifestly absurd to say that although property is held in trust, none of the benefits of the trust accrue to the beneficiaries, and that none of the rents or profits of the trust property need be used in furtherance of the trust purposes. On this point, namely, that the land is trust property, held for the "uses and purposes" of the act, and that the proceeds are stamped with the character of the property from which they flow, the statute, read in the light of elementary principles, leaves no room for debate.

[9] It next becomes necessary to determine whether payment of the bondholders is one of these purposes. On this question defendants and amici curiae vigorously contend that the purposes of the act are to construct irrigation works, and provide for irrigation of the lands of the district. They concede that the district is authorized to borrow money for these purposes, but assert that creation of debts is not one of its purposes. They concede that the act requires repayment of the money borrowed, but assert that this is not one of its purposes. This type of argument, however, tends to prove too much, for it is difficult to conceive of the legitimate use of any funds of the district, derived in any manner, for something which is not a purpose of the district. How can the assessments, when collected, be paid to bondholders, if payment of their obligations is not a purpose of the act? If the bond fund was not created to carry out a purpose of the act, for what purpose was it created? But laying aside quibbles as to the exact meaning of the phrase "uses and purposes", it seems clear that if the district is to be created and to function on borrowed money, repayment of the money is not a wholly immaterial and foreign objective. Evading creditors is not a contemplated activity of a public district, whose bonds are recognized investments for financial institutions. Among other purposes of the act, therefore, is the repayment of the bondholders of the

district, and it follows that this is one of the purposes for which the trust money is held.

[10, 11] This view is fortified by a consideration of the general plan of the statute, in so far as it provides for the creation of an obligation and a procedure for payment. The land is the ultimate and only source of payment of the bonds. It can never be permanently released from the obligation of the bonds until they are paid. The release from liability for assessments while the district holds title is intended to be temporary only, and the liability for new assessments is again imposed when it goes back into private ownership. Any practice which removes the land from its position as ultimate security for the bonds, or which places its proceeds beyond the reach of the bondholders, destroys that plan and is contrary to the spirit of the act. And the practice employed by the district herein does exactly that. Theoretically and formally, the remedies of the bondholders remain unaltered. Actually, they have been destroyed. Economic conditions have placed the land itself outside of the power of assessment for payment of the bonds. But it is the act of the directors alone which has taken the proceeds of the land from the bondholders. This use of funds, contrary to the whole intent of the act, is in our opinion in violation of the trust impressed on the land under section 29. We do not mean to hold, nor is it contended by plaintiff, that the entire proceeds are held in trust for bondholders. Payment of the bonds is but one of the purposes of the trust. The land may also be a source of funds to enable the district to function. It is true that another important method of raising operating funds exists, namely, the charging of tolls for the use of water (secs. 39 and 55 of the act), a practice said to be successfully employed in some districts. Whether any duty exists to levy such tolls so that money from rentals might go in full to the bondholders is not an issue in the instant case. We assume, for the purposes of this case, that the directors, in their discretion, may determine that some of the proceeds of leasing of lands are essential to operation and maintenance, and may use them for these purposes. But any surplus, over and above operating expenses, remains subject to the trust, and should go to the payment of bondholders.

The foregoing discussion disposes of such cases as Mulcahy v. Baldwin, supra, 15 P.2d 741, wherein the statement is made: "The declared plan of the Irrigation District Act is that the holders of outstanding bonds of the district have the right to enforce their demands solely by an annual assessment on the lands in the district. Such is their contract." And it is further declared that "in law purchasers of those bonds could look only to the statutory right of assessment and enforced payment under that method of raising revenue". These remarks, obviously correct as a definition of the rights of bondholders in situations within the contemplation of the framers of the act, offer no solution for the entirely new problem which confronts us. We held in the Mulcahy Case that the bondholder was not entitled to reach certain special funds, not derived from the land itself but from contracts for the sale of power; and we said that he could "enforce" payment under the assessment method. But suppose the assessment method has disappeared as a means of collecting revenue; can the bondholder "enforce" payment? He has a right to enforce making and payment of assessments under one part of the statute, but there are virtually no lands to assess; by reason of acts taken under other provisions of the statute the assessable land has been completely taken from him, and is now beyond the reach of this remedy. In this situation it would be unreasonable to say that the bondholder's only remedy is to have an assessment levied. We must take a practical view of the circumstances, and recognize that where there are no assessable lands, there is no remedy of assessment. The quoted excerpts from Mulcahy v. Baldwin are not, therefore, an obstacle to the application of the principles which we have already discussed. If there is any doubt as to the propriety of this interpretation of the holding of that case, it may be set at rest by an examination of our late decision in Kerr Glass Manufacturing Corp. v. San BuenaVentura, 7 Cal.2d 701, 62 P.2d 583, where we recognized the justice of applying equitable principles to the payment of bondholders in unusual circumstances, notwithstanding the fact that express provisions of the statute stood in the way. We call attention to this significant statement on page 710 of that decision, 62 P.2d on page 587: "The trust status of the fund has been considered appropriate where it is theoretically replenishable by a so-called inexhaustible taxing power, but the exercise of that power is rendered fruitless by reason of economic conditions resulting in a tax-collecting incapacity." In the same

sense the bond fund in the instant case is theoretically replenishable by the unlimited power of assessment, but in fact that power is gone because the subject of the assessment, the land, is removed from its reach.

[12] It follows that if the allegations of the complaints are true, the purchases of the bonds from the various defendants were unauthorized, and the sales must be set aside, and the consideration returned to the parties.

The judgment is reversed with directions to the trial court to overrule the demurrers and permit defendants to answer if they deem it advisable to do so.



12 Cal.2d 791

PROVIDENT LAND CORPORATION, a Corporation, Appellant, v. PROVIDENT IRRIGATION DISTRICT, etc., et al., Respondents.

Sac. 5134.

Supreme Court of California.

Nov. 28, 1938.

Rehearing Denied Dec. 27, 1938.

In Bank.

Appeal from Superior Court, Glenn County; Warren Steel, Judge.

Prior opinion, 71 P.2d 832.

Louis Bartlett, of San Francisco (W. S. McGuire, of San Franciso, of counsel), for appellant.

George R. Freeman, of Willows, for respondents other than I. G. Zumwalt.

Rutledge & Rutledge and Thomas Rutledge, all of Colusa (Elmer Laine, of Willows, of counsel), for respondent I. G. Zumwalt.

Hankins & Hankins, of San Francisco, C. F. Metteer, of Sacramento, Harry W. Horton and George R. Kirk, both of El Centro, Arvin B. Shaw, Jr., of Los Angeles, A. L. Cowell, of Stockton, and Thomas C. Boone, of Modesto, amici curiae for Irrigation Districts Assn. of California.

PER CURIAM.

This is a companion case to Provident Land Corporation v. Zumwalt, 85 P.2d 116, this day decided. The issues raised are identical, and the decision therein is controlling. For the reasons stated in said case, the judgment is reversed with directions to the trial court to overrule the demurrers and permit defendants to answer if they deem it advisable to do so.



12 Cal.2d 790

PROVIDENT LAND CORPORATION, a Corporation, Appellant, v. George BENOIT, as Administratrix, etc., et al., Respondents.

Sac. 5135.

Supreme Court of California.

Nov. 28, 1938.

Rehearing Denied Dec. 27, 1938.

In Bank.

Appeal from Superior Court, Glenn County; Warren Steel, Judge.

Prior opinion, 71 P.2d 832.

Louis Bartlett, of San Francisco (W. S. McGuire, of San Francisco, of counsel), for appellant.

George R. Freeman, of Willows, for respondents other than I. G. Zumwalt.

Rutledge & Rutledge and Thomas Rutledge, all of Colusa (Elmer Laine, of Willows, of counsel), for respondent I. G. Zumwalt.

Hankins & Hankins, of San Francisco, C. F. Metteer, of Sacramento, Harry W. Horton and George R. Kirk, both of El Centro, Arvin B. Shaw, Jr., of Los Angeles, A. L. Cowell, of Stockton, and Thomas C. Boone, of Modesto, amici curiae for Irrigation Districts Ass'n of California.

PER CURIAM.

This is a companion case to Provident Land Corporation v. Zumwalt, 85 P.2d 116, this day decided. The issues raised are identical, and the decision therein is controlling. For the reasons stated in said case, the judgment is reversed with directions to the trial court to overrule the demurrers and permit defendants to answer if they deem it advisable to do so.

12 Cal.2d 378

EL CAMINO IRR. DIST. v. EL CAMINO LAND CORPORATION et al.

Sac. 5161.

Supreme Court of California.

Nov. 28, 1938.

1. Execution ⇐22

Land acquired by irrigation district at sales for delinquent assessments, and deeded to the district after expiration of the redemption period, was not subject to execution on judgment against district on bonds and interest coupons. Gen.Laws 1931, Act 3918; Act 3854, § 29.

2. Waters and water courses ⇐230(6)

Permitting holders of irrigation district bonds not prior in registration to obtain payment by the proceeds of execution sales of the district's lands under judgments on the bonds constitutes an unjustified preference. Gen.Laws 1931, Act 3918; Act 3854, § 29.

3. Attachment ⇐50
Execution ⇐22
States ⇐213

Land owned by the state or its agencies and held for a public purpose is not subject to attachment or execution in the absence of an express statute permitting it, irrespective of whether there is a statute expressly exempting such property from execution.

4. Waters and water courses ⇐224, 228½

Irrigation or reclamation districts are state agencies whose functions are exclusively governmental, and their property is state owned for governmental purposes, not in the proprietary sense.

5. Execution ⇐22
States ⇐213

Where it is established that property is owned by the state or its agency, rather than by a municipal corporation, the rule authorizing levy of execution against proceeds of such property is inapplicable.

6. States ⇐213

The purpose or capacity in which state property is held does not alter the rule that state property cannot be levied upon and sold except as permitted by the Legislature.

7. Execution ⇐22

The statute declaring that property acquired by irrigation district shall be held in trust for the uses and purposes of the statute governing irrigation districts makes lands acquired by district by tax deed exempt from execution. Gen.Laws 1931, Act 3854, § 29.

8. Execution ⇐22

Lands held subject to a public trust cannot be subjected to execution.

In Bank.

Appeal from Superior Court, Tehama County; Harry Deirup, Judge.

Action by the El Camino Irrigation District against the El Camino Land Corporation and another, to enjoin execution sale of lands. From a judgment granting the injunction, defendants appeal.

Affirmed.

Albert L. Garvey, of San Francisco, and Curtiss E. Wetter, of Red Bluff, for appellants.

L. C. Smith, of Redding, for respondent.

Harry W. Horton and George R. Kirk, both of El Centro, Hankins & Hankins, of San Francisco, C. F. Metteer, of Sacramento, Arvin B. Shaw, Jr., of Los Angeles, Thomas C. Boone, of Modesto, and A. L. Cowell, of Stockton, amici curiae for Irrigation District Ass'n of California, in support of respondent.

PER CURIAM.

Plaintiff El Camino Irrigation District was organized April 12, 1921, under the California Irrigation District Act, St.1897, p. 254 and comprises 7546.5 acres of land in Tehama county. Its outstanding bonds, issued on November 1, 1926, now amount to $423,000. Defendant El Camino Land Corporation is the owner of about $302,000 of said bonds. In October, 1935, said defendant brought an action against the district on some of the past due bonds and interest coupons, and a judgment was entered in its favor May 15, 1936, for $40,390.

Upon entry of the judgment said defendant had execution issued, and levied on certain lands previously acquired by the district at sales for delinquent assessments, and deeded to the district after expiration of the redemption period. Of the 7546.5 acres in the district, about 5500 had already been so transferred, and the rest were in default. The district then brought this action to enjoin the said defendant and defendant sheriff from holding the contemplated sale, on the ground that the lands were not subject to execution. The lower court granted the injunction, and defendants appealed.

The economic background of this and certain other related cases has been fully set forth in our opinion in Provident Land Corporation v. Zumwalt et al., 85 P.2d 116, this day filed. It is therein pointed out that a number of irrigation districts have suffered almost complete delinquency in assessments, followed by the taking over of the bulk of the land by the districts. The land thus acquired by a district is not subject to assessments and hence produces no revenue except minor amounts from rentals. Such districts are in serious default in their bond payments, for the normal method of payment provided by statute, namely, assessment of the land, has become ineffective. Bondholders, unable to obtain any payments, have sought to discover some other means of enforcing their obligations. The broad question, underlying this group of cases is, as we said in the Provident Land Corporation Case, supra, "whether unpaid bondholders, in the unusual situation where there is wholesale delinquency in assessments, wholesale default in bond payments, and acquisition of substantial portions of the land by the district itself, have any special equitable rights or remedies, in addition to those expressly stated in the statute". We held in that case that revenues from rentals of these tax-deeded lands were subject to the claims of bondholders, thereby establishing the rule that the statutory remedy of mandamus to compel levy of assessments was not, in these circumstances, the sole means of relief for unpaid bondholders. The question now presented is whether the bondholders may pursue the legal remedy of execution against the tax-deeded lands themselves.

Defendant's argument in favor of execution may be summarized as follows: All property is subject to levy unless expressly made exempt by law, and this is true of public corporations as well as private persons. Property of a public corporation is exempt only where it is held for a public use; where held in a proprietary capacity and not devoted to public use, it is subject to execution. As applied to irrigation districts, this doctrine would exempt the operative property, e. g., the irrigation works, but not the tax-deeded lands.

[1, 2] Before discussing this contention we may briefly notice the further argument that it will be highly beneficial to force sale of these lands to private persons, who will become obligated to pay assessments, whereas now, with title in the district itself, the lands are free from assessments and produce no revenue. Such a proposition, even if sound, could hardly be deemed sufficient justification for subjecting exempt public lands to execution. But we are bound to observe that there is grave doubt as to whether defendant's remedy would produce the suggested result. Amicus curiae has persuasively argued that if any buyers can be found, which is extremely questionable, they, faced with huge pyramided assessments, will in all likelihood prove as recalcitrant as the old, and will merely hold the land without any payments for the period of some five cropping seasons until they are again taken over by the district after expiration of the redemption period. The recent history of the districts lends support to this prophecy (see Provident Land Corporation v. Zumwalt, supra), and we are inclined to believe, therefore, that were it legally possible to execute on these lands, the bondholders as a group would derive little benefit from the procedure. No substantial revenue could be expected, and court costs and expenses of execution would add further amounts to the already staggering burden of indebtedness of the districts. Moreover, to permit successful judgment creditors, whose bonds may not be prior in registration, to be paid by the proceeds of execution sales, would result in an unjustified preference in favor of those who brought the actions and procured the levies. The lower court in the instant case made an express finding to this effect, and the procedure, unless restricted in some manner unknown to us, would operate to violate the rule of priority established by the decisions in this state. Bates v. McHenry, 123 Cal.App. 81, 10 P.2d 1038; Selby v. Oakdale Irrigation District, 140 Cal.App. 171, 35 P.2d 125; Strasburger v. Van Delinder, 17 Cal. App.2d 437, 62 P.2d 387; Shouse v. Quinley, 3 Cal.2d 357, 45 P.2d 701. It seems clear, therefore, that neither public policy nor the plan of the Irrigation District Act favors the position of defendant, and with this observation we turn to a consideration of the principles governing execution on public property.

[3] There is a general doctrine, settled by numerous authorities, that land owned by the state or its agencies and held for a public purpose, is not subject to attachment or execution in the absence of an express statute permitting it. It is immaterial that there is no statute expressly ex-

empting such property from execution. Westinghouse Electric & Mfg. Co. v. Chambers, 169 Cal. 131, 135, 145 P. 1025; Meyer v. State Land Settlement Board, 104 Cal.App. 577, 585, 586, 286 P. 743; People v. San Joaquin Valley Ag. Ass'n, 151 Cal. 797, 806, 91 P. 740; San Francisco Savings Union v. Reclamation District, 144 Cal. 639, 648, 79 P. 374; Tulare Irrigation District v. Collins, 154 Cal. 440, 442, 97 P. 1124; People v. Honey Lake Valley Irrigation District, 77 Cal.App. 367, 246 P. 819.

It is true that a few decisions in this state have recognized the familiar distinction between proprietary and governmental functions and uses, and have declared that property owned by a municipal corporation in its proprietary capacity, and not devoted to nor held for public use, is not exempt from execution. See Marin Water & Power Co. v. Sausalito, 49 Cal.App. 78, 83, 193 P. 294; Kubach Co. v. Long Beach, 8 Cal.App.2d 567, 48 P.2d 181. Plaintiff vigorously attacks these cases, pointing out that the remarks in the Marin Water & Power Co. Case were dictum, since the court actually held the particular property not subject to execution; and that the Kubach Co. Case relies largely on that dictum, with no hearing sought in this court. Other criticisms of the latter case have been made, e. g., that it defeats the statutory protection enacted in 1901, Deering's Gen.Laws, Act 3918, enabling a city to repay a judgment creditor in ten instalments out of funds raised by tax levies. (Note, 9 So.Cal.L.Rev. 415; see, also, 49 Harv. L.Rev. 489.) But we do not find it necessary to re-examine the rule of that case, since it is clearly distinguishable both on the facts and the legal issues involved from the instant case. The Kuback Co. Case held that the money from lessor's oil royalties on city-owned land under lease was subject to execution; the opinion stressed the fact that the lessor's interest in an oil lease can be sold separate and apart from the land, and that a levy upon such interest is not a levy upon the land itself. The court was not called upon to determine whether the land itself was subject to execution, and expressly so states. 8 Cal. App.2d at page 578, 48 P.2d 181.

[4-6] When we consider the precise legal question before us it is equally apparent that this decision is not controlling. Defendant has attempted to lump together all public bodies and agencies, and to make the characterization of governmental or proprietary use applicable to all. But the cases make a sharp distinction between municipal corporations, such as the cities in the Kubach Co. and Marin Water & Power Co. Cases, and state agencies such as irrigation or reclamation districts. These latter are agencies of the state whose functions are considered exclusively governmental; their property is state owned, held only for governmental purposes; they own no land in the proprietary sense, within the rule of defendant's cases. See Whiteman v. Anderson-Cottonwood Irrigation District, 60 Cal.App. 234, 212 P. 706; Turlock Irrigation District v. White, 186 Cal. 183, 187, 198 P. 1060, 17 A.L.R. 72; Wood v. Imperial Irrigation District, 216 Cal. 748, 752, 17 P.2d 128. Once it is established that the property is owned by the state or its agency, rather than by a municipal corporation, the rule of the Kubach Co. Case becomes inapplicable. "Our attention has been called to no act, and we have been unable to find any act of the Legislature authorizing state property to be sold upon execution, whether such property is used either in a governmental or in a proprietary character. The purpose or capacity in which state property is held does not, so far as we have been able to ascertain, alter the rule that state property cannot be levied upon and sold, save and except as permitted by the Legislature, and not being permitted, it cannot be done." Meyer v. State Land Settlement Board, supra, at page 586, 286 P. at page 746.

[7, 8] There is another and conclusive answer to the contention of defendants, found in the terms of the Irrigation District Act. Section 29 of the act Gen.Laws 1931, Act 3854, declares that property acquired by the district shall be held "in trust for, and is hereby dedicated and set apart to the uses and purposes set forth in this act". We have discussed the meaning and effect of this section in Provident Land Corporation v. Zumwalt, supra, and it is sufficient to point out here that the statute places these tax-deeded lands in a classification which necessarily makes them exempt from execution. The "uses and purposes" of the act are of course the improvement by irrigation of the lands of the district, governmental purposes under the authorities cited above. The lands are expressly "dedicated and set apart" for these purposes. It is impossible, in the face of such language, to say that any such property could be subject to levy on

the ground that it was not held for a public use; the statute forecloses any argument on this point. This is recognized in the statement in the Marin Water & Power Co. Case, supra, 193 P. 296: "* * * property which it holds merely as a proprietor, devoting it to no use of a public character, such as lands acquired or held for other than public purposes and not in trust for public use, is subject to execution unless some statutory or constitutional provision forbids it". Lands held subject to a public trust cannot be subjected to execution. See Hart v. Burnett, 15 Cal. 530. In Tulare Irrigation District v. Collins, supra, the district had acquired land for the purpose of a reservoir, but the project proved unsound and was abandoned. A creditor with an unsatisfied judgment levied on that land, which the lower court found was wholly unnecessary for the irrigation plans of the district. Nevertheless it was held by this court that execution was improper and should be enjoined. The opinion points out that the statute places all lands of the district in trust, dedicated and set apart to the uses and purposes of the act; that under the statute then in force there was not even the power of voluntary sale of the lands of the district; and suggests that the legislature might have reasonably provided for sale or execution of land of that type, thus relieving the same from the burden of the strict trust. The court then says (page 442, 97 P. page 1125): "But, in the absence of such expression these lands stand in precisely the same position as do the other lands of the district. Equally with such other lands they are impressed with the trust and equally they are exempt from execution, levy, and sale. This question as to pueblo lands was most learnedly considered in the leading case of Hart v. Burnett, 15 Cal. 530, and the principles there announced have never been departed from. These principles are equally applicable to the lands held under this public trust."

The view that the irrigation district land is free from execution is further supported by the holding of this court in San Francisco Savings Union v. Reclamation District, supra, the similarity in purpose of reclamation and irrigation districts being well established. In the light of these various decisions and the clear provisions of the California Irrigation District Act, we deem it unnecessary to discuss or distinguish the very few cases from other jurisdictions which defendant cites as persuasive herein.

It follows that the trial court properly enjoined the levy. The judgment is therefore affirmed.



12 Cal.2d 385

CLOUGH v. COMPTON-DELEVAN IRR. DIST. et al.

Sac. 5090.

Supreme Court of California.

Nov. 28, 1938.

1. Waters and water courses ⇐230

No lien or resulting trust arises from the purchase of irrigation district bonds, notwithstanding statute providing that land acquired by district shall be held in trust for purposes of the statute, and statute providing for trust in favor of person by or for whom consideration is paid for transfer of land. Civ.Code, § 853; Gen.Laws 1931, Act 3854, § 29.

2. Waters and water courses ⇐231

Under statute providing that property acquired by irrigation district shall be held in trust for the uses and purposes of the statute, land taken for delinquent assessments is impressed with a public use and trust, of which the bondholders are not exclusive beneficiaries. Gen.Laws 1931, Act 3854, § 29.

3. Partition ⇐32

Land acquired by irrigation district under sales for delinquent assessments was not subject to partition at the suit of an unpaid bondholder of the district. Civ.Code, § 853; Code Civ.Proc. § 752; Gen.Laws 1931, Act 3854, § 29.

4. Action ⇐6

In action against irrigation district by unpaid bondholder, for partition of lands acquired by the district, a vague demand for declaratory relief, which amounted to a mere request that the court devise some means of obtaining payment of bondholder's bonds, was properly refused.

5. Appeal and error ⇐1035

In action against irrigation district by unpaid bondholder, for partition of lands ac-

quired by the district, refusal to permit the action to go to judgment on the bonds was not prejudicial error, since enforcement by execution would not be permitted, and hence such judgment would be futile.

In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by George A. Clough against the Compton-Delevan Irrigation District and others, for partition of lands. From a judgment for defendants, plaintiff appeals.

Affirmed.

George A. Clough, of San Francisco, in pro. per. (Tobin & Tobin, of San Francisco, of counsel), for appellant.

Rutledge & Rutledge, of Colusa, for respondent Compton-Delevan Irr. Dist.

U. S. Webb, Atty. Gen., and Ralph H. Cowing and Neal Chalmers, Deputy Attys. Gen. for respondent District Securities Commission.

Sullivan, Roche & Johnson, of San Francisco, for respondent Friend W. Richardson as Superintendent of Banks, etc.

W. Coburn Cook, of Turlock (Charles L. Childers, of El Centro, of counsel), for respondents Reed J. Bekins and Milo W. Bekins, as trustees, etc.

Hankins & Hankins, of San Francisco, C. F. Metteer, of Sacramento, Arvin B. Shaw, Jr., of Los Angeles, A. L. Cowell, of Stockton, and Thomas C. Boone, of Modesto, amici curiae in behalf of respondents for Irrigation Districts Ass'n of California.

PER CURIAM.

This is an action by an unpaid bondholder of an irrigation district seeking partition of the lands of the said district which were deeded to the district after default in assessment.

The complaint alleges the following facts. Defendant Compton-Delevan Irrigation District was organized in 1920 under the California Irrigation District Act, St.1897, p. 254. It issued over $300,000 worth of bonds to finance its works. Interest and principal obligations maturing on January 1, 1932, are unpaid. All of the lands in the district were sold to the district for delinquency, and in practically all cases the time for redemption has passed and title is vested in the district. Similar sales of the same land for delinquency have been made to Sacramento and San Joaquin Drainage District, and to Reclamation District No. 2047. The irrigation district has practically ceased to function. Plaintiff holds 21/384 of the outstanding bonds.

The complaint makes further allegations to the effect that the entire cost of creation of the district and construction of its works was met by funds contributed by the bondholders; that when title to the tax-deeded lands vested in the district, it took such title as trustee for the bondholders; that plaintiff and other bondholders are now collectively the owners of equitable interests in the land, and of estates of inheritance therein. The prayer is that the property be partitioned among such bondholders, or if this is not possible, that it be sold; and if neither be possible, that the court declare what relief shall be granted and instruct the plaintiff as to what procedure should be pursued, in order to obtain it.

The lower court sustained demurrers without leave to amend, and after judgment for defendants, plaintiff appealed.

The economic background of this and similar cases, and the rights of the irrigation districts and their bondholders, are fully considered in two decisions of this court filed today, Provident Land Corporation v. Zumwalt, 85 P.2d 116, and El Camino Irrigation District v. El Camino Land Corporation, 85 P.2d 123. In the Provident Land Corporation Case we held that the bondholders were entitled to reach money derived from rentals of the tax-deeded lands. In the El Camino Irrigation District Case we held that bondholders with judgments against the district could not levy execution on such lands. In the instant case we find the bondholder seeking the unusual remedy of partition of the land on the theory that the contribution of the original capital of the district gave him a sufficient interest in the lands of the district.

The unprecedented character of plaintiff's action makes it somewhat difficult to discuss. His theory seems to be that the original loan of money to the district created both an equitable lien and a resulting trust under section 853 of the Civil Code, reinforced by section 29 of the Irrigation District Act, Gen.Laws 1931, Act 3854; that this trust is in favor of the bondholders as beneficiaries; that the beneficiary of a trust has an estate of inheri-

tance and is therefore entitled to partition under section 752 of the Code of Civil Procedure. There is no authority supporting the main proposition for which plaintiff contends, and the entire argument runs counter to the terms of the statute and the holdings of our cases.

[1-3] There is, first, no lien nor resulting trust arising from the purchase of the bonds. The statute fully defines the relationship of bondholders, district and landowners. Nowhere does it declare that the bondholder has a lien on the land itself, and it certainly does not recognize any trust for his sole benefit. Section 29 provides that the title to land acquired by the district shall vest in the district, "and shall be held by such district, in trust for, and is hereby dedicated and set apart to the uses and purposes set forth in this act." The property is by this language impressed with the public use, and the trust is for all the purposes of the act. Payment of the bondholders is such a purpose, as we have held in the Provident Land Corporation Case, supra; but there are other purposes as well, and the bondholders cannot be considered exclusive beneficiaries, even if the doubtful assumption be made that they, as individuals, are beneficiaries at all. Indeed, it is futile to attempt to discover the "beneficiaries" of the statutory trust created by section 29. It is enough to point out that it is an active trust for public uses and purposes, and to permit partition of the land which constitutes its corpus would mean the destruction of the trust, in violation of the statute. The same considerations of policy which make this property exempt from execution (see El Camino Irrigation District v. El Camino Land Corporation, supra) are equally applicable to any attempt to take the same by partition.

[4, 5] Plaintiff's vague demand for declaratory relief amounts to nothing more than a request that the court devise some means of obtaining payment of his bonds, and was properly refused. The prayer for judgment on the bonds would be futile, since enforcement by execution is not permitted (El Camino Irrigation District v. El Camino Land Corporation, supra), and hence the refusal to permit the action to go to judgment for this purpose cannot be considered reversible error. See Moody v. Provident Irrigation District, Cal.Sup., 85 P.2d 128, this day filed.

The judgment is affirmed.

12 Cal.2d 389

MOODY v. PROVIDENT IRR. DIST.

Sac. 5235.

Supreme Court of California.

Nov. 28, 1938.

1. Waters and water courses ⇐230(8)

The entry of a money judgment against an irrigation district does not give bondholder any additional remedies in seeking to enforce payment on matured bonds and matured coupons. St.1897, p. 254, as amended.

2. Waters and water courses ⇐224

An irrigation district is a governmental agency and has such powers, and is subject to such liabilities, as are expressly provided by statute. St.1897, p. 254, as amended.

3. Waters and water courses ⇐230(2)

The law in force at the time bonds and coupons of irrigation district are issued become part of contract. St.1897, p. 254, as amended.

4. Waters and water courses ⇐230(2)

The rule that the law in force when bonds and coupons are issued by irrigation district becomes a part of the contract does not limit the Legislature's power to provide for a subsequent method of payment not impairing the bondholder's existing rights, and to authorize district and bondholder to enter into a subsequent agreement relative to the bonds.

5. Waters and water courses ⇐216

No constitutional prohibition exists against enactment of statute providing for agreement between irrigation district and holder of irrigation district bonds specifying that bonds and coupons shall be paid as soon as money is available therefor and promising to pay bondholder rate of interest which would be payable on money judgment. St.1931, p. 172, § 52.

6. Execution ⇐22

The property of an irrigation district constitutes a public trust and is held by the district for public use, and hence is not subject to levy and sale by execution by creditors of district. St.1897, p. 254, as amended.

7. Limitation of actions ⇐145(3)

Under Irrigation District Act, registering of irrigation district bonds and coupons by district on presentation when there was insufficient money for payment thereof as

provided by statute and acceptance thereof by bondholder constituted new agreement and tolled statute of limitations until there was sufficient money in hands of treasury of district with which to pay bonds and notice had been given as provided by statute. St. 1931, p. 172, § 52.

8. Waters and water courses ⇐230(8)

The holder of matured bonds and interest coupons of irrigation district was not entitled to judgment on bond and coupons where, upon presentation thereof, treasurer of district had registered bonds and indorsed agreement thereon that they should bear interest at 7% until funds were available for their payment, since holder was put in same position by indorsement as he would have been by obtaining a money judgment. St.1917, p. 764, § 33; St.1931, p. 172, § 52; St.1909, p. 1075, § 29.

In Bank.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by Gilbert Moody against the Provident Irrigation District, to recover judgment on matured bonds and coupons issued by the defendant. From a judgment for defendant, plaintiff appeals.

Affirmed.

Prior opinion, 77 P.2d 253.

W. Coburn Cook, of Turlock, for appellant.

Albert L. Garvey, of San Francisco, and Curtiss E. Wetter, of Red Bluff, amici curiæ.

George R. Freeman, of Willows, for respondent.

PER CURIAM.

A hearing was granted in this case in order that it might be considered in connection with certain other cases dealing with related matters then pending in this court, namely, Provident Land Corporation v. Zumwalt, 85 P.2d 116, El Camino Irrigation District v. El Camino Land Corporation, 85 P.2d 123, and Clough v. Compton-Delevan Irrigation District, 85 P.2d 126. Upon a full consideration of the issues in the light of the decisions this day filed in the above mentioned cases, we have determined to adopt the opinion of Mr. Justice Plummer, with certain excisions, as the opinion of this court. It reads as follows:

"This action was begun by the plaintiff to recover a money judgment against the defendant upon certain of its matured bonds and coupons issued on the 5th day of August, 1918, and owned by the plaintiff. The cause was tried before the court without a jury, and resulted in a judgment favorable to the defendant. From this judgment the plaintiff appeals.

"The record shows that the Provident Irrigation District was organized on the 27th day of April, 1918, and ever since said date has been and now is a duly existing irrigation district.

"On the 15th day of August, 1918, the district issued certain bonds in the aggregate sum of $1,000,000, represented by 1000 bonds in the denomination of $1,000 each, payable serially commencing on the 15th day of August, 1930, and thereafter, on the 5th day of August of each year until 1940. The bonds provided for the payment of interest at the rate of 6 per cent. per annum, payable semi-annually. The bonds had coupons attached specifying that the district would pay to the bearer, at the office of the treasurer of the district, in the city of Willows, county of Glenn, California, a sum of money representing six months' interest.

"The plaintiff is the owner of three matured and unpaid bonds, and also is the owner of matured and unpaid interest coupons of the face value of $502.50. All of the bonds and coupons owned by the plaintiff, after date of maturity and prior to the beginning of this action, were presented to the treasurer of the district for payment. There being no funds in the hands of the treasurer for the payment of either the bonds or the interest coupons, the treasurer endorsed thereon that funds were not available for payment, and that the bonds and coupons should bear interest at the rate of 7 per cent. per annum from the date of presentation until notice is given that funds are available for their payment. After making this endorsement on the bonds and coupons, the bonds and coupons were returned to the plaintiff.

"The record shows that annual assessments for the payment of bonds and coupons have been duly and regularly levied by the district, but the assessments have not been paid by the landowners, and that there are not now, and have not been, any funds in either the bond or interest funds of the district with which to pay any

of the plaintiff's bonds or coupons since their original due dates.

"The record shows that there has been a general default in the payment of principal and interest on the bonds of the district since January 1, 1931.

"Where an action is begun to obtain a money judgment against the district for and on account of the unpaid bonds and coupons, it is contended by the respondent that the presentation by the plaintiff of his bonds and coupons at a time when there was no money in the bond or interest funds of the district for their payment, the registration and endorsement thereof by the treasurer of the district at the request of the plaintiff agreeing to pay the plaintiff 7 per cent interest from date of presentation until notice should be given that funds were available for payment, constituted a new agreement between the plaintiff and the district, under which the plaintiff's bonds and coupons would be exempt from the running of the statute of limitations until money sufficient to make payment thereof had come into the hands of the treasurer and notice given that money was available for the payment of the bonds; that the action by the plaintiff was either premature or an idle proceeding.

"It is further contended by the respondent that having the bonds and coupons registered and the district endorsement made by the treasurer as authorized by the provisions of section 52 of the California Irrigation District Act as amended in 1919, [St. 1919, p. 667] increasing the interest from 6 per cent to 7 per cent, and specifying that the bonds and coupons should thereafter bear interest at the rate of 7 per cent until funds were available for their payment, and the acceptance of the same by the plaintiff, constituted a new agreement. The consideration moving to the plaintiff would be the increased interest and the waiving on the part of the district of the right to plead the statute of limitations, thus, in any event rendering the entering of a money judgment against the district on the bonds and coupons an unnecessary and idle procedure.

[1] "It is clear that while it has been held in a number of cases prior to the amendment of section 52, supra, that a money judgment was proper to be entered against the district, and also necessary to prevent the bar of the statute after the lapse of four years, it is likewise clear that the entering of a money judgment against the district does not give to a bondholder any additional remedies in seeking to enforce payment on matured bonds and matured coupons.

* * * * * *

"The prayer of the complaint in this action asks for judgment in the amount of the principal sum of the bonds and coupons, matured and unpaid, and interest thereon at the rate of 7 per cent per annum. The endorsement on the bonds and coupons by the treasurer of the district binds the district to pay that rate of interest whenever funds are available for such purpose. Thus, the financial interests of the plaintiff are rendered exactly the same by the endorsement as it would be after obtaining a money judgment. Again, it is thus shown that no change could be effected concerning the financial interests of the plaintiff by having a judgment entered in his favor as prayed for.

"The first paragraph of section 52, supra, as amended by St.1931, p. 172, reads as follows: 'Upon presentation of any matured bond of the District, the Treasurer shall pay the same from the bond principal fund, and upon presentation of any matured interest coupon of any bond of the District, the Treasurer shall pay the same from the bond interest fund. If money is not available in the fund designated for the payment of any such matured bond or interest coupon, it shall draw interest at the rate of seven per cent per annum from the date of its presentation for payment until notice is given that funds are available for its payment, and it shall be stamped and provision made for its payment as in the case of a warrant for the payment of which funds are not available on its presentation.'

[2–5] "It is settled law that an irrigation district is a governmental agency, and that it has such powers, and is subject to such liabilities as are expressly provided by statute. Whiteman v. Irrigation District, 60 Cal.App. 234, 212 P. 706; Selby v. Oakdale Irrigation District, 140 Cal. App. 171, 35 P.2d 125; Meyerfeld v. South San Joaquin Irr. Dist., 3 Cal.2d 409, 45 P. 2d 321. Likewise, it is also well settled that the law in force at the time the bonds and coupons are issued by a district become a part of the contract. Hershey v. Cole, 130 Cal.App. 683, 20 P.2d 972, and cases there cited. These cases, however, do not limit the power of the legislature to provide for a subsequent method of payment which does not impair the existing rights of the bondholder; nor does it pre-

vent the legislature providing that the district and the bondholder may enter into a subsequent agreement relative to the bonds issued by the district and owned by the bondholder. In other words, there is no constitutional prohibition against a subsequent agreement being entered into between a bondholder and the district, specifying that the bonds and coupons shall be paid as soon as money is available therefor, and promising to pay the bondholder the same rate of interest which he would receive if a money judgment were entered on the matured bonds and coupons. There being, as we have stated, no change in the substantive rights of the bondholder relative to enforcing, such proceedings as the law specifies may be taken by the officers of the district in an effort to obtain money with which to pay the bonds.

* * * * * *

[6] "That the annual assessments and the sale of lands upon which the assessments are not paid may never realize sufficient money to pay the indebtedness of the district, is entirely beside the question. The property of the district, so far as it owns any property, constitutes a public trust and is held by the district for a public use, and, therefore, is not subject to levy and sale upon execution by a creditor of the district. Tulare Irr. District v. Collins, 154 Cal. 440, 97 P. 1124; sec. 29, California Irrigation District Act, as amended by St. 1909 p. 1075.

[7] "That the statute of limitations, under the circumstances disclosed by this case, could never be pleaded by the district until it had the money in its possession to pay the bonds belonging to the plaintiff, and had given notice, is supported by the case of Freehill v. Chamberlain, 65 Cal. 603, 4 P. 646, where it was held that when a city issues bonds with interest coupons, payable as fast as money should come into the treasury from special sources designated in the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act.

"That the registering of the bonds and coupons, as provided by section 52, supra, constituted a new agreement and tolled the statute of limitations until there was sufficient money in the hands of the treasury of the district with which to pay the same, and notice given as provided by the California Irrigation District Act, is upheld by the United States Supreme Court in the case of the County of Lincoln v. Luning, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766. The opinion in this case, after holding that a transaction similar to that which took place between the plaintiff and the district constituted the creation of a new agreement, used the following language:

"'The cases of Underhill v. Sonora, 17 Cal. 172, and Freehill v. Chamberlain, 65 Cal. 603, 4 P. 646, are in point. In the former case the court observes that "the legislative acts then recognized the debt and made provision for its payment. That is enough to withdraw the case from the operation of the statute; it is equivalent to a trust deed by the state setting apart property out of which the money due was to be paid at a given time, if not sooner paid upon a claim acknowledged to be an outstanding debt, and we cannot conceive of any principle of law or justice which would hold the claim to be barred by the statute simply because the creditor waited after this for his money." In the other case it was held that "where a statute provides for the issuing of bonds of a city with interest coupons payable as fast as money should come into the treasury from special sources designated by the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act".'

"While the question has been presented as to whether matured bonds and matured coupons, without taking the proceedings specified in section 52, supra, would or would not bear interest, a ruling as to such question is not necessary to a decision in this cause. However, we may cite two cases from the supreme court of Colorado, to the effect that such bonds and coupons do not bear interest, to-wit: In re Green City Irr. Dist., Heath v. Green City Irr. Dist., 91 Colo. 202, 13 P.2d 1113, and North Denver Municipal Irr. Dist. v. Heath, reported in 91 Colo. 210, 13 P.2d 1116.

[8] "While the briefs presented in this cause cite a number of cases to which we have made no reference, we think what we have set forth determinative of the issues involved. The proceeding being a purely idle act, and the entry of a money judgment by the trial court affording the plaintiff no additional rights or remedies, we think the court was correct in holding in substance that it should not be burdened with proceedings which would avail the plaintiff nothing.

"We also hold that the statute of limitations in this case is tolled and cannot be pleaded by the district as a defense until the statutory period elapses after funds are in the hands of the treasurer of the district with which to make payment, and notice thereof given."

The judgment is affirmed.



12 Cal.2d 440

MILLER et al. v. STOCKBURGER, State Director of Finance, et al.

L. A. 16715.

Supreme Court of California.

Dec. 13, 1938.

As Modified Dec. 29, 1938.

1. Navigable waters ⇐37(8)

The statute granting to city of Long Beach the state's right, title and interest "in and to all the tidelands and submerged lands, whether filled or unfilled, within the present boundaries of said city, and situated below the line of mean high tide," passed fee title to tidelands which were artificially filled but were below the line of mean high tide in their former state, subject only to the public trusts, limitations and reservations specified in the acts. St.1911, p. 1304.

2. Navigable waters ⇐37(8)

The statutes granting tidelands and submerged lands to cities of Long Beach and Los Angeles manifest intent, not to reserve indeterminate portions of the tidelands granted, but to encourage the development of tidelands and submerged lands by the cities for the promotion of commerce and navigation. St.1911, pp. 1256, 1304.

In Bank.

Proceeding on petition by George I. Miller and others against Arlin E. Stockburger, State Director of Finance, and another, for writ of mandate to compel issuance of oil prospecting permits. On demurrer to the petition.

Demurrer sustained, alternative writ discharged and peremptory writ denied.

George R. Wickham, of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondents.

O'Melveny, Tuller & Myers, Louis W. Myers, Chandler, Wright & Ward, and Chandler P. Ward, all of Los Angeles, amici curiæ.

George W. Trammell, Jr., City Atty., Harlan V. Boyer, Asst. City Atty., Henry D. Lawrence, Deputy City Atty., Swaffield & Swaffield and Roland G. Swaffield, Special Counsel, all of Long Beach, amici curiæ on behalf of Long Beach.

PER CURIAM.

Petition for writ of mandate. Petitioners sought to obtain oil prospecting permits under the Mineral Leasing Act of 1921 (Stats.1921, chap. 303, p. 404), and subsequent amendments thereto, on certain lands situated respectively in the cities of Long Beach and Los Angeles, within the respective harbor districts thereof. The petitioners contended that the lands were tide and submerged lands in their natural state and became vested in the state of California by virtue of its sovereignty at the time of its admission to the Union, and were artificially filled at some time prior to the year 1929. The city of Long Beach, appearing as amicus curiæ, on behalf of respondents, contended that by act of the legislature of 1911 (Stats.1911, p. 1304) it became the owner of the lands here involved lying within its corporate limits. That act read as follows: "There is hereby granted to the city of Long Beach, a municipal corporation of the State of California, * * * all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all the tide lands and submerged lands, *whether filled or unfilled,* within the present boundaries of said city, and situated below the line of mean high tide of the Pacific Ocean, * * *" for the establishment of a harbor, and for the construction of wharves, docks, piers, etc. (Italics added.)

However, the respondents contended that neither the 1911 grant to the city of Long Beach nor that of like character to the city of Los Angeles (Stats.1911, p. 1256), conveyed the minerals, oil, gas or other hydrocarbon substances lying in or under said tide and submerged lands, whether filled or unfilled. Respondents further contended, that although the ownership of such minerals remained in the state, nevertheless such lands were not subject to

prospecting permits, or leases thereunder, because of certain prohibitions in the Mineral Leasing Act of 1921, particularly sections 4 and 23 thereof, as amended in 1929, (Stats.1929, chap. 7, p. 11; chap. 536, p. 944), which they contended, specifically exempted the said tidelands and submerged lands from the operation of the Mineral Leasing Act. In accordance with these views, the respondents refused to issue the permits sought by petitioners and the latter thereupon sought to compel the issuance thereof by filing in this court a petition for a writ of mandate directed to respondents herein. The alternative writ issued, and respondents have filed a demurrer to the petition, which they contend should be sustained upon numerous grounds, the first of which is that during the pendency of this litigation the decision of this court in the case entitled City of Long Beach et al. v. Marshall Port Manager, et al., 82 P.2d 362, has rendered moot the issues presented in this proceeding. In that case it was decided that the 1911 grant of the state of its tidelands to certain coastal cities, including the cities of Long Beach and Los Angeles, conveyed the mineral rights, including those in oil and gas, to those respective cities; and it is contended in the instant proceedings that since the alleged right of the petitioners to the issuance of the permits is dependent upon the ownership by the state of the lands in question, together with the oil rights thereto, the decision in the Marshall Case has divested this court of authority to issue the writ, and that the demurrer should be sustained.

Since the filing of the decision in the Marshall Case, the petitioners have asserted, however, that as to the greater portion of the area involved in the instant case the decision in the Marshall Case "makes it inevitable that the petition for writ of mandate must be denied because of the holding that the title to the premises sought is in the City of Long Beach (and in the City of Los Angeles) and not in the State of California." They contend, however, that certain *portions* of the lands described in the petition belong to the state of California and are not included in the grants to the city of Long Beach and to the city of Los Angeles, respectively, and ask that the writ issue with respect to *such portions*. With regard to their contention that certain portions of the lands referred to in their petition did not pass by the grant of the state to said cities, they rely upon the case entitled Strand Improvement Company v. Long Beach, 173 Cal. 765, 161 P. 975, wherein they assert it was held that the grant embraced only the tide and submerged lands situated *below* the line of high tide, and which were filled prior to May 1, 1911, the date of the respective acts, or otherwise stated, that by the Strand Case it was held that land which was *filled* and *above* high tide at the date of the grant, did not pass by the grant, —and that the portions of the lands they now contend did not pass to the respective cities, and to which they are entitled to permits, *were filled prior to 1911*, and were above the line of mean high tide, over which the tide did not ebb and flow on said May 1, 1911. They contend also that the language of the respective granting acts supports this contention, wherein it is provided that the grant shall cover "* * the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all the tide lands and submerged lands, *whether filled or unfilled*, within the present boundaries of said city, and situated *below* the line of mean high tide of the Pacific Ocean". (Italics added.) The respondents call attention to the fact that no claim is made in the petition that the lands were filled prior to 1911, but that, on the other hand, the petition shows affirmatively that the lands therein described were artificially filled at a time prior to January 1, 1929, some eighteen years later. Nor does the record disclose by description or otherwise, what particular portions of the lands referred to in the petition it is now contended are owned by the state and open for prospecting permits.

[1, 2] Respondents also point out that the Strand Case relied upon by petitioners is not authority for their contention with regard thereto, in that the court in that case was considering the question of accretion or alluvion, formed by the natural movement of the tides, and not by *artificial* means such as are alleged to have been used with regard to the lands here involved; and in that regard they contend that the case entitled Patton v. City of Los Angeles, 169 Cal. 521, at pages 525 and 526, 147 P. 141, decides the question adversely to petitioners' contention. There the court was considering the question of ownership of tidelands which had been artificially filled prior to 1911, and concluded that such land re-

tained its character as tideland and was included in the 1911 grant to the city of Los Angeles. The respondents further contend that by the language of the granting acts of 1911, the legislature intended that all the lands described in the petition were intended to be granted by the state to the respective cities here involved, by its use of the language, "all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all the tide lands and submerged lands, *whether filled or unfilled*" (italics added), and that to hold that the legislature only intended to convey title to lands which lay below the line of mean high tide on May 1, 1911, would be to ignore the qualifying word "filled"; and that in such case it would have been unnecessary to say anything at all about the lands being filled or unfilled for, obviously, all lands which in fact lie below the line of mean high tide of the Pacific Ocean are in fact tidelands or submerged lands; that in expressly providing that the grant included tidelands and submerged lands, whether filled or unfilled, the legislature intended to include something *more* than would have passed by a grant merely of "tide lands and submerged lands * * * situated below the line of mean high tide". It would seem clear that the only lands which the legislature could possibly have had in mind which were not included in the description "tide lands and submerged lands * * * situated below the line of mean high tide" would be lands which formerly had been situated below said mean high tide line, but which at the time of the grant, had been filled in such manner as not to lose their character as tideland or submerged lands. As was said in the Marshall Case, 82 P.2d 365, "* * * the history of tideland grants in this state, and the actions of the various legislatures and the courts in connection therewith, show a general agreement that the tidelands were conveyed to municipalities in fee, subject only to the public trusts and the limitations and reservations specified in the acts; and that until the discovery of these valuable oil rights in the southern California tidelands no serious doubt was ever expressed as to the title of the municipalities." Nowhere in either of the granting acts here involved is there to be found any language which indicates that the state intended to reserve unto itself any unspecified or indeterminate portions of the tidelands there granted, but the very purpose of the acts was to encourage the development of the tidelands and submerged lands by the cities, for the promotion of commerce and navigation.

In 26 California Jurisprudence, page 306, it is said, "* * * accretions caused by railroad embankments cannot operate to divest the title of the state to its tidelands, or to transfer them to the adjoining littoral owners. And so if tidelands are reclaimed, the change in the character of the land does not have the effect of transferring it to the owners of the abutting upland." Patton v. City of Los Angeles, 169 Cal. 521, 525, 147 P. 141.

From the foregoing it follows that by virtue of the language of the granting acts of 1911, the state conveyed "all the right, title and interest * * * held by said state * * * in and to all the tide lands and submerged lands, whether filled or unfilled" to the respective cities of Long Beach and Los Angeles, and that the portions of the lands here concerned, having been tide and submerged lands in their former state, passed to the said cities of Long Beach and Los Angeles, respectively, by the 1911 grants. No opinion, however, is expressed or intended as to the ownership of the lands here involved as between the respective cities and private claimants.

In view of the conclusions herein reached, it is unnecessary to discuss other questions presented by the record.

The demurrer is sustained; the alternative writ discharged, and a peremptory writ denied.

12 Cal.2d 792

John D. LAURICELLA, Petitioner, v. Arlin E. STOCKBURGER, as State Director of Finance, and Carl Sturzenacker, as Chief of Division of State Lands, Department of Finance of the State of California, Respondents.

L. A. 16744.

Supreme Court of California.

Dec. 13, 1938.

In Bank.

Daniel M. Hunsaker and Lloyd E. Keiser, both of Los Angeles, for petitioner Ben F. Downing.

John G. Clock and Clock, McWhinney & Clock, all of Long Beach, for petitioner John D. Lauricella.

U. S. Webb, Atty. Gen. and R. S. McLaughlin, Deputy Atty. Gen., for respondents.

George W. Trammell, Jr., City Atty., Harlan V. Boyer, Asst. City Atty., and Henry D. Lawrence, Deputy City Atty., all of Long Beach, John O. Palstine, Deputy City Atty., of Los Angeles, and Swaffield & Swaffield and Roland G. Swaffield, all of Long Beach, Special Counsel, amici curiæ for City of Long Beach.

PER CURIAM.

A petition for the issuance of a writ of mandate directed to respondents herein to compel the issuance by them of oil prospecting permits on certain lands allegedly situated within the harbor district of the city of Long Beach, was filed by petitioner in this proceeding, in the District Court of Appeal, Second Appellate District, Division One. An alternative writ of mandate was issued therein. Thereafter the respondents filed a demurrer to the petition, and while the cause was pending final determination in that court, the said proceedings were ordered transferred to this court in order that the issues therein raised might be considered with those presented in the case entitled Miller et al. v. Stockburger et al., 85 P.2d 132, pending decision in this court, and assertedly involving the same questions as those presented in the above-entitled proceedings.

Upon consideration of the respective records in these two cases it is apparent that, except for minor factual differences, the issues presented are substantially identical, and the conclusions arrived at in the said case of Miller v. Stockburger, supra, this day decided, are therefore decisive of the questions presented in the above-entitled case.

It is therefore ordered that the demurrer be sustained; the alternative writ discharged, and a peremptory writ denied.



29 Cal.App.2d 648

Ex parte McGEE.

Cr. 1654.

District Court of Appeal, Third District, California.

Dec. 14, 1938.

1. Criminal law ⇐145½
Indictment and Information ⇐87(4)

The statute of limitations in criminal actions is jurisdictional, and hence indictment or information showing on its face that prosecution is barred by limitations fails to state a public offense. Pen.Code, § 802.

2. Criminal law ⇐105

That indictment or information shows on its face that the prosecution is barred by limitations, being jurisdictional, may be raised at any time before or after judgment.

3. Criminal law ⇐152

The statute providing that the period of limitations shall not include time during which defendant has not been an inhabitant of or usually resident within the state is applicable when defendant is charged with an ordinary offense, whether he was within or without the state when offense was committed. Pen.Code, § 802.

4. Indictment and Information ⇐87(4)

If statutory exception, under which time of defendant's nonresidence in the state is not included within period of limitations is to be claimed, the information must contain an allegation showing that the case comes within the exception. Pen.Code, § 802.

5. Indictment and Information ⇐87(4)

In information charging an escape from prison road camp on June 1, 1924, and alleging "that since June 1, 1924," defendant was outside the state, the word "since" was used in the sense "from a definite past time until now," and the information sufficiently

pleaded the statutory exception under which time of defendant's nonresidence is not included in determining whether prosecution is barred by limitations. Pen.Code, § 802.

[Ed. Note.—For other definitions of "Since," see Words & Phrases.]

Proceeding in the matter of the application of Edward H. McGee for a writ of habeas corpus, for relief against imprisonment under conviction of escaping from a prison road camp.

Writ discharged and petitioner remanded.

A. M. Mull, Jr., of Sacramento, and Frank Bottaro, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

ROSS, Justice pro tem., delivered the opinion of the court.

Petitioner is a prisoner in Folsom prison. He was convicted in the superior court of Sacramento county of the offense of escaping from a prison road camp.

The information was filed January 2, 1931, charging said escape as occurring on June 1, 1924, and concluding: "that since June 1, 1924, the said Edward H. McGee was outside the State of California". Petitioner claims this pleading is not sufficient to remove the apparent bar of the statute of limitations, the alleged offense having been committed almost seven years before the filing of the information.

[1, 2] It is settled law in California that the statute of limitations in criminal actions is jurisdictional, and that an indictment or information which shows on its face that the prosecution is barred by limitations, fails to state a public offense. The point may therefore be raised at any time, before or after judgment. People v. McGee, 1 Cal.2d 611, 36 P.2d 378.

[3, 4] It is also settled that the provision of section 802 of the Penal Code, that the period of limitation shall not include the time when the defendant has not been "an inhabitant of, or usually resident within this state", is applicable when the defendant is charged with an ordinary offense, whether he was within or without the state at the time the offense was committed. People v. McGill, 10 Cal.App.2d 155, 51 P.2d 433. The information must have an allegation showing that the case comes within the exception set forth in section 802, Penal Code, if the exception is to be claimed. The only question before this court, therefore, in the instant case, is to interpret the allegation in the information—"that since June 1, 1924, the said Edward H. McGee was outside the State of California".

[5] One of the definitions of "since" in most standard dictionaries is: "From a definite past time until now." It was obviously used in this sense in the information herein. No demurrer for uncertainty was filed. The phrase used was a sufficient pleading of the exception to the statute of limitations, set forth in section 802 of the Penal Code, and the information as a whole was sufficient to give the court jurisdiction of the case.

The writ is discharged; and the petitioner remanded.

We concur: PULLEN, P. J.; THOMPSON, J.



29 Cal.App.2d 588

COTTON v. RIVERSIDE CEMENT CO.

Civ. 11979.

District Court of Appeal, Second Appellate District, Division 2, California.

Dec. 9, 1938.

Hearing Denied by Supreme Court Feb. 6, 1939.

1. Evidence ⇐442(1), 443(1)

In action on a written contract, evidence of a contemporaneous oral collateral contract is admissible as long as the collateral contract does not conflict with the terms of the written contract, covers a matter distinct from, even though closely related to, the express subject matter of the written instrument, and is not embodied therein.

2. Evidence ⇐442(6), 443(1)

In action to recover sum allegedly due coke buyer as result of seller's sale of coke to a third party, where buyer did not rely either in pleadings or in proof on letter introduced by seller containing an offer to sell coke at a specified price, testimony of a contemporaneous oral understanding that buyer had exclusive right to handle the coke of seller but that seller could sell it to others on protecting buyer in a sum of not less than

$1 per ton for each ton sold to third parties, in consideration for buyer's services in advertising, handling and marketing the coke was improperly rejected.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Charles E. Cotton, and Charles E. Cotton, doing business under the fictitious name of the Superheater Service Company, against the Riverside Cement Company to recover an amount allegedly due plaintiff as result of a sale of coke by defendant to the California Fuel & Utilities Company. Judgment for defendant and plaintiff appeals.

Reversed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

William H. Brawner and Caryl Warner, both of Los Angeles, for appellant.

O'Melveny, Tuller & Myers, and Pierce Works, all of Los Angeles, for respondent.

WOOD, Justice.

This action was commenced to recover the amount alleged to be due on the sale of coke by defendant to California Fuel and Utilities Company. The trial court directed the jury to return a verdict in favor of defendant and plaintiff appeals from the resulting judgment.

It is alleged in the complaint that on or about November 27, 1936, a contract was made by and between plaintiff and defendant whereby it was promised by defendant that in consideration of previous services of the plaintiff and services to be rendered in the future, consisting in the advertising, exploiting, handling and marketing of coke owned by the defendant from the year 1933 to November 27, 1937, defendant would sell coke to plaintiff in quantity and that if defendant should sell coke to any other buyer defendant would pay to plaintiff a sum not less than $1 per ton of the coke so sold. Plaintiff purchased various quantities of coke from defendant, which plaintiff resold to various individuals. In May, 1937, defendant sold its entire supply of coke to California Fuel and Utilities Company. Plaintiff seeks to recover $1 for each ton sold to the last-named company.

At the trial the representative of the defendant, A. A. Goethals, was called as a witness under section 2055 of the Code of Civil Procedure. While his testimony was being received a letter dated November 27, 1936, addressed to plaintiff was produced by plaintiff and introduced in evidence by defendant as exhibit A. This letter is as follows: "November 27, 1936. Mr. Chas. E. Cotton, 753 Laurel, Pomona, California. Dear Mr. Cotton: We desire to sell you coke from our plant at Crestmore, to be delivered between November 27th and April 15th, 1937, at $4.00 per ton, F. O. B. our scales at Crestmore. If you take between this period 1,000 or more tons, a rebate of $1.00 per ton will be given you after April 15th. If, however, the tonnage should be under 1,000 tons, we are to discuss the matter again and a possible rebate, depending on tonnage, delivered to you, may be made. Under no conditions, however, will the price be less than $4.00 per ton if 500 or less tons have been sold during this period. All coke is to be paid for as it leaves our plant. The first 360 tons are to be paid for at $5.00 per ton, $1.00 per ton applying on the balance due us as per our books November 27, 1936. Yours truly A. A. Goethals Auditor."

The plaintiff was called as a witness and gave testimony concerning the writing and receipt of the letter and concerning the conversation which took place before the letter was handed to him. Plaintiff sought to establish that an oral agreement was made by and between the parties at the time of this conversation. On objection of defendant the jury was excused and the court heard the testimony of plaintiff in order to determine whether the issue of the oral agreement should be given to the jury. Mr. Cotton testified that beginning with the year 1933 and up to May, 1937, he had managed defendant's coke pile, containing about 10,000 tons of coke at Crestmore. During this time he had screened, sacked, advertised and marketed the coke; that he was the only purchaser of the coke from defendant and had in turn sold to the ranchers for smudging purposes. Before November of 1936 the winters had been warm and plaintiff's operations had been so curtailed that he had suffered the loss of many sacks of screened coke because of rotting sacks. The parties had had an oral understanding that plaintiff had the exclusive right to handle the coke but that defendant could sell it to others upon protecting plaintiff in a sum not less than $1 per ton for each ton sold by defendant to third parties. This agreement was referred to by the parties at various

times during the period in question. No sales were made by defendant during the 1936-37 coke season except to plaintiff with the exception of the sale of the entire supply of 8,000 tons in May, 1937. This sale forms the basis of plaintiff's action. Mr. Cotton testified further that his conversation with Mr. Goethals on November 27, 1936, lasted about one hour and a half. During this time the situation was discussed, including the terms of the sale of coke to plaintiff. At that time an oral agreement was made to the effect that in case defendant should sell the coke to a third party plaintiff would be paid a sum not less than $1 for each ton so sold. During this conversation Mr. Goethals left the room temporarily and dictated a letter which he placed in a sealed envelope and handed to plaintiff. Plaintiff did not read or sign this letter and did not open it until the fall of the following year. The letter was the one previously referred to as exhibit A. During the succeeding months plaintiff screened and sacked the coke and prepared it for market. He made contracts with the various citrus growers, secured their orders and purchased coke from defendant.

After hearing Mr. Cotton's testimony the trial court sustained defendant's objection to questions concerning the oral agreement and struck out the evidence on the subject on the ground, as stated by the court, that defendant was attempting to vary the terms of a written agreement. The jury was recalled and directed to return a verdict for defendant.

[1] The letter introduced as exhibit A was merely an offer to sell coke and did not purport to constitute an agreement until acted upon by plaintiff and then only for the individual orders of coke purchased by plaintiff. It did not purport to relate to or provide for any contingencies in case of the sale of coke by defendant to third parties. In Gardiner v. Burket, 3 Cal. App.2d 666, 40 P.2d 279, this court stated the rule which governs in situations like the present [page 280]: "Evidence of a contemporaneous oral collateral contract is admissible as long as the collateral contract does not conflict with the terms of the written contract, and covers a matter distinct from, even though closely related to, the express subject-matter of the written instrument, and is not embodied therein." The court cited numerous authorities in support of the rule as stated. In Greathouse v. Daleno, 57 Cal.App. 187, 206 P. 1019, the court referred to the general rule that where a contract in writing is complete in all its terms parol evidence to vary those terms may not be admitted and stated [page 1020]: "A well-understood concurrent rule is that, where the parol evidence which is offered is entirely consistent with and in no way changes or contradicts the written instrument, such parol evidence may be admitted." See, also, Lindsay v. Mack, 5 Cal.App.2d 491, 43 P. 2d 350.

[2] We are satisfied that the evidence offered should have been received by the court. Plaintiff did not rely upon the letter exhibit A either in his pleadings or in his proof. The contemporaneous oral agreement had been in effect for a number of years before the writing of the letter, and according to plaintiff's testimony was in effect after the letter was written. The oral agreement, if there were such agreement, merely continued in force the practice which had previously been the practice between the parties. The letter referred only to sales made direct by defendant to plaintiff whereas the oral agreement referred to sales made by defendant to third parties. Although the two matters are closely related there is no conflict between the terms of the oral agreement and the terms of the letter, which covered a matter distinct from the matter covered by the oral agreement. The considerations for the two agreements are distinct, the consideration for the letter being the payment of a certain sum to defendant upon the purchase of coke by plaintiff and the consideration for the oral agreement being plaintiff's services in advertising, handling and marketing the coke.

The judgment is reversed.

I concur: CRAIL, P. J.

I dissent: McCOMB, J.

29 Cal.App.2d 554

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. RICHARDSON, Building and Loan Commissioner, et al.

Civ. 10936.
District Court of Appeal, First District, Division 2, California.

Dec. 7, 1938.

Hearing Denied by Supreme Court Feb. 2, 1939.

1. Pleading ⇐291(2)

In action for accounting by holder of interest in notes and trust deeds against commissioner who was liquidating building and loan company, where commissioner as assignee claimed set-off on a guarantee of payment of a note and trust deed to which guarantee, the seal of the corporation was not affixed though signed by its president, and plaintiff did not file an affidavit denying the genuineness and due execution of instrument which was admitted in evidence, plaintiff admitted the genuineness and due execution of the instrument. Code Civ.Proc. § 448.

2. Pleading ⇐291(2)

In action for accounting by holder of interest in notes and trust deeds against commissioner who was liquidating building and loan company wherein commissioner in answer claimed set-off on guarantee of payment of note and trust deed executed by president of corporation, genuineness and due execution of which instrument was not denied by plaintiff, such admission permitted the inference that president was authorized to sign the guarantee. Code Civ.Proc. § 448.

3. Set-off and counterclaim ⇐22(1)

In action for accounting by holder of interest in notes and trust deeds against commissioner who was liquidating building and loan company, commissioner could properly claim set-off on guaranty of payment of a note and trust deed as against contention that plaintiff's claim being for an accounting sounded in equity while commissioner's claim was one at law which could not be set off against claim in accounting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for an accounting by the Bank of America National Trust & Savings Association, a national banking association, against Friend W. Richardson, as Building and Loan Commissioner of the State of California, and Louis C. Drapeau, his successor. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Edmund Nelson, Howard Waterman, Freston & Files, and Ralph E. Lewis, all of Los Angeles (Louis Ferrari, of San Francisco, of counsel), for appellant.

James C. Ingebretsen, of Los Angeles, for respondents.

STURTEVANT, Justice.

In an action for an accounting the trial court ordered judgment in favor of the defendants and the plaintiff has appealed. In its complaint the plaintiff alleged that it is a corporation; that Friend W. Richardson was building and loan commissioner until July 19, 1934, and he was then succeeded by Louis C. Drapeau, who was such officer at the time the action was commenced; that Lincoln Mortgage Company, Prudential Building Loan Association, and North American Building Loan Association were corporations; that on May 28, 1929, Lincoln Mortgage Company sold to Prudential Loan Association an interest amounting to $65,827.78 in certain promissory notes and deeds of trust in the aggregate amount of $94,705.59 and that it reserved to itself an interest amounting to $28,877.81; that on February 10, 1931, the Prudential sold all of its property to North American; that on May 21, 1931, the Lincoln sold its reserved interest to this plaintiff; that on July 8, 1932, the building and loan commissioner took possession of the North American and now retains such possession; that the North American and its successors have collected large sums of money on the promissory notes and deeds of trust; that they have never accounted to the plaintiff; that the building and loan commissioner after he took possession of the North American never caused a copy of notice to all persons having claims against the North American to be mailed to plaintiff and never notified plaintiff to file a claim; that on June 5, 1933, the plaintiff made a written demand upon the North American for an accounting but the building and loan commissioner made no response; that on July 6, 1933, the plaintiff made an oral demand upon the commissioner and he agreed to give the demand consideration as soon as he could find time to do so; that on January 31, 1934, the plaintiff made a written demand

on the commissioner for an accounting but he refused to make such accounting.

The defendants filed an answer in which they admitted many of the allegations contained in the complaint but they also pleaded certain new matter. They alleged that on July 8, 1932, Friend W. Richardson, the then building and loan commissioner, took possession of the North American under the provisions of section 13.11 of the California Building and Loan Act (Stats.1931, pp. 483, 539) and commenced to liquidate that corporation; that on July 19, 1934, Friend W. Richardson was succeeded in office by Louis C. Drapeau and that the latter retained possession of said association and has proceeded with the liquidation thereof; that on December 16, 1927, Seaboard Building Corporation executed and delivered to Lincoln Mortgage Company a promissory note in the sum of $67,500 payable in instalments and bearing interest at 7 per cent per annum; that said note was secured by a deed of trust which was recorded on the 4th day of February, 1928; that on the 16th day of May, 1929, Lincoln Mortgage Company sold to the Prudential the last-mentioned note and deed of trust; that as a part of the consideration of said sale of said note and deed of trust Lincoln Mortgage Company executed and delivered to the Prudential a guaranty; that said guaranty was as follows (here the defendants pleaded the alleged document in haec verba); that among other things said guaranty provided: "Please be advised that this company guarantees the payment of the balance due on the said loan above mentioned in the event that the same remains unpaid for a period of three months after the maturity thereof, namely, December 16, 1930"; that there is now unpaid on said note the sum of $45,000 together with interest at 7 per cent from March 16, 1930; that on April 17, 1930, the Prudential sold to the North American said promissory note, and the deed of trust, and the guaranty above mentioned; that as building and loan commissioner the defendant Louis C. Drapeau is now the owner and holder of said promissory note, deed of trust, and guaranty; that on the 17th day of April, 1930, the North American succeeded to all of the properties of the Prudential; that on May 21, 1931, the date the said Lincoln Mortgage Company assigned to plaintiff all of its interest in the debentures mentioned in the contract dated May 28, 1929, the said Lincoln Mortgage Company was indebted to the North American Company in the sum of $45,000 and in excess of the amount reserved by said Lincoln Mortgage Company under the contract of sale dated May 28, 1939; and that it is now indebted in excess of that sum.

[1] The trial court made a finding that the defendants and their predecessors in interest had collected $5,857.42 on the interest reserved by the Lincoln Mortgage Company in the debentures which were the subject of the contract dated May 28, 1929. Pointing to that finding the plaintiff claims it was entitled to a judgment in that sum and that the defendants were not entitled to any set-off. In that connection they contend the instrument relied on as a guaranty was not the contract of Lincoln Mortgage Company. As stated above, the instrument was pleaded by the defendants in their answer. It is in form a letter addressed to Prudential Building Loan Association. Omitting the address, the document is as follows: "Dear Sirs: With reference to your purchase of our loan No. 1132—in connection with which we have previously delivered all instruments to you —we find that the note of the Seaboard Building Corporation secured by trust deed in the original amount of $67,500 was assigned to you 'without recourse'. Please be advised that this company guarantees the payment of the balance due on the said loan above mentioned in the event that same remains unpaid for a period of three months after the maturity thereof, namely, December 16, 1930. Yours very truly, Lincoln Mortgage Company by J. K. Baillie Prs." The seal of the corporation was not affixed. After the defendants' answer was served the plaintiff did not file with the clerk within ten days or at all an affidavit denying the genuineness and due execution of said instrument. On the trial the document was admitted in evidence. The plaintiff offered evidence to attack the genuineness and due execution of said instrument and that evidence was stricken out. The plaintiff contends that on the record as so made it did not admit the genuineness and due execution of the instrument. We think it is clearly mistaken. (Code Civ.Proc., § 448; Reynolds v. Pennsylvania Oil Co., 150 Cal. 629, 89 P. 610; Quartz Glass & Mfg. Co. v. Joyce, 27 Cal. App. 523, 150 P. 648; 21 Cal.Jur. 167.) The plaintiff cites and relies on Heath v. Lent, 1 Cal. 410, and the several cases citing and following that decision. They are not in point. The statute before the

court in Heath v. Lent, supra, was section 62 of chapter 142 of the Statutes of 1850. That statute is quite different from section 448, the statute now in force.

[2] In this same connection the plaintiff further asserts that if the "genuineness and due execution" of said letter be admitted, still the defendants' case is not made out because the defendants did not show the board of directors of Lincoln Mortgage Company had authorized Baillie to write the letter. In other words, its claim is that the facts above recited may show an admission that the letter was written and signed by Baillie but it does not follow Baillie was authorized by the corporation to sign its name. That assertion has been directly ruled against the contention which the plaintiff now makes. Reynolds v. Pennsylvania Oil Co., supra.

[3] Still contesting the force and effect of the guaranty, the plaintiff asserts its claim for an accounting sounded in equity, that the defendants' claim was one at law and therefore one may not be set off against the other. The question is not an open one in this state. It has been decided such facts warrant a set-off. It is unnecessary to do more than cite Sooy v. Cerf, 220 Cal. 611, 32 P.2d 365, and the cases there cited.

The trial court made findings including the following: "The court further finds that the defendants duly and legally caused notice to be given to all persons having claims against the association to file the same pursuant to law and particularly section 13.16 of the Building and Loan Association Act; the court further finds that the plaintiff did not file with the commissioner prior to the commencement of this action a verified claim upon the matters complained of in this action." The plaintiff contends it was not bound to file such a claim. In that connection it contends the statute upon which the defendants must rely does not and cannot apply to an attempt to recover trust funds. The plaintiff cites and relies on Campbell v. Vining, 101 Fla. 939, 133 So. 555; Smith v. Reddish, 113 Fla. 20, 151 So. 273, and cases there cited. Its argument is not without merit. However, section 13.16 of the Building and Loan Act (Stats. 1931, pp. 483, 541) is very broad. The primary purpose of the statute is to authorize the commissioner to take charge of a defaulting corporation, liquidate it, and cause its creditors to be paid. Honesty, efficiency, and speed in the liquidation are certainly contemplated. To accomplish those results the commissioner is entitled to know at an early date the nature and amount of demands that will be made upon him. But, as we have reached the conclusion that the judgment must be affirmed on the first points we have discussed above, it is unnecessary for us to express an opinion as to the effect of the failure of the plaintiff to file its claim within the period of time fixed by the provisions of section 13.16, supra. Therefore we express no opinion on the point.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



29 Cal.App.2d 524

GATES v. GAUTIER et al.

Civ. 11944.

District Court of Appeal, Second District, Division 2, California.

Dec. 2, 1938.

1. Theaters and shows ⇐6

Owner and operator of public resort where public were charged for privilege of bathing was under duty to use reasonable care for safety of patrons in view of the use of the premises as might reasonably be anticipated.

2. Theaters and shows ⇐6

Where public were charged for privilege of bathing in lake in public resort, as respects contributory negligence of patron who was injured by invisible rocks when he dived from bank of lake into shallow water, patron, without making a critical inspection, had right to assume that owner and operator had discharged his duty to use reasonable care for safety of patrons in view of the use of the premises as might reasonably be anticipated, and that operator had provided a reasonably safe place.

3. Appeal and error ⇐1008(1)

In patron's action against owner and operator of public resort for injuries sustained when patron dived from bank of lake into shallow water where bottom was invisible,

question whether patron exercised ordinary care for his safety was for trial court.

4. Appeal and error ⇐1008(1)

In patron's action against owner and operator of public resort for injuries sustained when patron dived from bank of lake into shallow water where bottom was invisible, finding of trial court that patron had exercised ordinary care for his safety was binding upon District Court of Appeal.

5. Damages ⇐130(1)

$1,250 judgment for deep laceration on forehead at hair line, scar of which still remained after eight months, for sprained neck and for lacerations on elbow, sustained by paid patron at public resort who dived into shallow water where bottom was invisible, was not excessive.

6. Appeal and error ⇐295, 1004(1)

Where evidence did not indicate that judgment for plaintiff was influenced by passion or prejudice, appellate court could not award a new trial on ground that damages were excessive, especially where defendant did not make a motion for a new trial. Code Civ. Proc. § 657, subd. 5.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Walter Gates against James Gautier and others for injuries suffered when plaintiff dived from the bank of a lake in a public resort owned and operated by named defendant. From a judgment for plaintiff, defendants appeal.

Judgment affirmed.

C. A. Pinkham, of Los Angeles, for appellants.

William Empey, Jr., of North Hollywood, and Le Roy Anderson, of Los Angeles, for respondents.

WOOD, Justice.

This appeal is prosecuted from a judgment in the sum of $1,250 in plaintiff's favor in an action to recover damages for injuries suffered by plaintiff when he dived from the bank of a lake in a public resort owned and operated by defendant.

The resort in question is known as "Pop's Willow Lake", near Roscoe in Los Angeles county. The public were charged admission fees for the purposes of bathing and boating. On the afternoon of July 3, 1937, plaintiff visited the resort, paid the regular admission fee and began swimming in the lake. The north end of the lake was generally known as the deep water part of the lake. Defendant had erected two diving boards at the north end of the lake and a diving raft had been placed in the vicinity of the diving boards. At one of the diving boards a sign had been placed showing the depth of the water to be eleven feet. Plaintiff dived from the bank on the north end of the lake at a point some fifty or sixty feet from the sign. At the point from which he dived no sign had been placed to indicate the depth of the water. The bottom of the lake at this point was invisible and the depth there was only four or four and one-half feet at a distance of five feet from the edge of the water. Defendant had permitted "rough and jagged" rocks to remain on the bottom of the lake and when plaintiff dived his head struck upon these rocks. Plaintiff received a deep laceration on his forehead at the hair line. At the time of the trial eight months later a scar still remained. Plaintiff's neck was sprained and he received lacerations on the right elbow.

[1-4] Defendant contends that plaintiff was guilty of contributory negligence as a matter of law. There is no merit in this contention. It was the duty of defendant to use reasonable care for the safety of his patrons in view of the use of the premises that might reasonably be anticipated. Plaintiff as a patron of the bathing resort had the right to assume that defendant had discharged his duty and had provided a place which was reasonably safe. He was not required to make a critical inspection. Waddel's Adm'r v. Brashear, 257 Ky. 390, 78 S.W. 2d 31, 98 A.L.R. 553. It was the duty of the trial court to determine whether plaintiff exercised ordinary care for his own safety when he dived from the point in question. The finding of the trial court on this issue is adverse to defendant and is binding upon the reviewing court.

[5, 6] It is contended that the amount of the judgment is excessive. Reviewing courts are too frequently asked to substitute their views on the amount of damages for those of the trial courts and juries in actions involving personal injuries, resulting in many cases in the expensive waste of much of the courts' time in disposing of meritless contentions. The present action was tried before the court without a

jury. It is provided in section 657, subdivision 5, of the Code of Civil Procedure that a verdict or other decision may be vacated and a new trial granted on account of "excessive damages, appearing to have been given under the influence of passion or prejudice". There is not the slightest indication that the judgment under review was influenced by passion or prejudice. Moreover, defendant did not make a motion for a new trial. It has been held that the issue of excessive damages may not be urged for the first time on appeal. 20 Cal.Jur. p. 100, and cases there cited.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.



COOK v. LOS ANGELES RY. CORPORATION.*

Civ. 11913.

District Court of Appeal, Second District, Division 2, California.

Dec. 2, 1938.

Rehearing Denied Dec. 21, 1938.

Hearing Granted by Supreme Court Jan. 30, 1939.

1. Appeal and error ⇐82(1)

An order striking from the record affidavits filed in support of a motion for a new trial is a special order made after final judgment, and as such is appealable. Code Civ.Proc. § 963, subd. 2.

2. Appeal and error ⇐1069(3)

In action by passenger against street railroad for injuries from alleged sudden jerk of street car while passenger was alighting, instructing, in response to request by jury for reading part of instructions after deliberation, that all the instruction the court would give was that there was only one instruction and that was, did the street car stop and start according to passenger's evidence or did passenger fall by slipping, was not prejudicial to passenger.

3. Appeal and error ⇐1069(3)

In action for injuries, instructing, in response to request for reading part of instructions after deliberation, that there was only one instruction to be given and that the court would give jury 10 minutes in which to reach conclusion, although not commendable procedure, was not prejudicial to plaintiff, since time jury should be allowed for deliberation was for discretion of trial judge and no abuse of discretion was shown.

4. New trial ⇐140(1)

In action for injuries, striking from record an affidavit filed by plaintiff's attorney in connection with motion for new trial stating a certain instruction had been given in language of firm tone and firm manner was proper, since statement that instruction was given in such manner was a statement of a conclusion.

5. New trial ⇐143(1)

In action for injuries, striking from record an affidavit of foreman of jury, filed in connection with plaintiff's motion for new trial, relative to ballots taken by jury prior to a certain instruction and to the effect that jury requested foreman to have court re-read the instructions, was proper, since a juror may not impeach his verdict, except upon the single ground that verdict was result of a resort to determination by chance. Code Civ.Proc. § 657, subd. 2.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Evyonne S. Cook against the Los Angeles Railway Corporation to recover for injuries sustained while alighting from a street car. From a judgment for defendant and an order striking certain affidavits filed in connection with her motion for new trial, plaintiff appeals.

Affirmed.

Harold D. Kraft, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondent.

McCOMB, Justice.

Plaintiff appeals from (1) a judgment entered after trial before a jury in an action to recover damages for personal injuries, and (2) an order striking certain affidavits filed in connection with her motion for a new trial.

The material facts are:

Plaintiff was injured while alighting from a street car owned and operated by

*For subsequent opinion see 91 P.2d 118.

defendant. There was testimony that the street car was standing still at the time plaintiff attempted to leave it, and there was also testimony that the car after stopping had started with a jerk just as she was alighting from it.

After the case had been submitted to the jury and several hours of deliberation had ensued, the jury returned to the courtroom and the following occurred:

"The Court: Who is your foreman?

"The Foreman: Right here, your Honor.

"The Court: What is the trouble?

"The Foreman: We would like to have that part of your instructions read—

"The Court: There is only one instruction to be given you, and that is, now did this street car stop and start according to the plaintiff's evidence, or did she fall off by slipping or some other thing? That is all you have got to figure out. You should not be over fifteen minutes at most.

"The Foreman: There seems to be a difference of opinion.

"The Court: That is all I am giving now. I will give you ten minutes more to fix it up, because I am not going to keep you here longer on a simple question like that. I don't know what you would do with a complicated case if one as simple as this confuses you. You have got the evidence of people that said the car did not start. You have the evidence of the women or man who was on the street car, or the boy, who said it did start. It is up to you what followed. That is all there is to this case, ladies and gentlemen of the jury. It is as plain as the nose on your face. Go back and see what you can do.

"The Foreman: All right, your Honor."

Thereafter the jury retired and within a few minutes returned a verdict in favor of the defendant.

On motion for a new trial two affidavits were upon motion of defendant stricken from the record: (1) an affidavit of plaintiff's attorney stating that the instruction to the jury set forth above had been given by the trial judge "in language of firm tone and firm manner"; (2) an affidavit of the foreman of the jury relative to the ballots which the jury had taken prior to the occurrence set forth above, and also to the effect that the jury had requested the foreman to have the trial judge reread the instructions.

These are the questions necessary for determination:

First: Is an order striking from the record affidavits filed in connection with a motion for a new trial appealable?

*Second: Did the trial court commit prejudicial error in instructing the jury as follows: "There is only one instruction to be given you, and that is, now did this street car stop and start according to the plaintiff's evidence, or did she fall off by slipping or some other thing? That is all you have got to figure out. You should not be over fifteen minutes at most. * * That is all I am giving now. I will give you ten minutes more to fix it up, because I am not going to keep you here longer on a simple question like that. I don't know what you would do with a complicated case if one as simple as this confuses you. You have got the evidence of people that said the car did not start. You have the evidence of the women or man who was on the street car, or the boy, who said it did start. It is up to you what followed. That is all there is to this case, ladies and gentlemen of the jury. It is as plain as the nose on your face. Go back and see what you can do."*

Third: Was it prejudicial error for the trial court to strike from the record the affidavits of plaintiff's attorney and the foreman of the jury filed in connection with her motion for a new trial?

[1] The first question must be answered in the affirmative. The law is established in California that an order striking from the record affidavits filed in support of a motion for a new trial is a special order made after final judgment, and as such is appealable. Sec. 963, subd. 2, Code Civ.Proc.; Gay v. Torrance, 145 Cal. 144, 147, 78 P. 540. The statement to the contrary in Melde v. Reynolds, 120 Cal. 234, 238, 52 P. 491, has been overruled by the Supreme Court by the later decision in Gay v. Torrance, supra.

[2] The second question must be answered in the negative. In view of the evidence which had been received the question of whether defendant was guilty of negligence depended upon a determination of the fact whether the street car after stopping had started or not at the time plaintiff was injured. The instruction containing as it did the phrase, "That is all I am giving now", though not artfully worded, could not have misled the

jury nor caused it to believe that it was to disregard the previous instructions given, which plaintiff concedes were entirely adequate.

[3] In view of the simple question presented to the jury for determination, though we do not approve of the procedure followed by the trial judge, we perceive no prejudicial error resulting to the plaintiff from the time limit placed upon their deliberations by him. The time the jury should be allowed for deliberation was a matter resting in the sound discretion of the trial judge, and no abuse of such discretion has here been shown.

[4, 5] The final question must also be answered in the negative. The statement in the affidavit filed by plaintiff's attorney that the trial judge had given his instruction in language of firm tone and firm manner was purely the statement of a conclusion, and, therefore, the affidavit was properly stricken. The law is settled that a juror may not impeach the verdict of a jury of which he was a member, except upon the single ground that the verdict was the result of a resort to determination by chance. Sec. 657, subd. 2, Code Civ.Proc.; Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 379, 397, 104 P. 986; Leonard v. Hume, 5 Cal.App.2d 41, 43, 41 P.2d 965; 24 Cal.Jur. [1926] 877, sec. 126. Hence, the affidavit of the foreman of the jury was also properly stricken from the record.

For the foregoing reasons the judgment and order appealed from are and each is affirmed.

I concur: CRAIL, P. J.

WOOD, Justice (dissenting).

I dissent. The court should have permitted the foreman to state what instructions were required. "The information required must be given * * *". (Sec. 614, Code Civ.Proc.) Instead of giving the information sought the court told them that *only one* instruction would be given and in doing so stated the evidence incompletely, inaccurately and indefinitely.

The instruction of the court was almost tantamount to a direction to return a verdict for defendant. The foreman stated, in effect, that the jury was divided on the question of liability. Immediately following this statement by the foreman the judge said to the jury: " I will give you ten minutes more to fix it up * * * it is as plain as the nose on your face. Go back and see what you can do." It would not have been possible for the jury to return a verdict in favor of plaintiff in the time allowed since more than ten minutes would have been necessary to agree on the amount of the damages. That the jury were convinced that the court was urging a verdict for defendant is evident from the fact that they did return a verdict for defendant in ten minutes, whereupon the court said: "Thank you, ladies and gentlemen of the jury. I do not see how you could have arrived at any other verdict."



29 Cal.App.2d 439

In re KERR'S GUARDIANSHIP.

KERR v. WALLACE.

Civ. 10683.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1938.

1. Guardian and ward ⇐8

Court was not deprived of jurisdiction to determine guardianship proceeding instituted by minor by reason of a decree of divorce granted to minor's parents wherein provision was made for custody of the minor, since the divorce court did not have jurisdiction to appoint a guardian notwithstanding a general power to make an order for the custody of the child. Civ.Code, § 138; Probate Code, §§ 1405, 1406.

2. Guardian and ward ⇐13(1)

In guardianship proceeding instituted by a minor where person appointed as guardian was attorney and an officer of the court whose qualifications and fitness to act as guardian were known to the presiding judge, and not questioned by contestant, court did not abuse its discretion in appointing such person as guardian without first having taken testimony as to his fitness and qualifications. Probate Code, §§ 1405, 1406.

3. Guardian and ward ⇐10

A child over 14 years of age may nominate his own guardian and such nominee, if approved by the court, must be appointed. Probate Code, § 1406.

4. Guardian and ward ⇐10

In guardianship proceeding instituted by minor, wherein minor did not nominate contestant as guardian, failure to appoint contestant guardian was not error, notwithstanding that contestant may have been a fit guardian. Probate Code, § 1406.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the guardianship of the person of Louise Elizabeth Kerr, a minor, by Louise Elizabeth Kerr, opposed by Leonora Wallace, contestant. From an order appointing a guardian, contestant appeals.

Affirmed.

Carlton D. Dethlefsen, of San Franciso, for appellant.

Athearn, Chandler & Farmer, F. G. Athearn, and Philip H. Angell, all of San Francisco, for respondent.

KNIGHT, Justice.

This is an appeal from an order appointing a guardian of the person of the respondent, Louise Elizabeth Kerr, a minor of the age of eighteen years.

She is the daughter of Andrew L. and Leonora Kerr, who in September, 1923, were divorced. By the terms of the divorce decree the care and custody of respondent, then four years old, was awarded to her mother, but she was maintained and educated out of a monthly allowance paid by her father. Subsequently each parent married again, the mother having become Mrs. Wallace. For a considerable period prior to 1936 the relations between the mother and daughter were at times extremely unpleasant; at other times, as shown by certain letters and communications written by respondent to her mother, they were on affectionate terms. In June, 1936, they went to New York on a visit, during which several violent quarrels took place between them. According to respondent's testimony, her mother repeatedly called her vile names, accused her of gross misconduct, and of being a thief, struck her and otherwise abused and mistreated her. Finally respondent wired her father in San Francisco to send her allowance directly to her, which he did; and following a violent quarrel with her mother, as a result of which, so respondent claimed, her mother prevented her from taking the train, she boarded an airplane and flew back to San Francisco, where she took up her residence with friends; and on January 11, 1937, being then past eighteen years of age, she filed a petition in the superior court for the appointment of a guardian of her person, whom she nominated in the petition. Mrs. Wallace filed objections to the granting of respondent's petition; and after a hearing in which both parents participated and gave testimony, the court announced that while there was no question about the fitness of respondent's nominee to act as guardian, it believed that for reasons which it elaborated upon, it would be advisable to select someone else, and that it would appoint Mrs. Mary Conway Kohler as such guardian. Immediately following such announcement respondent and her nominee gave their consent thereto, and on April 21, 1937, a former order of appointment was entered to that effect, from which Mrs. Wallace has taken this appeal.

[1] The first point appellant urges for reversal of the order is that the court herein was without jurisdiction to hear or determine the guardianship proceeding instituted by respondent, her contention in this behalf being that where as here a decree of divorce is granted wherein provision is made for the custody of a minor child, the court in which such decree is rendered thereafter and at all times retains exclusive jurisdiction over the matter of the custody of said child. The case of Collins v. Superior Court, 52 Cal.App. 579, 199 P. 352, holds to the contrary. As there said, although general power is conferred upon the divorce court by section 138 of the Civil Code to make an order for the custody of a child, that section does not confer jurisdiction upon such court to appoint a guardian for such child; and in this connection the court in that case went on to point out that the authority to appoint a guardian is granted by section 1747 and those following of the Code of Civil Procedure (now sections 1405 and 1406 of the Probate Code) which provide that the superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardians legally appointed by will or deed, and who are inhabitants or residents of the county; that in such guardianship matters the court acts strictly in a special proceeding, and by virtue of

power conferred upon it to appoint guardians in designated cases. And in that case it was held that a minor over fourteen years of age had the absolute right to select and nominate his guardian, who, if approved by the court, must be appointed. To hold otherwise, said the court, would be to deny a minor the exercise of that absolute right.

[2] Appellant's second point is that the court erred in appointing Mrs. Kohler guardian without first having taken testimony as to her fitness and qualifications. It appears, however, that such testimony was wholly unnecessary for the reason that Mrs. Kohler was an attorney and an officer of the court, namely, a referee of the juvenile court, and her qualifications and fitness to act as such guardian were well within the knowledge of the presiding judge. Moreover, at no time after the court indicated it would appoint Mrs. Kohler did appellant intimate that she was not a fit and proper person to be so appointed, nor did appellant at any time make any objection to the appointment on that ground or offer to produce any evidence with respect thereto. In view of the foregoing circumstances, there is no ground upon which it may be held on appeal that the court abused its discretion in making such appointment.

[3, 4] Finally, appellant contends that she was denied the opportunity of refuting the accusations made against her as to her unfitness to act as respondent's custodian, or to produce witnesses to prove her fitness. The record shows, however, that the court's finding that she was unfit was based largely upon facts disclosed by her own testimony, which are amply sufficient to sustain the trial court's adverse finding on that issue; consequently any testimony she may have offered to show her fitness would only have added to the conflict already existing. Moreover and in any event, it is the established law of this state that a child over fourteen years of age may nominate his own guardian, and that such nominee, if approved by the court, must be appointed. Probate Code, § 1406, formerly sections 1748, 1750, Code Civ.Proc.; In re Estate of Kirkman, 168 Cal. 688, 144 P. 745; In re Estate of Meiklejohn, 171 Cal. 247, 152 P. 734; In re Estate of McSwain, 176 Cal. 287, 168 P. 117. As said by the court in Re Estate of Meiklejohn, supra, parental relationship is of no consequence in such a case because the statute gives the minor the authority to select a new guardian, and does not make such power dependent upon relationship. It follows, therefore, that regardless of the question of appellant's fitness she was not entitled, in the face of respondent's objections, to receive the appointment.

There is nothing in any of the cases cited by appellant which in our opinion conflicts with the views hereinabove expressed.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



29 Cal.App.2d 503

RAFFTERY v. KIRKPATRICK et al.

Civ. 2177.

District Court of Appeal, Fourth District, California.

Nov. 30, 1938.

1. Mortgages ⇐544(3)

The writ of assistance is incident to the execution of a judgment and is issued as a matter of right where a defendant or one claiming under him refuses to surrender possession after execution of deed to purchaser at mortgage foreclosure sale.

2. Mortgages ⇐544(3)

Generally, title to property cannot be tried in a proceeding on motion to vacate order directing issuance of writ of assistance after mortgage foreclosure sale.

3. Mortgages ⇐544(3)

In proceeding on motion to vacate an order directing issuance of writ of assistance after mortgage foreclosure sale, the trial court may, on proper evidence, determine the question of fact of possession of property by a person not a party to the foreclosure proceeding.

4. Mortgages ⇐578

In proceeding on motion to vacate order directing issuance of writ of assistance after mortgage foreclosure sale, the question of possession of property by a person not a party to the foreclosure proceeding is one of fact addressed to the trial court.

5. Mortgages ⇐578

In proceeding on motion to vacate order directing issuance of writ of assistance after mortgage foreclosure sale, if question of possession of property by a person not a party to the foreclosure proceeding is decided on conflicting evidence, the implied finding will not be disturbed on appeal.

6. Mortgages ⇐544(3)

Where a stranger to mortgage foreclosure proceeding is found in possession of premises and the stranger voluntarily appears in the proceeding and demands the recall of a writ of assistance, the trial court in the absence of objection obtains jurisdiction to try and decide the stranger's claim to the possession of the property.

7. Mortgages ⇐544(3)

Where a stranger to mortgage foreclosure proceeding voluntarily appeared in the proceeding and demanded the recall of a writ of assistance and asked trial court to adjudicate his right to possession of property which he asserted was a superior equitable title and that issue was tried without objection, the trial court had jurisdiction to determine whether the stranger's claim was reasonable and was supported by a reasonable showing, notwithstanding the stranger appeared specially in the proceeding.

8. Trusts ⇐72

Where husband and wife purchased property and went into possession, but record title was placed in name of purchasers' daughter and her husband, the daughter and her husband held the legal title to the property in trust for the purchasers.

9. Trusts ⇐357(3)

If transferee pays value to trustee and acts without knowledge or notice of existence of trust, transferee's claim to property is superior to that of equitable owner. Civ. Code, §§ 856, 2243.

10. Mortgages ⇐154(3)

Where purchasers went into and remained in possession of property but record title was placed in name of purchasers' daughter and her husband who also lived on the property, mortgagee taking mortgage from daughter and her husband was not put on inquiry as to secret trust existing in favor of others than the legal owners and acquired right superior to purchasers' equitable interest, since usually when record owners live on property reasonable inference follows that they are in possession, notwithstanding other members of family live there with them.

11. Estoppel ⇐94(1)

Where purchasers went into possession of property but record title was placed in name of purchasers' daughter and her husband who also lived on property, and where surviving purchaser sat idly by during time mortgagee made loan to daughter and acquired mortgage on property without actual knowledge of such purchaser's claim of title, purchaser could not claim rights superior to rights of mortgagee.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action to foreclose a mortgage by Kate Rafftery against Helen Louise Kirkpatrick and another. Judgment for plaintiff. The plaintiff filed a petition for a writ of assistance which was granted ex parte. C. L. Cunningham filed a notice of motion for an order vacating the order for the issuance of the writ of assistance and recalling it. From an order denying the motion, C. L. Cunningham appeals.

Affirmed.

LeRoy B. Lorenz, of Los Angeles, for appellant.

A. Heber Winder, of Riverside, for respondent.

MARKS, Justice.

This is an appeal from an order denying the motion of C. L. Cunningham to vacate an order directing the issuance of a writ of assistance and to recall the writ.

On April 6, 1931, Helen Louise Kirkpatrick and her husband were the record owners of four lots in Perris, in Riverside county, which is the property involved in this action. On that day, together with her husband, Leonard Kirkpatrick, she executed a mortgage on this property to secure a promissory note for $750 payable to Kate Rafftery, due one year after date, with interest at eight per cent per annum. The note was not paid when due. Interest was not paid after April 6, 1934, and taxes were not paid by the mortgagors.

This action to foreclose the mortgage was instituted against the mortgagors on March 25, 1935. A decree of foreclosure was rendered and entered on June 17, 1935. The property was sold to plaintiff at a commissioner's sale on July 10, 1935.

After the expiration of a year a commissioner's deed was issued to her. C. L. Cunningham was found in possession of the property. Demand for possession of the premises was made on him, which he refused.

On September 2, 1936, plaintiff filed a petition for a writ of assistance which was granted ex parte. The writ was issued on the same day. On September 12, 1936, C. L. Cunningham, appearing specially for that purpose, filed a notice of motion, supported by his affidavit, for an order vacating the order for the issuance of the writ and recalling it. Counteraffidavits were filed by and on behalf of plaintiff and a hearing was had on September 21, 1936, at which Cunningham testified in his own behalf. The trial court denied Cunningham's motion and this appeal followed.

The decree of foreclosure contained the following: "That if any of the parties to this action who may be in possession of said premises, or any part thereof, or any person who, since the commencement of this action, has come into possession under them, or either of them, refuse to deliver possession thereof to such purchaser or purchasers, on production of the Commissioner's Deed for such premises, or any part thereof a writ of assistance may, without further notice, be issued to compel such delivery to the purchaser."

[1-5] The writ of assistance is incident to the execution of the judgment and is issued as a matter of right where a defendant, or one claiming under him, refuses to surrender possession after the execution of the deed to the purchaser at the foreclosure sale. 3 Cal.Jur. 340. It is also true, that as a general rule, title to the property in question cannot be tried in a proceeding of this kind. 3 Cal.Jur. 341. The trial court, however, may, on proper evidence, determine the question of the fact of the possession of the property by a person not a party to the foreclosure proceeding. The question of such possession is one of fact addressed to the trial court. If decided on conflicting evidence the implied finding will not be disturbed on appeal. Hibernia Savings & Loan Society v. Robinson, 150 Cal. 140, 88 P. 720.

[6] It is also established that when a stranger to the foreclosure proceeding is found in possession of the premises, and that person voluntarily appears in the proceeding and demands the recall of the writ of assistance, the trial court, in the absence of objection, "obtained jurisdiction to try and decide his claim to the possession of the property". Pacific States Savings & Loan Co. v. Harwell, 204 Cal. 370, 268 P. 341. See, Dobbins v. Economic Gas Co., 182 Cal. 616, 189 P. 1073.

[7] Cunningham voluntarily appeared in the action and asked the trial court to adjudicate his right to the possession of the property. In asserting this right he claimed under a purported superior equitable title. It is true that he appeared specially in the action. That special appearance was for the purpose of having his right of possession under such title determined. That issue was tried without objection. These facts gave the trial court jurisdiction to determine whether or not his claim was reasonable and was supported by a reasonable showing. Kirsch v. Kirsch, 113 Cal. 56, 45 P. 164; Pac. States Savings & Loan Co. v. Harwell, supra. The trial court found against Cunningham, and while he cloaks his argument here under various guises, the real question presented is whether or not there is sufficient evidence in the record to support the implied finding that Cunningham's claim is neither supported nor reasonable, within the rules announced in the Kirsch and Pacific States Savings cases.

In his affidavit in support of his motion Cunningham set forth the following: That he and his wife bought the property in question in 1923 and went into and remained in possession of it as owners in fee until May, 1935, when his wife died; that thereafter he remained in possession; that in 1923 "bare paper title" was placed in his daughter and remained there until January 30, 1932, when, by a deed, record title was placed in John L. Cunningham, affiant's son.

The material portions of Cunningham's testimony are thus summarized in his bill of exceptions: "That the property in question was purchased in 1923, the record title being taken in the name of the daughter of C. L. Cunningham, Helen Kirkpatrick and her husband, Leonard Kirkpatrick; that the Cunninghams and the Kirkpatricks lived on the property together some being absent from time to time, the exact dates not being definite; that the wife of C. L. Cunningham died in 1935, but C. L. Cunningham continued to live on the property with the Kirkpatricks, that the Cunninghams, Kirkpatricks and plaintiff were all

well acquainted, that the plaintiff, Kate Rafftery, who was a domestic servant by occupation, often visited in the home of the Cunninghams and Kirkpatricks and all knew that she had a mortgage on the property and further that the present note and mortgage was a renewal by them to her of her previous note and mortgage; C. L. Cunningham stated that he had never told Kate Rafftery that he owned the property nor claimed any interest in it; C. L. Cunningham further testified that when Helen Kirkpatrick and her husband, Leonard Kirkpatrick deeded said property by a deed dated January 30th, 1932, to his son, John L. Cunningham, subject to 'mortgage securing note for $750.00 in favor of Kate Rafftery', said son took the title in trust for him and he gave no definite reason for this deed not being recorded until shortly before the Commissioner's Deed was issued in 1936, when the first notice of his claim of an interest in said property was given to plaintiff's attorneys; * * *."

Cunningham bases his argument for reversal on the following reasoning: That he and his wife were equitable owners of the property since its purchase in 1923; and in possession until May, 1935; that he was in possession after May, 1935; that this possession was notice to plaintiff of a claim of title sufficient to put her on her inquiry; that as she had such notice he should have been joined as defendant in the foreclosure suit; that as he was not so joined his outstanding title was not foreclosed and his right of possession based on it could not be determined by the writ of assistance nor on the motion before us for review.

[8] It is clear from the foregoing facts that Helen Louise and Leonard Kirkpatrick held the legal title to the property in trust for Mr. and Mrs. Cunningham. 25 Cal.Jur. 162 et seq.

[9] In 25 California Jurisprudence 221 it is said:

"If the evidence shows that the transferee paid value to the trustee and acted without knowledge or notice of the existence of the trust, his claim to the property is held to be superior to that of the equitable owner. Section 856 of the Civil Code provides that 'no implied or resulting trust can prejudice the rights of a purchaser or encumbrancer of real property for value and without notice of the trust'; and section 2243, in declaring that one to whom property is transferred in violation of trust shall be deemed to hold as trustee, contains an exception in favor of an innocent purchaser for value. The rule applies in favor of one who took a conveyance from the holder of the record title, as against a person who furnished the consideration for the purchase by the grantor.

"A notification by the plaintiff to the defendant must be held to have been ineffectual, where it was received after the sale of the property was consummated by delivery of the deed and payment of the purchase price." See, also, Hentig v. Williams, 1 Cal.App. 454, 82 P. 546.

Cunningham's argument must fail unless, as a matter of fact, he was in actual possession of the mortgaged property, and unless such possession should have put Kate Rafftery on her inquiry as to his right of possession.

[10] We believe that the testimony of Cunningham which we have quoted is sufficient to negative the idea of possession of the property by Cunningham. Mr. and Mrs. Kirkpatrick held the record title to the property. They resided on it. Usually when the record owners of property live on it the reasonable inference follows that they are in possession of it. This is not destroyed by the fact that other members of the family lived there with them. Under such circumstances a mortgagee would not be put on inquiry as to a secret trust existing in favor of others than the legal owners. In 25 California Jurisprudence 224 it is said: "However, if the transferor had possession of the property, as well as the legal title, and exercised rights which imported absolute ownership in himself, it seems that the transferee is not to be held responsible on the ground that he did not make inquiries as to the state of the title although the evidence may show that inquiry or investigation would have disclosed that the transferor held the title in trust for the plaintiff."

[11] Cunningham admitted in his testimony that he knew of the loan by Kate Rafftery to his daughter and the giving of the mortgage as security for the loan. He further testified that he sat idly by during the time the loan was extended and the present mortgage executed without informing the mortgagee of the trust or of his claimed interest in the property. It is not claimed that Kate Rafftery had any actual knowledge or notice of the secret

trust or of Cunningham's claim of title. It is only claimed that she should have made inquiry as to the status of the title. In view of his silence when he should have spoken, this claim from Cunningham comes with bad grace at this late date. A person may be deceived and misled as much by silence as by spoken words. To uphold Cunningham's claims after he had failed to warn Kate Rafftery when he had the opportunity and should have spoken would permit him to profit by his own wrong.

The order is affirmed.

We concur: BARNARD, P. J; GRIFFIN, J.



29 Cal.App.2d 551

HOHNEMANN et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 10799.

District Court of Appeal, First District, Division 1, California.

Dec. 7, 1938.

1. Appeal and error ⇐82(1)

An order denying defendant's motion to terminate proceedings instituted by plaintiffs for preparation of a transcript on appeal taken pursuant to alternative method provided by statute was not "appealable" as a "special order made after final judgment." Code Civ.Proc. §§ 953a, 963, subd. 2.

[Ed. Note.—For other definitions of "Appealable Order" and "Special Order," see Words & Phrases.]

2. Appeal and error ⇐775
Exceptions, bill of ⇐28

The trial court's action in denying defendant's motion to terminate proceedings instituted by plaintiffs for preparation of a transcript on appeal taken pursuant to statute may be reviewed, preliminary to hearing of main appeal on the merits by way of motion to dismiss based on affidavits and where appeal from order denying defendant's motion to terminate proceedings was dismissed because order was not appealable, bill of exceptions used on such appeal could be used as the record in presentation of motion to dismiss main appeal. Code Civ.Proc. § 953a.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Charlotte M. Hohnemann, by William H. Hohnemann, by Annie Doud, his guardian, minors, against the Pacific Gas & Electric Company for damages, wherein judgment was entered in defendant's favor. From an order denying defendant's motion to terminate proceedings instituted by plaintiffs for preparation of a transcript on appeal, defendant appeals.

Appeal dismissed.

Thomas J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, for appellant.

Paul C. Dana, Lawrason Driscoll, and Bronson, Bronson & McKinnon, all of San Francisco, and Bardin, Harrington & Bardin, of Salinas, for respondents.

KNIGHT, Justice.

The trial court denied defendant's motion to terminate the proceedings instituted by plaintiffs for the preparation of a transcript on appeal, which plaintiffs had taken pursuant to the alternative method provided by section 953a of the Code of Civil Procedure from a judgment in defendant's favor after verdict by a jury in an action for damages; and from the order of denial so made defendant has taken this appeal, which plaintiffs now move to dismiss upon the ground that such an order is not appealable. Defendant contends in opposition to the motion to dismiss that the order in question is a "special order made after final judgment", and therefore under the provisions of subdivision 2 of section 963 of the Code of Civil Procedure, is appealable.

[1] It seems that the precise question here presented has never been definitely ruled upon. It was raised in the case of Hudgins v. Standard Oil Co., 136 Cal.App. 44, 28 P.2d 433, but not decided. However, it has been held generally that a special order made after final judgment, as contemplated by subdivision 2 of section 963 of the Code of Civil Procedure, to be appealable, must affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution (Lake v. Harris, 198 Cal. 85, 243 P. 417, citing Griess v. State Investment, etc., Co., 93 Cal. 411, 28

P. 1041; Kaltschmidt v. Weber, 136 Cal. 675, 69 P. 497; Watson v. Pryor, 49 Cal. App. 554, 193 P. 797; 2 Cal.Jur. p. 153); and it has been held specifically that an order terminating proceedings instituted for the preparation of a transcript is appealable. Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922. But in the case last cited the Supreme Court expressly stated that a distinction must be drawn between an order terminating such proceedings, and an order refusing to terminate such proceedings, because, says the court, the former necessarily operates as a final determination of the matter and may result in the termination of the original or main appeal unless it is open to attack by separate appeal. Moreover, in that same case, the court stated that there is no material distinction between an order involving the termination of proceedings for the preparation of a reporter's transcript pursuant to the provisions of section 953a of the Code of Civil Procedure, and an order involving the termination of proceedings for the preparation and settlement of a bill of exceptions; and in a later case, Landreth v. Ducommun, 9 Cal.App.2d 136, 48 P.2d 984, it was squarely held that an order refusing to terminate proceedings for the preparation and settlement of a bill of exceptions was not appealable, citing Buis v. Lindauer Corp., 116 Cal.App. 558, 3 P.2d 18, and McWilliams v. Hudson, 98 Cal.App. 185, 276 P. 598, 277 P. 529. In so holding the court in that case went on to say that the question of the invalidity of such an order may be raised when and if the main appeal from the judgment is prosecuted. Since, therefore, as pointed out in Wood v. Peterson Farms Co., supra, there is no material difference between an order involving the termination of proceedings for the preparation and settlement of a bill of exceptions and one involving the termination of proceedings for the preparation of a transcript requested under the alternative method of appeal, the decision in Landreth v. Ducommun, supra, is obviously here controlling, and it must be held, as there, that the order refusing to terminate the proceedings is not appealable.

[2] Defendant argues that to deny the right of appeal from such an order is to deny an aggrieved party any remedy whatever to review the ruling of a trial court refusing to terminate the proceedings for the preparation of a transcript, for the reason that the proceedings upon which such an order is based take place subsequent to the entry of judgment and to the ruling on motion for new trial, if such motion be made, and consequently form no part of the record on the main appeal. It has been the practice in some trial courts, however, to allow such subsequent proceedings to be incorporated in the transcript on the main appeal, to the end that a full and complete consideration on appeal may be given to all material questions presented to and determined by the trial court; and in those cases wherein such subsequent proceedings have not been so made part of the transcript on the main appeal, the question of the validity of the trial court's order of denial has been brought up for review, preliminary to the hearing of the main appeal on the merits, by way of motion to dismiss, based on affidavits; and there would seem to be no reason why such course may not be followed in the present case, using as the record in the presentation of such a motion the bill of exceptions upon which the present appeal was taken.

It is ordered, therefore that the appeal be and the same is hereby dismissed, without prejudice to the right of defendant to present such a motion.

We concur: TYLER, P. J.; CASHIN, J.



29 Cal.App.2d 446

PARKER v. MANCHESTER HOTEL CO.

Civ. 10605.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1938.

Hearing Denied by Supreme Court Jan. 26, 1939.

1. Innkeepers ⇐10

Allegations that as result of hotel elevator having stopped uneven with floor level and as result of slippery condition of floor, both of which factors concurred in proximately contributing to the result, plaintiff, while leaving the elevator, was caused to fall to the floor, sufficiently alleged that each of the alleged acts of negligence was the proximate cause of the injury.

2. Negligence ⇐119(1)

It is unnecessary to prove all the allegations of negligence.

3. Carriers ⇐280(4)

The owner of an elevator is responsible for injury occasioned by the slightest neglect which human care and foresight might have guarded against, and, although not insurers of the absolute safety of passengers, they are bound to utmost care and diligence of very cautious persons.

4. Innkeepers ⇐10

In action against hotel company for injuries sustained when hotel guest, who was alighting from elevator which had stopped at a level uneven with the floor, slipped on floor and fell, even if guest had knowledge that elevator did not always stop at floor level, question whether guest used ordinary care for her own safety was for jury.

5. Negligence ⇐136(8)

The court should consider the question of negligence one of law and not of fact only when the facts are undisputed and are such that reasonable men can honestly draw but one conclusion therefrom.

6. Innkeepers ⇐10

In hotel guest's action against hotel company for injuries sustained when guest slipped and fell on floor after alighting from elevator which had stopped at a level not even with floor, question of hotel company's negligence in maintenance of the elevator was for jury.

7. Innkeepers ⇐10

In hotel guest's action against hotel company for injuries sustained when guest slipped and fell on floor after alighting from elevator which had stopped at a level not even with floor, whether hotel company's negligence in maintenance of elevator proximately caused injury was for jury.

8. Innkeepers ⇐10

In hotel guest's action against hotel company for injuries sustained when guest slipped and fell on floor when alighting from elevator which had stopped at a level not even with floor, question of guest's contributory negligence was for the jury.

9. Evidence ⇐591

In negligence action, plaintiff was not bound by her own testimony.

10. Appeal and error ⇐1064(1)

In hotel guest's action against hotel company for injuries sustained when guest slipped and fell on floor when alighting from elevator which had stopped at a level not even with floor, instruction that the law presumes plaintiff and defendant free from negligence, which presumption is a species of evidence and continues until overcome by contradictory evidence, if erroneous, was not reversibly prejudicial.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Julia Parker against the Manchester Hotel Company and another to recover for injuries sustained when plaintiff fell in a hotel lobby after alighting from an elevator. Judgment for plaintiff for $2,000 against the named defendant, and the named defendant appeals.

Affirmed.

Charles V. Barfield, of San Francisco, for appellant.

McCarthy, Richards & Carlson, of Oakland, for respondent.

CONLAN, Justice pro tem.

Plaintiff commenced this action against the defendants, Manchester Hotel Company, owners of the Claridge Hotel, and Westinghouse Electric Elevator Company, serviceors of the elevators in the Claridge Hotel, for personal injuries which she received when she fell in the lobby of the hotel on May 21, 1936.

The complaint alleged, in part, that on May 21, 1936, and for several years prior thereto, plaintiff was a guest in the Claridge Hotel; that on said day defendants so negligently maintained, regulated and operated said elevator as to cause it to stop with its floor uneven with the floor of the lobby and that the defendant, Manchester Hotel Company, so negligently maintained the floor of the lobby immediately adjacent to the door of said elevator as to cause the same to be slippery and uneven and to be hazardous and unsafe for passengers leaving the elevator; that on the date in question, as the result of the automatic elevator having stopped uneven with the level of the lobby floor, and as a result of the slippery, uneven and unsafe condition of the floor, both of said factors concurring in producing and directly and proximately contributing to this result, plaintiff, while leaving the elevator, was caused to slip, trip and to fall to the floor of the lobby, thereby sustaining certain alleged injuries.

The defendants, Manchester Hotel Company and Westinghouse Company, filed separate answers to plaintiff's first amended complaint, wherein each of the defendants denied any negligence and alleged that the plaintiff at the time and place had been guilty of contributory negligence.

The trial court granted the motion of the defendant, Westinghouse Company, for a nonsuit, but denied the motion for nonsuit of the defendant, Manchester Hotel Company. The jury returned a verdict in favor of the plaintiff and against the defendant, Manchester Hotel Company, in the sum of $2,000. Thereafter the trial court denied the motion of the defendant, Manchester Hotel Company, for a new trial, whereupon the defendant, Manchester Hotel Company, duly filed notice of appeal from the judgment pursuant to the provisions of section 953a of the Code of Civil Procedure.

After alleging negligence against both defendants as above stated, there is an allegation in plaintiff's complaint as follows: "That as a result of said elevator having stopped uneven with the level of said lobby floor as aforesaid and as a result of the slippery, uneven and unsafe condition of said floor as aforesaid, both of said factors concurring in producing and directly and proximately contributing to this result, plaintiff, while leaving said elevator, was caused to slip, trip and to fall to the floor of said lobby with great force and violence."

[1, 2] The above allegation sufficiently alleges that each of the alleged acts of negligence was a proximate cause of the injury. It is unnecessary to prove all the allegations of negligence. Criss v. Angelus Hospital Association, 13 Cal.App.2d 412, 56 P.2d 1274; Potvin v. Pacific Greyhound Lines, 130 Cal.App. 510, 20 P.2d 129; and Froeming v. Stockton Electric R. R. Co., 171 Cal. 401, 153 P. 712, Ann.Cas.1918B, 408.

Appellant's contentions are as follows: There is not sufficient evidence that appellant was negligent to sustain the verdict of the jury; that there is no evidence that appellant was negligent in the maintenance and operation of its elevator; that there is no evidence that appellant had notice that the elevator was in a defective condition immediately prior to the accident; that the evidence of alleged negligence in the maintenance and operation of the elevator was insufficient to sustain the jury's verdict; that there is no evidence that appellant negligently maintained the lobby in front of the elevators; that respondent failed to prove either of the alleged concurrent acts of negligence, but in any event respondent could not recover upon proof of only one of such acts under the allegations; that respondent was guilty of contributory negligence as a matter of law; that respondent had such knowledge of the condition of the elevator as would put her on notice of its defective conditions; that, if Mrs. Parker had knowledge of the defective condition of the elevator, the question of her contributory negligence should have been decided by the court as a matter of law; that the trial court committed prejudicial error in its instructions to the jury.

Appellant relies upon the following testimony of the respondent, Julia Parker, to show that the respondent was guilty of negligence as a matter of law: "Q. I take it, from what you have told us here a little while ago, that the elevator must have been uneven or you would not have fallen, but you actually did not look to see as you stepped? A. Of course, I would not look to see, no sir. I did not look to see, I never did, carelessness that is what it was, I ought to have done that."

Plaintiff and respondent relied upon the following testimony of Mrs. Parker, the plaintiff, to show that plaintiff had only momentarily forgotten a known danger. Appellant contends that this testimony does not show that plaintiff momentarily forgot, but that she negligently disregarded what she claims to be a known danger. This testimony is as follows:

"Q. In times previous to this accident, had you ever noticed that the elevator did not come quite flush with the floor of the lobby? A. Dozens of times.

"Q. Dozens of times? A. Yes.

"Q. You were aware of the fact that it was necessary to gauge your step accordingly, were you not? A. Why, you don't think of such a thing when you are in the elevator. You just——

"Q. Second nature, you do gauge yourself? A. I expect it was, yes.

"Q. In accordance with the slight variation between the level of the elevator and the level of the surrounding floor? A. I should expect the elevator to be right.

"Q. Beg your pardon? A. I should expect it to be right.

"Q. No, but you had seen it just a trifle up or a trifle down on numerous occasions? A. Oh, lots of times.

"Q. It had become a habit with you to gauge your step accordingly, when it was off level a little bit, hadn't it? A. In fact, I never thought of it. You never think of such a thing as being off. I never thought of such a thing."

Appellant further contends the following testimony of the respondent proves that "Plaintiff failed to prove that the defendant was guilty of negligence as alleged in the complaint."

"Q. And did you fall as you stepped out into the lobby? A. I may have taken two or three steps first—I do not know—I know I stumbled.

"Q. And you lost your balance, did you? A. I lost my balance, yes.

"Q. Did you feel yourself stepping down or up from the elevator floor? A. Well, I was stepping down, of course, to get to the lobby.

"Q. Do you know how far off of even or flush the elevator floor was from the lobby floor? A. I was just looking ahead, but it never was very far."

In the deposition which was introduced into evidence Mrs. Parker testified that the elevator was a little bit higher than the floor; that she could not say whether it was about half an inch, but it was enough to make her fall; that she was not quite certain how much higher; that she fell out of the elevator because it was not flush with the floor, she stumbled on the tile floor, it was the elevator's fault.

Appellant further contends: "Mrs. Parker's conclusion that the elevator was not on a level with the floor when she stepped out is not entitled to any weight or credence when opposed to the direct testimony of eye-witnesses to the contrary, especially when coupled with her admission that she did not look to see as she stepped out, could not tell how much higher the elevator was than the floor and walked a distance of six or seven feet before she fell," and quotes Mrs. Parker's testimony as follows:

"Q. I take it, from what you have told us here a little while ago, that the elevator must have been uneven or you would not have fallen, but you actually did not look to see as you stepped? A. Of course, I would not look to see no sir. I did not look to see, I never did, carelessness that is what it was, I ought to have done that."

Appellant quotes from witness Siddoway's testimony as follows in support of appellant's contention:

"There is no evidence that appellant negligently maintained the lobby in front of the elevator."

"Q. Well, when did you last polish this floor before May 21st? A. Probably about a week.

"Q. You say 'probably about a week'—did you remember that it was a week that you polished the floor before May 21st? A. No, sir.

"Q. It may have been longer than a week? A. It may have been."

Appellant makes the further contention that plaintiff had no complaint to make of the cleanliness of the floor and attributed her fall solely to the elevator, and quotes her testimony as follows: "I fell out of it because that elevator was not flush with the floor. I stumbled on this tile floor. It was the elevator's fault."

Appellant further contends the "evidence of alleged negligence in the maintenance and operation of the elevator was insufficient to sustain the jury's verdict" and quotes respondent's testimony as follows:

"Q. Now, Mrs. Parker, I believe you said that as you walked out of the elevator you just looked straight ahead of you? A. Yes, sir.

"Q. You did not look down at the floor, or anything like that? A. No.

"Q. On the occasion of your unfortunate fall, how do you know that the elevator was not even with the floor? A. Because I fell off, that is why I know it. If it had been even, I would not have fell off.

"Q. In other words, you did not actually see it, but you knew it was always uneven because you fell as you started to step out, is that it? A. Yes, why certainly, what else would make you fall? What would make you fall unless something caused it?"

Appellant further contends: "In addition to the fact that plaintiff did not look before stepping from the elevator, it further appears that she does not claim that there was any appreciable difference between the level of the elevator floor and the lobby floor." In this regard appellant also quotes the following testimony of Mrs. Parker:

"Q. Do you know how far off of even or flush the elevator floor was from the lobby floor? A. I was just looking ahead, but it never was very far.

"Q. You mean the floor of the elevator was a little bit higher than the floor of the adjoining floor? A. Yes.

"Q. About a half an inch, would you say? A. I could not say. It was enough to make me fall, that's all I know.

"Q. Now, as you walked out of the elevator you say that you may have taken a few steps? A. I might, yes, some, yes.

"Q. And can you tell us just how many steps you took, Mrs. Parker? A. No.

"Q. And what is your best recollection as to how many steps you took after you left the elevator before you fell, just your best recollection?

"Mr. Carlson: Objected to on the ground it has already been asked and answered. She said she cannot say.

"The Court: She may answer. A. I said I could not remember.

"Mr. Barfield:

"Q. Do you think that you moved, walked six or seven feet after you left the elevator? A. Yes.

"Q. In the lobby, what type of a floor is there? A. Just exactly like glass, exactly like glass. He keeps it polished. You can go and see for yourself—terribly smooth, just like glass.

"Q. You were aware of the fact that it was necessary to gauge your step accordingly, were you not? A. Why, you don't think of such a thing when you are in the elevator. You just——

"Q. Second nature, you do gauge yourself? A. I expect it was, yes."

On the taking of her deposition the respondent, Mrs. Parker, testified in part as follows:

"Q. Mrs. Parker, did you see anybody get into the elevator and close the door before you fell? A. That lady was going up. I was the only one that came out. She was the only one that went up.

"Q. This lady did get into the elevator, did she not? A. Yes.

"Q. She got in before you got—— A. (Interrupting.) What?

"Q. She got in before you fell, did she? A. Yes.

"Q. Then you were outside of the elevator before you fell? A. I was just stepping out. She had just closed the inside door. I was just stepping out of the elevator when I fell.

"Q. Was the inside door entirely closed before you fell? A. I don't know."

Mark Siddoway, a witness called on behalf of the plaintiff, testified in substance and in part as follows: That he was employed by the Claridge Hotel on May 21, 1936; that he was head houseman at that time; that he had to do with the cleaning and taking care of the elevators; that he was familiar with those elevators; that this particular elevator, the east elevator or the elevator nearest the dining room, stopped at various distances from the level of the floors—on the sixth floor—a matter of from two to six inches approximately; that on several different occasions he reported this to the manager of the hotel; that as a matter of fact, a week or ten days previous to that there were elevator men working on the floors; that a matter of ten—a week or ten days before the accident occurred he observed the elevators after these men worked on the elevators; that the same conditions existed in the east elevators after that; that he observed the east elevator the next morning after the accident; that the next morning he got up and got his stick, about eighteen inches long, and took measurements of the elevator, running it up and down several times, taking definite measurements of each floor; that on the main floor, on the observation that he took, it stopped a matter of about four inches above the level of the floor varying on different trips; that it stopped sometimes above and sometimes below—never on level—that as to the type of floor there in the lobby of the hotel it is in a large square with a hard substance of uneven tile arrangement; it is laid off in squares with about nine-inch squares, or eight-inch squares with very close seams—a very close seam, probably three-eighths of an inch; the floor is uneven; that it was his duty to keep the floor in condition; that he kept it clean and polished.

And on cross-examination, Mr. Siddoway testified in substance and in part as follows: That he left the Claridge Hotel about June 6th; that he did not quit of his own volition; that he had a misunderstanding with Mr. Port and he was discharged; that they used wax and a polishing machine on the terra cotta surface; that he did that himself at times; that he polished the floor at the time; that he polished this floor probably a week before May 21st; that after he got through polishing it, it was not rough; that he reported the unevenness of the elevator to Mr. Swelzy or Mr. Port, the assistant

manager; that he believed he did mention it to Mr. Port, the manager, at one time; that he noticed these variations before the date of the accident and they would vary sometimes above and sometimes below the main floor; that these variations occurred in both operations, either up or down; that sometimes it would be a little above and sometimes a little below; that it usually stopped below or above; that when he went to measure it it was about 5 o'clock in the morning the day after the accident and that at that time he found there was a variation above the main floor and that it stopped a little above the main floor; that the largest variation he observed that day was approximately from four to six inches; that at the time he made those tests on the day following the accident there was no one in the elevator but himself.

Mr. A. B. Hendrickson, a guest at the hotel, testified in part as follows:

"Q. And as she fell did she have hold of that door? A. Well, I could not say exactly, but she either had hold of the doorknob or was reaching for it.

"Q. And was the outer door of the elevator open as she fell? A. Yes sir."

The case of Haag v. Harris, 4 Cal.2d 108, 48 P.2d 1, answers the contention of appellant that the testimony shows that the appellant was not guilty of negligence in the maintenance of the elevator because appellant had a service contract with the Westinghouse Company by which the elevator company serviced the elevators and made all the necessary repairs and adjustments.

We believe the rule announced in this case (Haag v. Harris, supra) applies to the evidence in the record and is controlling in the instant case as to the liability of the appellant for the condition of the elevator.

[3, 4] There is no question about the rule in California that the owner of an elevator is responsible for injury occasioned by the slightest neglect which human care and foresight might have guarded, and that, though not insurers of the absolute safety of passengers, they are bound to utmost care and diligence of very cautious persons. Gregg v. Manufacturers Bldg. Corp., 134 Cal.App. 147, 25 P.2d 1014, and cases therein cited. See, also, Jacobi v. Builders' Realty Co., 174 Cal. 708, 164 P. 394, L.R.A.1917E, 696, and White v. Red Mountain Fruit Co., 186 Cal. 335, 199 P. 318. Even if respondent had knowledge of the defective condition of the elevator, it is still a question for the jury whether she used ordinary care for her own safety.

The case of Perrault v. Emporium Department Store Co., 71 Wash. 523, 128 P. 1049, supreme court of Washington, Jan. 7, 1913, cited by the appellant, does not sustain appellant's contention that the resondent in the instant case was guilty of contributory negligence as a matter of law. An examination of the facts in this case shows that the plaintiff "facing her companions within, and attempted to step into the elevator without looking at its floor". The third floor of the store was level, carpeted and adequately lighted. The floor of the elevator was uncarpeted. She says that she did not notice the elevator was lower than the floor, that she thought it was level with the floor until she fell, and that she then looked and observed that it was four or five inches below the surface of the floor, etc. The facts in the Perrault Case do not differ much from the facts in the instant case except that in the Perrault Case the lady was getting into the elevator and there was an elevator attendant at his post. It was held that the contention that the plaintiff was guilty of negligence as a matter of law could not be sustained. The dissenting opinion quotes certain evidence wherein the plaintiff admits she did not look and paid no attention as to whether the elevator floor was level with the storeroom floor or not. The majority opinion held under the circumstances she was not guilty as a matter of law.

[5] The case of Williams v. Sleepy Hollow Mining Co., 37 Colo. 62, 86 P. 337, 7 L.R.A.,N.S., 1170, 11 Ann.Cas. 111, cited by respondent, is not particularly helpful in the instant case except that it declares the general rule, viz: "It is only when the facts are undisputed and are such that reasonable men can honestly draw but one conclusion from them that the court should consider the question of negligence one of law, and not of fact." Page 340 of 86 P. This same rule is recognized in California. The case of Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870, cited by the respondent, quotes Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, wherein it is stated [page 538]: "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference

pointing unerringly to the negligence of the plaintiff contributing to his injury. * * * In all other cases the question of contributory negligence is a question of fact for the jury." See, also, Kanopka v. Kanopka, 113 Conn. 30, 154 A. 144, 80 A. L.R. 619, and Whiteacre v. Boston Elevated Ry. Co., 241 Mass. 163, 134 N.E. 640.

Appellant contends that the rule applied in the case of Mautino v. Sutter Hospital Association, 211 Cal. 556, 296 P. 76, should apply.

[6] There is sufficient evidence in the record to uphold the implied finding of the jury that the defendant hotel company was negligent in the maintenance of the elevator so it is unnecessary to consider the application of the rule announced in Mautino v. Sutter Hospital Association, supra, as to respondent's knowledge of the condition of the floor in the lobby of the hotel.

[7, 8] Taking the testimony as a whole most favorable to the respondent, there is sufficient testimony to sustain an implied finding that when the respondent opened the door to step into the lobby, the elevator was at a sufficient height from the level of the lobby floor to cause her to lose her balance; that that lack of control of her balance caused her to fall, and that her loss of balance, caused by the elevator's not stopping at the floor level, caused her to fall regardless of the condition of the floor. There is evidence in the record tending to show that the action of the elevator in stopping at the floors was intermittently faulty, and that periodically, but not all of the time, it did not stop at the floor level. There is a clear conflict in the evidence as to how many feet appellant was away from the door of the elevator or how many steps she took before she fell. While it is true there is abundant evidence upon which reasonable men and women might have concluded respondent was guilty of contributory negligence, the implied finding of the jury was to the contrary.

[9] The plaintiff is not bound by her own testimony. See Whicker v. Crescent Auto Co., 20 Cal.App.2d 240, 66 P.2d 749; and cases cited therein; Kanopka v. Kanopka, supra, and Whiteacre v. Boston Elevated Ry. Co., supra.

Appellant complains of the following instruction which was given to the jury:

"The law presumes that the plaintiff and the defendant, and each of them, were free from negligence. Such presumption is a species of evidence, and continues with the respective parties in this case unless and until overcome by contradictory evidence", and cites the cases of Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709; Varner v. Skov, 20 Cal.App.2d 232, 67 P. 2d 123, and Whicker v. Crescent Auto Co., 20 Cal.App.2d 240, 66 P.2d 749.

It is stated in Varner v. Skov, supra, as follows [page 127]: "It has also been held in a number of cases in this state that under the circumstances thereof the giving of such an instruction, even if erroneous, was not sufficiently prejudicial to justify a reversal." In the Varner v. Skov Case the reversal was for other reasons. The Varner v. Skov Case was not reversed on account of the giving of the instruction regarding the presumption and the question of its being prejudicial error although erroneous was not passed upon.

In Whicker v. Crescent Auto Co., supra, the case was not reversed. The instruction regarding the presumption was given. The Whicker Case involved an injury to an elderly woman who stepped from a safety zone in an attempt to reach the sidewalk. This case states, in part [page 751]:

"The automobile driven by Vaughn rounded a corner of Powell and Market streets in San Francisco and turned into the latter street at a speed estimated at 30 miles an hour. The distance from this corner to the place where plaintiff was injured was between 25 and 30 feet. The plaintiff was struck as she stepped from a safety zone on Market street in an attempt to reach the north sidewalk. Due apparently to the confusion attending such a casualty, her recollection of the precise details of the accident was far from clear; that of Vaughn created a conflict in certain particulars, and the testimony of a third witness to the occurrence differed in some respects from both.

"Vaughn's testimony, though evidence in the case which the jury might consider, did not of itself destroy the probative weight of the fact presumed, the question whether his testimony proved facts sufficient to overcome the presumption being one for the jury. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Tuttle v. Crawford [8 Cal.2d 126], 63 P.2d 1128. According to numerous cases it is only where facts are admitted or established by proof (the effect of evidence,

Code Civ.Proc., § 1824) which are irreconcilable with the presumption that it loses its evidentiary weight. Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269; Smellie v. Southern Pacific Co., supra; 10 Cal.Jur. Evidence, § 64, p. 747. As held in the Smellie Case, the calling of an adverse party under the Code section does not have that effect, nor in cases of this character is a party who is merely giving a narration as to how events appeared to him rather than making an admission or testifying to a fact peculiarly within his own knowledge, bound by his own testimony as against circumstantial or other evidence which the jury might fairly believe. Kanopka v. Kanopka, 113 Conn. 30, 154 A. 144, 80 A.L.R. 619; Whiteacre v. Boston Elevated Ry. Co., 241 Mass. 163, 134 N.E. 640; Hill v. West End Street Ry. Co., 158 Mass. 458, 33 N.E. 582."

The case of Kanopka v. Kanopka, 1931, 113 Conn. 30, 154 A. 144, 80 A.L.R. 619, holds as follows [page 147]: "The practice in this state conforms to the views expressed by Professor Wigmore. A judicial admission may be made by a party as well as by his counsel. If a party, as a witness, unequivocally concedes a fact, such concession, for the purposes of the trial, has the force of a judicial admission, and a party is bound thereby unless the court, in its reasonable discretion, allows the concession to be later withdrawn, explained, or modified, if it appears to have been made by improvidence or mistake. State v. Marx, 78 Conn. 18, 27, 60 A. 690; State v. Chapman, 103 Conn. 453, 478, 130 A. 899. Unless it amounts to such a stipulation or waiver as to have the force of a judicial admission, the testimony of a party to a fact is ordinarily no more conclusive upon him than the evidence given by any other witness; and it is the duty of the court or jury to determine the fact, not alone from the testimony given by the party, but from all the evidence in the case. Lampe v. Simpson, 106 Conn. 356 [358], 359, 138 A. 141; Connelly v. Connecticut Co., 107 Conn. 236, 239, 140 A. 121; Clark v. Torrington, 79 Conn., 42, 45, 63 A. 657."

This rule is followed in the case of Whiteacre v. Boston Elevated Ry. Co., 241 Mass. 163, 134 N.E. 640. This case is cited with approval in Kanopka v. Kanopka, supra, at page 146 of 154 A.

In the instant case, the testimony of the respondent comes within the rule stated on page 146 of 154 A. of Kanopka v. Kanopka, supra, which quotes the rule in Hill v. West End St. Ry. Co., 158 Mass. 458, 33 N.E. 582, with approval as follows: "'There is no sound reason why the familiar doctrine that a party may contradict, though not impeach, his own witness, should not, if the circumstances are consistent with honesty and good faith, be applied when he is himself the witness; nor, under the same circumstances, is there any reason why, to prove material facts denied by his own testimony, he may not rely on the testimony of witnesses called by the adverse party. * * * In other words, the law recognizes the fact that parties, as well as other witnesses, may honestly mistake the truth, and requires juries to find the facts by weighing all the testimony, whatever may be its source.' In Missouri, where the doctrine is recognized to some extent, it is held that, if a party, through ignorance, oversight, or mistake, makes statements against his interest, which are not true, the jury are not bound to give conclusive effect to such statements."

[10] In our opinion the instruction given in the instant case even if erroneous is not sufficiently prejudicial to justify a reversal. As pointed out by the respondent the instruction applied equally to both parties, and would apply to defendant's benefit to dispel the res ipsa loquitur rule. The testimony of the plaintiff, who was 83 years of age at the time of the accident and approximately 84 years of age at the time of the trial tends to show she was or may have been confused as to just how far she was from the elevator when she fell.

Where confusion may have prevented the plaintiff giving a clear and uncontradictory narrative of the events concerning the accident the rule announced in Whicker v. Crescent Auto Co., supra, and cases cited herein, with reference to "confusion" would seem to apply.

We find no prejudicial error in the other instructions complained of or in the record warranting a reversal of the case.

The judgment appealed from is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

29 Cal.App.2d 569

STRANDT v. CANNON.

Civ. 2159.
District Court of Appeal, Fourth District, California.

Nov. 30, 1938.

Hearing Denied by Supreme Court Jan. 26, 1939.

1. New trial ⇐39
Trial ⇐242

The test of error in giving a correct instruction of law is whether it is misleading, and if instructions, correct as abstract propositions, may have misled the jury a new trial may be granted on that ground.

2. Negligence ⇐93(1)

In guest's action for injuries sustained in highway intersection collision between host's automobile and automobile driven by defendant, negligence of host could not be imputed to the guest in absence of evidence showing that guest exercised some control over the driver or that he possessed the power to supervise or direct the manner in which the automobile should be operated.

3. Trial ⇐248

In guest's action for injuries sustained in highway intersection collision between host's automobile and automobile driven by defendant, where evidence failed to show contributory negligence on the part of the guest, instruction stating doctrine of comparative negligence as an abstract proposition of law was misleading.

4. Automobiles ⇐145

An automobile operator's negligence is to be determined by the facts existing at the time of the accident, and whether the operator had a license to operate an automobile is immaterial unless there is some causal relationship between the injuries and the failure to have a license or the violation of the statute in failing to have one. St.1935, p. 128, § 252.

5. Automobiles ⇐145

In guest's action for injuries sustained in highway intersection collision between host's automobile and automobile driven by defendant, instruction that host's lack of operator's license was prima facie showing of incompetency and lack of qualifications of a driver was erroneous, since the question in issue was not the character or reputation of the driver, but whether on the occasion of the accident he was negligent. St.1935, p. 128, § 252.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Guenther W. Strandt, an infant, by Rudolph O. F. Strandt, his guardian ad litem, against John W. Cannon for injuries sustained by the minor in a collision between an automobile in which minor was riding and an automobile driven by defendant. Verdict for defendant, and from an order granting a new trial, defendant appeals.

Affirmed.

C. F. Jorz, of Los Angeles, for appellant.

Charles D. Swanner, of Santa Ana, for respondent.

GRIFFIN, Justice.

This is an appeal by the defendant from an order granting a new trial in an action for damages for personal injury tried before a jury. The jury returned its verdict in favor of the defendant and appellant John W. Cannon. The ground upon which the trial court bases the order setting aside the verdict is the claimed error in submitting to the jury two instructions which were requested by appellant.

The action in the lower court arose out of an automobile collision which occurred about the hour of 4 o'clock on April 28, 1935, at the intersection of Valencia avenue and Munger road, in Orange county. The collision was between an automobile driven by Kenneth Layton and one driven by John W. Cannon. Guenther W. Strandt, a minor, was riding as a guest in the Layton automobile and was injured. Suit was instituted on behalf of the minor by Rudolph Strandt as guardian ad litem against John W. Cannon. Layton was not made a party defendant.

The Layton car in which respondent was riding was proceeding southerly on Valencia avenue across the intersection of Munger road and Valencia avenue. The Cannon car was traveling in an easterly direction on Munger road across said intersection. Both streets were open public highways, 60 feet in width with a 16-foot pavement, intersecting each other at right angles about one-half mile west of the town of Irvine.

The evidence shows that three corners of said intersection were clear and unobstructed and were used for bean fields; that the northwesterly corner of said intersection was obstructed by trees. The paved portion of Valencia avenue did not continue beyond

the south edge of the pavement on Munger road. From there Valencia avenue narrowed into a dirt road. It was crossed by a culvert and continued on through some nearby ranch property.

The appellant testified he knew this was a blind intersection; that up until the time he approached the intersection he had been traveling about 35 miles per hour and that at the time of the impact he was going 20 or 25 miles per hour; that he did not see the car in which respondent was riding until just the instant before the accident.

Respondent testified that the Layton car slowed down to practically a stop at the intersection, shifted gears and then traveled into the intersection at a speed of 5 or 10 miles per hour.

Layton placed the speed at 15 miles per hour or under. After the cars collided in this intersection the Chrysler, driven and owned by appellant, was found in the ditch on the south side of Munger road near the culvert, about 27 feet from the point of impact.

The Overland, driven by Layton, was found on Munger road about 60 feet from the center of the intersection. It was the intention of Layton not to turn at Munger road but to continue straight across on the dirt road described, where they were going to see a friend.

The entire cross-examination of Layton, the driver of the car in which respondent was riding, was upon Layton's failure to have an operator's license. A portion of it was as follows:

By Mr. Jorz: "Q. Did you ever discuss with him (Strandt) the question of whether or not you had a license to drive an automobile? A. I don't recall it * * *

"Q. Well, you didn't have a license to drive an automobile when this accident happened, did you? A. No.

"Q. You had been driving a car without a license? A. Yes, on the ranch.

"Q. You had never been given any examination by the vehicle department showing that you were able to drive a car had you? A. No."

By the answer filed in the pleadings appellant put in issue the following separate and affirmative defenses: (1) That any injury sustained by Strandt was caused solely and proximately by the negligence of Layton in operating his automobile at the time in a careless and negligent manner; (2) contributory negligence of Strandt; (3) that Strandt and Layton were engaged in a joint undertaking and enterprise and that the negligence of Layton in the operation of his automobile was, by virtue of said joint undertaking and enterprise, imputed to Strandt.

After a verdict by the jury in favor of Cannon and the judgment accordingly entered, Strandt moved for a new trial on several stated grounds. Following the hearing on the motion the trial court filed its order granting a new trial in the following language: "After reviewing the evidence * * * the court is of the opinion that there was no evidence of contributory negligence on the part of the plaintiff who occupied the status of a passenger in the car operated by Kenneth Layton. If that is true the court is of the opinion that error was committed in reading defendant's instruction No. 4 to the jury * * * I think that the giving of defendant's instruction No. 4, together with defendant's instruction No. 2 was misleading to the jury, and they might reasonably infer from those instructions that there was evidence of contributory negligence on the part of the plaintiff."

These instructions given by the court at the request of appellant are:

No. 2: "You are instructed that the Vehicle Code of this State in effect at the time of this accident required the examination of all persons first applying for licenses to drive a motor vehicle, and an operator's license is in effect a certificate evidencing the fact that the holder of such license has demonstrated his competency to drive a motor vehicle, and if the driver of a vehicle is unlicensed, that fact, if it is a fact, is prima facie evidence in the eyes of the law, that such driver is incompetent."

No. 4: "I instruct you, Ladies and Gentlemen of the Jury, that in this state you are not entitled to compare the negligence, if any, of the parties to this action. If you find that both parties to this action were negligent, then I instruct you that it makes no difference if the negligence of the defendant was in your opinion greater or less than the negligence of the plaintiff, and if you find from the evidence that the plaintiff was guilty of negligence in any degree, no matter how slight, and that his negligence contributed directly or proximately to the accident, your verdict shall be against the plaintiff and in favor of the defendant, Cannon."

These were but two of the many instructions offered and given for both appellant and respondent, to which objections were made. Respondent in his brief admits that defendant's instruction No. 4 is correct as an abstract proposition of law and states the doctrine of comparative negligence, but alleges that there was no evidence of contributory negligence on the part of respondent guest. Such being the case, and the trial court having so decided, it was error to give this instruction, if by so doing, the jury was misled. Murphy v. Nat. Ice Cream Co., 114 Cal.App. 482, 300 P. 91; Wessling v. So. Pac. Co., 116 Cal.App. 455, 3 P.2d 25; Briggs v. Hall, 20 Cal.App. 372, 129 P. 288.

In Stoneburner v. Richfield Oil Company, 118 Cal.App. 449, 5 P.2d 436, it was held by this court that the trial court committed an error of law in giving an instruction requested by defendants dealing with the question of contributory negligence on the part of the plaintiff who was merely a guest in the automobile in which she was riding, where the question of plaintiff's contributory negligence was neither raised by the pleadings nor presented by the evidence.

[1] The test of error in giving a correct instruction of law is whether it is misleading. If instructions, correct as abstract propositions, may have misled the jury, a new trial may be granted on that ground. Hirshberg v. Strauss, 64 Cal. 272, 28 P. 235; In re Calkins, 112 Cal. 296, 44 P. 577.

[2, 3] There is no sufficient evidence in the record to establish appellant's defense of imputed negligence through joint enterprise or otherwise. The negligence of the driver of the automobile cannot be imputed to the guest herein in the absence of any evidence showing that the latter exercised some control over the driver or that he possessed the power to supervise or direct the manner in which the automobile should be operated. Marchetti v. So. Pac. Co., 204 Cal. 679, 269 P. 529. We find nothing in the evidence, either that admitted on behalf of the respondent or that introduced by the appellant, which would tend to show that respondent was guilty of contributory negligence. Nothing had happened during the trip, so far as the evidence shows, which indicated in any manner that Layton was not driving his machine in a proper and careful manner up to the time of the accident. There was no reason for respondent, therefore, to be apprehensive of his safety while riding with Layton, or to take any unusual precautions against their running into danger. There was no showing that Strandt knew that Layton was an unlicensed operator.

Appellant contends that his instruction No. 2 is a proper one and is supported by the decisions in Owens v. Carmichael's U-Drive Autos, Inc., 116 Cal.App. 348, 2 P.2d 580, and Moore v. Re, 131 Cal.App. 557, 22 P.2d 45. The holding in Owens v. Carmichael's U-Drive Autos, Inc., supra, that evidence of the fact that the driver did not possess a driver's license was admissible, was applied to a case in which liability was imposed upon an owner who negligently entrusted his automobile to another. Sec. 76, California Vehicle Act, St.1923, p. 536. The action was for damages for personal injuries sustained by the plaintiff when struck by an automobile belonging to the defendant, on the theory, as alleged in the complaint, that the defendant "negligently let and hired" the automobile to a named man; that defendant "negligently permitted" said man "to drive and operate said automobile upon the highway"; that defendant knew that said man "was not competent to operate" said automobile; and that said man "was not licensed to drive any automobile upon such highway". The court held that under the circumstances the fact that respondent corporation knew that the driver had no driver's license was sufficient to put it upon inquiry as to his competency and it was for the jury to determine under the circumstances whether respondent was negligent in permitting him to drive her car. At the time of this decision it was a violation of the law for an owner to entrust his car to an unlicensed person. Sec. 76, Calif.Vehicle Act. The respondent in that case argued that the fact that it violated section 76 of the California Vehicle Act was immaterial, and cited Perry v. Simeone, 197 Cal. 132, 239 P. 1056, and Arrelano v. Jorgensen, 52 Cal. App. 622, 199 P. 855. The court held the cited cases were decided prior to the amendment in 1927, St.1927, p. 1428, of section 63 of the California Vehicle Act and were not determinative, and that this section now requires the examination of all persons applying for licenses, and that an operator's license is no longer merely a means of identification but is in effect a certificate evidencing the fact that the holder has demonstrated his competency, and that the violation of the statute in failing to obtain a license is material. Citing Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063;

Andreen v. Escondido Citrus Union, 93 Cal. App. 182, 183, 269 P. 556. We do not believe this is sufficient authority for holding as a matter of law that evidence of the fact that the operator of an automobile is or is not licensed becomes material in all automobile damage actions, in determining the competency of the driver.

The case of Moore v. Re, supra, adopted the holding in the case of Owens v. Carmichael's U-Drive Autos, Inc., supra, and applied it to an action wherein the plaintiff Moore alleged that he was injured in a collision with a truck driven by one Michael Balcovich, defendant and appellant, who was accompanied by his employer, Sam Re, also a defendant and appellant. The court permitted respondent to show, by the testimony of the driver of the truck, that he did not possess an operator's license as required by the California Vehicle Act, with the limitation that it was admitted not as relating to the proximate cause of the injury but was proper to be considered by the jury on the general question of negligence and also as bearing on the ability and qualifications of the driver, and cited as its reasons that the Vehicle Act required that the appellant must be subjected to an examination by the Division of Motor Vehicles as to his qualifications for such a license, including a test of applicant's hearing and eye-sight, and his ability to understand highway warnings and direction signs, etc.

We are well aware of the divided authority in other jurisdictions bearing on this question. To some extent, the following cases support appellant's theory: Correira v. Liu, 28 Hawaii 145; McCarry v. Center Tp., 138 Kan. 624, 27 P.2d 265; Kenyon v. Hathaway, 274 Mass. 47, 174 N.E. 463, 73 A.L.R. 156; L'Esperance v. Sherburne, 85 N.H. 103, 155 A. 203. To the contrary we find the following: Lufty v. Lockhart, 37 Ariz. 488, 295 P. 975; DeVite v. Connecticut Co., 112 Conn. 670, 151 A. 320; Opple v. Ray, 208 Ind. 450, 195 N.E. 81; Schuster v. Gillispie, 217 Iowa 386, 251 N.W. 735; Ross v. Pennsylvania R. Co., 106 N.J.L. 536, 148 A. 741.

In Prichard v. Collins, 228 Ky. 635, 15 S.W.2d 497, the court held that evidence of the failure of the driver of a truck to be licensed was regarded as wholly immaterial, it having no bearing upon the negligence of plaintiff, who was riding on the truck. Also, in DeVite v. Connecticut Co., supra, the court said the operator's negligence was to be determined by the facts existing at the time of the accident, and that whether the operator had a license was a wholly immaterial consideration.

In Cruzen v. Wilcox, 20 Cal.App.2d 728, 67 P.2d 709, the court commented on the holding in Moore v. Re, supra, and said: "There appears to be no refusal of the court to receive evidence on the subject of defendant's possession of a license. The consideration we have given this * * * is not to be taken as indicating that we believe the presence or absence of a driver's license to be of any moment in the case, not even to the limited extent approved in Moore v. Re [supra]. The record before us does not require an expression of our opinion on the matter."

In the case of Page v. Mayors, 1923, 191 Cal. 263, 216 P. 31, our Supreme Court decided this question adversely to appellant's contention and contrary to the cases cited by appellant. This was an action in which the plaintiff sought to recover damages for a head-on collision occurring upon a public highway, between an automobile operated by defendant's agent and plaintiff's automobile. The defendant appealed from a judgment against him and claimed it to be erroneous for the reason that the evidence showed that the plaintiff did not have an operator's license at the time of the collision. In disposing of the question the court held: "With reference to the question of the operator's license, it is sufficient to say that it had nothing to do with the collision. We are not disposed to hold that the presence of the plaintiff upon the highway was unlawful, and that this was thus a proximate cause of his injuries or to deprive him of the right of recovery."

It is true that the legislature has enlarged upon the requirements necessary to obtain a license since the decision in this case. The Vehicle Code now requires that the operator be examined as to certain qualifications. However, it was then unlawful for any person to drive a motor vehicle upon the highway unless licensed. Stats. 1919, chap. 147, p. 223, sec. 24(a).

In some states the legislatures, by special enactments, have precluded a recovery by an unlicensed operator. Atwood v. Crowe & Co., 110 Conn. 288, 147 A. 871; Card v. Bissing, 114 Conn. 71, 157 A. 644; St.Mass.1921, C. 304, sec. 1. We find no expression in our statutes to this effect but on the contrary the legislature has been very liberal in its protection, in civil ac-

tions, of unlicensed operators where their licenses have been revoked or suspended. Sec. 754 of the Vehicle Code, St.1935, p. 243, provides: "No record of the suspension or revocation of an operator's or chauffeur's license or of a nonresident's driving privilege by the department, nor any testimony of or concerning or produced at the hearing terminating in such suspension or revocation, shall be admissible as evidence in any court in any civil action." Section 755, St.1935, p. 243: "No record of the conviction of any person for any violation of this code, nor any testimony of or concerning or produced at the trial terminating in such conviction, shall be admissible as evidence in any court in any civil action."

It would seem unjust to a competent operator, who has successfully passed the required examination and might well inadvertently allow his operator's license to expire, and who may have an automobile accident and suffer injury and as a result of which may rightfully have a cause of action for negligence against the other driver, to be confronted with an instruction that by reason of his lack of a license there is a prima facie case of his lack of qualification to operate an automobile or that he was incompetent. And it might well be that the defendant in such action may have had his license revoked for good and sufficient reasons. Plaintiff under the sections above referred to would be precluded from producing the record or testimony of his incompetency.

[4] The weight of authority, as we see it, is that the operator's negligence is to be determined by the facts existing at the time of the accident, and whether the operator had a license to operate an automobile under the laws of this state is immaterial unless there is some causal relationship between the injuries and the failure to have a license or the violation of the statute in failing to have one.

[5] A nonresident, over 21 years of age, having in his immediate possession a valid operator's license issued to him in his home state or county, may operate a motor vehicle in this state for one year without obtaining a license hereunder, and a nonresident whose home state or county does not require the licensing of operators may operate a foreign vehicle owned by him for 30 days under certain circumstances, without obtaining a license in this state. Sec. 252 Vehicle Code, St.1935, p. 128. Can it be said that the mere failure of the operator in an accident under these circumstances, to have a license under the laws of this state subjects him to a prima facie showing that such driver is incompetent? We think not. If the lack of an operator's license is a prima facie showing of incompetency and lack of qualifications of a driver, then the reverse rule should be true that the possession of a license under the laws of this state is prima facie evidence of the competency and qualifications of a driver. But we find in Carr v. Stern, 17 Cal.App. 397, 120 P. 35, that evidence showing the defendant's chauffeur was a capable, efficient and careful driver and bore a reputation as such was wholly immaterial, the question in issue in such cases being not as to the general character or reputation of the driver, but whether, on the occasion of the accident, he was negligent.

Considering the fact that the trial court gave defendant's instruction No. 2, which was clearly erroneous, together with instruction No. 4, which it found not to be applicable, we believe the trial court did not abuse its discretion in granting respondent's motion for a new trial on the grounds stated.

The order appealed from is affirmed.

MARKS, Justice.

I concur.

In concurring I wish to place emphasis on that phase of the case involving instruction numbered 2 in the foregoing opinion.

That instruction in effect told the jury that the fact that Kenneth Layton had no operator's license was prima facie evidence of his incompetency as a driver. That instruction should not have been given. The competency of Layton as a driver was entirely immaterial to the issues of the case. An incompetent driver may be careful and prudent at the time and place of an accident. A competent driver may be guilty of negligence that proximately caused an accident. Power v. Crown Stage Co., 82 Cal.App. 660, 256 P. 457. In this case the sole questions to be decided in the trial court were: Was Layton guilty of negligence that was the proximate or concurring cause of young Strandt's injury, and, was defendant guilty of negligence that was the proximate or concurring cause of these injuries? Contributory negligence of plaintiff was eliminated by the evidence. The answers to these questions should have been found in the evidence showing the conduct

of the parties at the time and place of the collision and not upon the evidence of the competency or incompetency of either driver.

The instruction was worse than meaningless unless it was intended to permit the jury to infer negligence and proximate cause on the part of Layton from the fact that he had no operator's license. If such an inference can be drawn, a plaintiff would only have to prove his damage and that a defendant driver was unlicensed to make out a prima facie case. If such inferences be permitted the converse should be true and the fact that a driver was licensed would be evidence of his competency, his lack of negligence and lack of proximate cause. Therefore, the possession of an operator's license by a defendant would be evidence that he was not negligent at the time and place of the accident. Under such a theory, evidence that a driver was licensed would support a judgment in his favor even though all the evidence of his conduct at the time of the accident showed him alone guilty of negligence that proximately caused it. I cannot subscribe to any such doctrine.

The instruction given requires the trier of fact to infer from the fact that Layton was unlicensed, (1) that he was incompetent; (2) that from such incompetency he was negligent at the time and place of the accident; (3) that such negligence was the proximate cause of the accident. There is no rule of law that permits such piling of inference on inference nor any rule drawn from experience that would justify it. The reasonable inferences to be drawn from the fact that a driver is unlicensed should be (1) that he has carelessly failed to apply for a license; (2) that he has carelessly permitted his license to expire from lapse of time without securing a new one; or (3) that his license has been suspended or revoked. Evidence supporting this latter inference is not admissible in a civil suit. Sec. 754, Vehicle Code. I cannot see how negligence and proximate cause can be predicated on any such inferences.

If it should be assumed that the lack of an operator's license justifies the inference of the lack of competency of a driver, still the instruction should not have been given. In this kind of a case the courts are not interested in the competency or incompetency of a driver but only in his actions at the time and place of the accident. The question of his competency or incompetency is wholly immaterial to the questions at issue, namely, negligence and proximate cause. This rule has long been established in California.

In the case of Towle v. Pacific Improvement Co., 98 Cal. 342, 33 P. 207, the plaintiff sought to recover damages for the death of his wife alleged to have been caused by the negligence of defendant's servant in causing or permitting a team of horses to run over her. The trial court permitted defendant to prove that its employee "was a good, first-class driver, careful in handling horses, and that during the four years he had been in the employ of defendant he had never been guilty of any mismanagement or carelessness in the conduct or care of the team." [page 208.] The judgment in favor of defendant was reversed because of the error in admitting this evidence. The Supreme Court held that the question of liability could only be decided on evidence of the driver's actions at the time and place of the accident and not on evidence of his character, competency or experience.

In the case of Cunningham v. Los Angeles Ry. Co., 115 Cal. 561, 47 P. 452, a father brought suit for damages caused by the death of his infant son who was injured by one of the defendant's cars. In considering the question now before this court, it was there said:

"The jury were instructed that, in determining whether the defendant was negligent in not stopping its car so as to avoid the injury, they had the right to take into consideration the fact that the motorman 'had only been at work about twelve days, according to his own testimony, and was a new hand on the road.' * * *

"It is objected that the instruction was erroneous, as submitting to the jury an element which could have no competent bearing upon the question whether defendant was guilty of the degree of negligence with which it was chargeable, under the circumstances of the case; and this objection must, we think, be sustained.

"Defendant was responsible to plaintiff for a want of ordinary care only, and whether it was in the exercise of such care was to be determined from a consideration of what actually occurred at the time of the alleged negligent act, regardless of any fact affecting the general character of the servant for skill or proficiency in the discharge of his duty. The question was, did the servant exercise ordinary care to avoid the injury? If he did, the plaintiff could

not recover, no matter how wanting the servant may have been in general competency; while, if he did not exercise such care, plaintiff was entitled to recover, even if the servant possessed the utmost degree of efficiency and skill in the performance of his duty. The sole question therefore was, what was the conduct of the servant at the time? and this to be unembarrassed by any consideration of his general qualifications."

The same question was before the Supreme Court in the case of Langford v. San Diego Elec. Ry. Co., 174 Cal. 729, 164 P. 398, where it was said [page 399]:

"Among other instructions, the court gave the following: 'You are further instructed that it is and was the duty of the defendant corporation to employ competent and careful persons to manage its street cars, and that it was and is the duty of the motorman in charge of the street cars of the defendant to exercise proper care, and keep a proper lookout, in order to avoid, if possible, all accidents and injury, and the defendant would be liable for any injury proximately caused by its failure in these respects.' The court refused to comply with the defendant's request to instruct the jury: 'Plaintiffs do not here complain that the motorman on defendant's westbound street car was incompetent or inexperienced, and the only question for you to consider with reference to him is whether on the occasion of the accident he acted with the care and prudence which a reasonably prudent man under the circumstances would have exercised.' The appellant assigns as error the giving of the one and the refusal to give the other instruction. These assignments are well taken. The question of the competency or incompetency of the motorman was not an issue, nor could it have been made an issue, in the case. The great weight of authority supports the rule that in actions of this kind the competency of the person claimed to have acted negligently, or his reputation for care, is not a subject of inquiry. * * * Under instruction 13, the jury was authorized to hold the defendant liable because it had employed an incompetent motorman, even though the evidence of the facts surrounding the accident may not have been sufficient, in and of itself, to show that the motorman had failed to exercise due care. The vice of the instruction is not remedied by the concluding words that 'defendant would be liable for any injury proximately caused by its failure in these respects.' The argument is that the mere employment of an incompetent motorman could not proximately cause the injury, if the motorman was not negligent on the particular occasion. But the answer to this suggestion is that the natural effect of testimony of incompetency is to lead the jury to infer that the person whose conduct is in question failed to act properly at the time and in the very matter under investigation. Wigmore on Evidence, § 65. The error is emphasized by the court's refusal to give the instruction requested by the appellant. The requested charge was designed to limit the jury, on the question of the defendant's negligence, to an examination of the conduct of the motorman at the very time in controversy. As we have seen, the defendant was entitled to have the inquiry so limited."

The cases of Spear v. United Railroads of San Francisco, 16 Cal.App. 637, 117 P. 956; Carr v. Stern, 17 Cal.App. 397, 120 P. 35; Power v. Crown Stage Co., supra, and Hanchett v. Wiseley, 107 Cal.App. 230, 290 P. 311, adhere to the same doctrine. The only vehicle case cited to the contrary is Moore v. Re, 131 Cal.App. 557, 22 P.2d 45. In view of the firmly settled rule announced in the foregoing cases, which are not considered in the Moore Case, I cannot agree with the conclusions there reached. The following cases lend support to this conclusion: Shimoda v. Bundy, 24 Cal.App. 675, 142 P. 109; Roos v. Loeser, 41 Cal.App. 782, 183 P. 204; Arrelano v. Jorgensen, 52 Cal.App. 622, 199 P. 855; Page v. Mayors, 191 Cal. 263, 216 P. 31.

The case of Owens v. Carmichael's U-Drive Autos, Inc., 116 Cal.App. 348, 2 P. 2d 580, contains nothing contrary to the conclusion reached by this court. The defendant in that case was engaged in the business of renting automobiles without drivers. It rented a car to Max Watson, an unlicensed driver, who negligently injured plaintiff. Defendant's agent knew that Watson had no operator's license. The District Court of Appeal held that this knowledge was sufficient to put defendant on its inquiry as to the competency of Watson and that instead of instructing a verdict for defendant the trial court should have left to the jury the determination of the question of whether or not defendant was negligent in permitting Watson to drive the automobile on the public highways without being accom-

panied by a licensed driver. This conclusion is logical but it is far from holding that the lack of an operator's license is evidence of that driver's incompetence, his negligence and that such negligence was the proximate cause of an accident.

In my opinion it was error to give the instruction here discussed. The trial court by granting the motion for new trial impliedly found that this error was prejudicial. In view of the facts of this case, that conclusion should not be disturbed here. Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774.

BARNARD, Presiding Judge.

I concur in the foregoing opinions.



29 Cal.App.2d 431

RIVERA et al. v. HASENJAEGER.

Civ. 11985.

District Court of Appeal, Second District, Division 2, California.

Nov. 29, 1938.

1. Appeal and error ⇐930(1)

On appeal from judgments for plaintiffs, it was duty of reviewing court to view the evidence in the light most favorable to plaintiffs and to determine whether there was any substantial evidence to take case to jury on question involved.

2. Automobiles ⇐245(75)

In action for death of motorist killed at night when defendant ran into rear of one of two parked automobiles between which motorist was fixing tire, question of contributory negligence of motorist because of alleged violation of statute prohibiting parking on traveled portion of highway when it is practicable to park elsewhere was for jury, where both parked automobiles were properly lighted and parked as far off paved highway as possible without driving into windrow of new highway material. St.1935, p. 190, § 582.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Actions by Teresa Rivera and Lupe Salas against A. C. Hasenjaeger for the death of plaintiffs' decedent in an automobile accident. From judgments for plaintiffs, defendant appeals.

Judgments affirmed.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for appellant.

Mott, Vallee & Grant, and Kenneth E. Grant, all of Los Angeles, for respondents.

CRAIL, Presiding Justice.

[1] These are appeals from two judgments, one in favor of Teresa Rivera and one in favor of Lupe Salas, for injuries arising out of an automobile collision. The contention of the defendant is that the plaintiffs' decedent was guilty of contributory negligence as a matter of law for the reason that he violated secton 582 of the California Vehicle Code, St.1935, p. 190, which reads as follows: "Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway." It is our duty to view the evidence in the light most favorable to the plaintiffs, and to see if there is any substantial evidence which would take the case to the jury on the question of contributory negligence.

At 3 o'clock a. m. the plaintiffs' decedent was driving in his car a party of friends along Firestone boulevard in a sedan. Following the sedan Lupe Salas was riding in a roadster which also belonged to the decedent. Firestone boulevard was a paved highway, the pavement being thirty feet in width and marked off into three travel lanes, each ten feet wide. The party was proceeding eastward. Extensive repair work was in progress on Firestone boulevard, the work consisting in building oiled shoulders on each side of the paved highway so as to widen the road. Shoulder material, in the nature of oiled gravel, was piled in long windrows along the sides of the highway. Flares were burning along the highway to warn traffic to keep off the shoulders, and wooden cross-arms were placed at intervals along the pile of shoulder material. Where the accident occurred the material was piled some two to two and one-half feet south of the pavement. The shoulder material had

been placed in a continuing pile along the south side of the pavement preparatory to being rolled to make the shoulder on the south side of the road flush with the pavement. This shoulder work was in progress from the scene of the accident clear into Buena Park and for a considerable distance back along the course which the party had followed. At the immediate scene of the accident the shoulder work had been completed on the north side of the road. The right rear tire of the sedan which the decedent was driving went flat. He immediately signaled to the roadster which was following, explained his predicament, and then drove his sedan as far off the southerly side of the paved highway as was possible without driving into the windrow. The driver of the roadster did the same thing, driving it to a position some distance in the rear of the Plymouth so as to permit its headlights to play upon the rear of the sedan while the decedent was proceeding with the necessary repairs. Both the sedan and the roadster were driven right up along the row of oiled shoulder, leaving only the left wheels upon the paved highway. Both cars were taken as far off the paved highway as the windrows would permit. The two cars were parked some three hundred feet east of Coyote creek bridge. From that bridge one has a clear and uninterrupted view of the highway practically into Buena Park. The defendant was driving in the same direction in a Pontiac car. As he came to the bridge he was traveling between forty-five and fifty miles an hour At this point he saw the cars ahead of him, but paid no particular attention to them. When he had crossed the bridge he observed the cars again and was of the opinion that one car was towing the other slowly along the road. He drove his Pontiac into the right rear of the parked roadster, which was propelled with terrific force forward against the rear of the parked sedan. The decedent was caught between the two cars and killed. The headlights and tail-lights on both Plymouth cars were burning at the time of the accident. With the cars parked as they were, at least twenty-seven and one-half feet of paved highway was left clear for passing traffic and the new shoulder beyond that.

The case of Hilbert v. Olney, 17 Cal. App.2d 135, 61 P.2d 941, was a case substantially on all fours with the instant case except that there was no windrow in that case. If anything, the instant case is factually more strong against the defendant. In that case, among other things, the court said [page 942], "Appellants contend that Hilbert was guilty of contributory negligence as a matter of law in parking his roadster partly on the main traveled road in the rear of the International truck, in violation of this statute, claiming that it was not impracticable for him to have placed the Chrysler altogether off the main traveled portion of the highway. Whether or not this was so would seem to have been a question of fact to be decided by the jury. * * * '* * * the principle that a violation of the statute is negligence per se being subject to the limitation that the act or omission must proximately cause or contribute to the injury (citing cases), and, when the evidence is conflicting or any reasonable man might differ as to the inferences which ought to be drawn from the evidence this question is one for the jury. (Smith v. Occidental, etc., Steamship Co., 99 Cal. 462, 34 P. 84).' * * * In fact this jury may have believed that instead of being a proximate cause of the accident, the placing of the Chrysler where it was should have been a means for preventing it. * * * '* * * In view of the excessive speed of the defendant and the other circumstances shown, the court might reasonably have concluded that the sole proximate cause of the collision was defendant's negligence, and, had plaintiff been traveling at the speed allowed by law the collision would nevertheless have occurred and that he would not have escaped injury. Under all the circumstances, the question was one for the trial court (citing cases), and we cannot say that its finding is unsupported.'"

[2] The evidence in the instant case shows the pains the decedent took to remove both cars from the paved highway as far as circumstances permitted and his care in keeping all lights on the cars burning. The contention of the defendant is that the decedent should have swung his cars across the highway to the north shoulder and parked them there, which would be on the wrong side of the highway, or that he should have driven the cars through the shoulder material so as to remove them completely from the pavement. In our view the question whether it was practicable to stop, park or so leave such vehicles off such part or portion of the highway, under all the facts and circumstances in evidence, was a question which was properly submitted to the jury. The decedent

was not guilty of contributory negligence as a matter of law.

Judgments affirmed.

We concur: WOOD, J.; McCOMB, J.



29 Cal.App.2d 559

REILLEY et al. v. McINTIRE.

Civ. 5978.

District Court of Appeal, Third District, California.

Dec. 7, 1938.

1. Trial ⇐62(2)

In automobile accident case, where defendant merely cross-examined plaintiffs' witnesses and introduced no evidence on his own behalf, court properly refused to permit plaintiffs to examine defendant's medical witness in rebuttal to prove that witness had examined plaintiff at defendant's request and conceded that plaintiff was seriously injured, since it did not constitute rebuttal evidence.

2. Appeal and error ⇐854(6)

On appeal from an order granting a new trial on ground of insufficiency of evidence to justify the verdict, the order may be upheld on any other proper ground enumerated in the notice of intention to move for a new trial, since an appellate court is not confined to the sole ground upon which the trial court announces that the motion is granted.

3. New trial ⇐75(1)

A new trial may be granted for the insufficiency of evidence to justify the verdict and judgment, in the sound discretion of the trial judge, when it appears that the amount of damages awarded is grossly inadequate to compensate the injured parties for the detriment received.

4. New trial ⇐70

The rule regarding the discretion of a trial judge to grant a new trial for insufficiency of evidence to justify the verdict is not affected by fact that defendant may have conceded his negligence in an automobile casualty, or that he had thereby admitted some liability because of the accident.

5. New trial ⇐75(1)

If it satisfactorily appears that evidence does not justify the verdict because verdict is clearly inadequate, verdict may be set aside regardless of whether it also appears to have been rendered through passion or prejudice. Code Civ.Proc. § 657, subds. 5, 6.

6. New trial ⇐75(4)

Where woman had tooth broken from jaw, sustained a bruise over one eye, suffered from severe pains in neck and head accompanied by constant headache, soft bones of nose were injured, and she felt constant pain and inability to breathe freely, was very nervous and was unable to perform usual household duties, and jury awarded a total of $750 damages for suffering, medical expense, etc., trial court did not abuse discretion in granting new trial on ground of inadequacy of verdict. Code Civ. Proc. § 657.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Joan Reilley and husband against H. L. McIntire to recover for injuries sustained by the wife in an automobile accident, and for resultant damages suffered by husband. Judgment for plaintiffs for $750, and, from a judgment granting plaintiffs a new trial on ground of insufficiency of the evidence to justify the verdict, defendant appeals.

Affirmed.

Honey & Mayall, of Stockton, for appellant.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from an order granting plaintiffs a new trial after a judgment for damages had been rendered in their favor in an automobile casualty case. The motion was granted on the ground that the amount for which the verdict was returned is inadequate to compensate the plaintiffs for the damages suffered. It is contended the trial court abused its discretion in granting the new trial.

The plaintiffs are husband and wife. As the result of a collision between the auto-

mobiles of plaintiffs and the defendant, Mrs. Reilley was seriously injured. The plaintiffs joined in this suit for damages. The complaint is couched in two counts. The first cause of action alleges that, as a result of the accident, Mrs. Reilley sustained damages on account of her injuries in the sum of $10,000. The second cause of action alleges that H. F. Reilley thereby suffered damages in the further sum of $300 for necessary medical and hospital care of his wife and for loss of her services in the performance of her household duties. The cause was tried with a jury. A verdict was returned in favor of the plaintiffs for $450 on the first count, and for $300 on the second count. Judgment was rendered accordingly. Plaintiffs moved for a new trial on various grounds specified in section 657 of the Code of Civil Procedure, including that of alleged insufficiency of the evidence to justify the verdict. The motion was granted "on the ground of insufficiency of the evidence to justify the verdict." From that judgment the defendant has appealed.

It is asserted the court abused its discretion in granting a new trial because the defendant practically conceded his liability on the ground of negligence on his part and that it does not appear the verdict is so grossly inadequate as to presume that it was rendered through passion or prejudice of the jurors.

[1] The respondents contend the court did not abuse its discretion in granting a new trial and that it erred in refusing to permit plaintiffs to call defendant's witness, Doctor Lynch, in rebuttal, to prove that he examined Mrs. Reilley at the defendant's request, and conceded that she was seriously injured. The court properly refused to permit the plaintiffs to examine the witness, since it does not constitute rebuttal evidence. There was no motion to reopen the case for further evidence in chief. The defendant introduced no evidence in his behalf except that he did cross-examine plaintiffs' witnesses. At the close of plaintiffs' evidence the defendant rested. The proffered evidence was properly excluded.

[2] On appeal from an order granting a new trial on the ground of insufficiency of the evidence to justify the verdict an order may be upheld on any other proper ground enumerated in the notice of intention to move for a new trial. An appellate court is not confined to the sole ground upon which the trial court announces that the motion is granted. Smith v. Royer, 181 Cal. 165, 183 P. 660; LaRue v. Barr, 208 Cal. 493, 282 P. 10; 2 Cal.Jur. 813, sec. 478. However, we are not directed to any valid ground for supporting the order in the present case, except that which was stated by the court upon the insufficiency of the evidence to justify the verdict because the amount of damages awarded is inadequate to compensate the plaintiffs for the detriment suffered.

[3] In the sound discretion of the trial judge, a new trial may be granted for the insufficiency of the evidence to justify the verdict and judgment, when it appears that the amount of damages awarded is grossly inadequate to compensate the injured parties for the detriment received. Franklin v. Bettencourt, 16 Cal.App.2d 511, 60 P.2d 1017; Taylor v. Northern Electric Ry. Co., 26 Cal.App. 765, 148 P. 543; 20 Cal.Jur. 104, sec. 67; 20 R.C.L. 283, sec. 67; 46 C.J. 207, sec. 152.

[4] The preceding rule with respect to the discretion of a trial judge to grant a new trial for the insufficiency of the evidence to justify the verdict is not affected by the fact that the defendant may have conceded his negligence in the automobile casualty or that he had thereby admitted some liability because of the accident. The trial court, nevertheless, has the authority to determine, on a motion for new trial, that the amount of damages awarded by the jury is grossly inadequate to fully compensate the plaintiffs for the injuries sustained.

[5] Nor is the discretion of the trial judge, on such a motion for new trial, confined to a case in which it appears from the record that the verdict is rendered through passion or prejudice of the jurors. Peri v. Culley, 119 Cal.App. 117, 6 P.2d 86. It is true that section 657, subdivision 5, of the Code of Civil Procedure does provide for the granting of a new trial for "excessive damages, appearing to have been given under the influence of passion or prejudice." But the following subdivision of that same section authorizes the granting of a new trial for "insufficiency of the evidence to justify the verdict or other decision." The last-mentioned subdivision does not mention the element of passion or prejudice. Of course, if it appeared that an inadequate verdict had been rendered through passion or prejudice, it may be set aside on a motion for new trial. But if it satisfactorily appears that the evidence does not justify

the verdict because it is clearly inadequate, it may be set aside regardless of whether it also appears to have been rendered through passion or prejudice.

There is nothing in the opinion which was rendered by this court in the case of Phillips v. Lyon, 109 Cal.App. 264, 292 P. 711, upon which the appellant in this case relies, in conflict with what we have previously said regarding the application of the principle of passion or prejudice. In that case a judgment was rendered for damages to an injured minor child in the sum of $3,000. The plaintiff contended that the verdict was inadequate to compensate for the injuries sustained. A motion for new trial on that ground was denied. In the present case it was granted. The plaintiff in the Phillips Case then appealed to this court, contending that the trial court erred in denying the motion for a new trial. This court refused to interfere with the discretion of the trial judge in that case.

In upholding the discretion of the trial judge in the Phillips Case this court said [page 712]: "While a court may not set aside a verdict and grant a new trial merely because the judge does not agree with the amount of the award of damages, where it is so grossly inadequate or excessive as to leave no reasonable doubt that the verdict is the result of passion or prejudice or that it is contrary to the evidence and constitutes a clear abuse of the discretion of the jury, a new trial should be granted for the reason that the award of damages is not justified by the evidence and does not reasonably compensate for the injuries sustained."

The preceding paragraph merely states a hypothetical situation in which it is assumed the trial court would be warranted in granting a new trial for insufficiency of the evidence to justify the verdict, or because it is excessive. We do not state that an inadequate verdict may be set aside only when it appears to have been rendered through passion or prejudice. In supporting the discretion of the trial judge in that case in denying plaintiff's motion for a new trial on the ground of "insufficiency of the evidence to justify the verdict" this court merely said: "Under the facts of this case we are unable to say as a matter of law that the judgment is inadequate or that the award is so grossly insufficient as to lack support of the evidence and require a reversal on that account."

[6] In support of the sound discretion of the trial court in the present case, we are impelled to uphold the order granting a new trial for the same reason assigned in the Phillips Case. In this case, we are unable to say as a matter of law that the total judgment of $750 which was awarded by the jury to the plaintiffs is not so grossly inadequate that it fails to compensate them for the injuries and damages incurred, and that the court was, therefore, not warranted in setting it aside. We may, therefore, not interfere with the discretion of the trial judge in granting a new trial for the insufficiency of the evidence to justify the verdict. There is ample evidence to justify the court in granting a new trial on account of the inadequacy of the verdict to compensate for the injuries which Mrs. Reilley received as a result of the accident.

Doctor Dewey R. Powell testified that some seven months prior to the trial of this case he treated the patient for her injuries during a period of three weeks. As a result of the collision Mrs. Reilley was rendered unconscious. She had one tooth broken from her jaw. She sustained a bruise over one eye, which left a slight bump even to the time of the trial. The doctor said that she was suffering from severe pains in the neck and head, accompanied by constant headache. The soft bones of her nose were injured; the membrane in her nose was irritated and swollen; she felt constant pressure, pain and inability to breathe freely. A large part of the air space of the nose was shut off. She was very nervous. The doctor feared an infection of the sinus. She suffered great inconvenience and constant pain. She was unable to perform her usual household duties. After repeated treatments, her condition remained practically unchanged. At the time of the trial, seven months after the doctor was first called to render professional services for her, the patient remained in about the same condition. Under such circumstances we may not say the trial court abused its discretion in granting a new trial.

The order granting a new trial is affirmed.

We concur: PULLEN, P. J.; STEEL, Justice pro tem.

29 Cal.App.2d 460

GORE et al. v. BINGAMAN et al.

Civ. 10700.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1938.

Rehearing Denied Dec. 30, 1938.

Hearing Denied by Supreme Court Jan. 26, 1939.

1. Wills ⇐509

Where will devised trust income to testator's niece and others, and provided that, "in event of either of beneficiaries' death, his next of kin shall take his share," and testator knew that girl living with niece was not niece's natural or adopted child, though girl was treated and considered as niece's child and testator referred to her elsewhere in his will as "niece," the words "next of kin" meant "heir" or "blood relative" and did not include such girl.

[Ed. Note.—For other definitions of "Next of Kin," see Words & Phrases.]

2. Wills ⇐488

Where meaning of will on its face, taking the words in the ordinary sense, is entirely clear and no latent ambiguity is shown by extrinsic evidence, there can be no evidence of extrinsic circumstances to show intention or desire not expressed in the will.

3. Executors and administrators ⇐315(5)

In suit for construction of decree of distribution under will, as respects conflicting claims to trust income of a deceased beneficiary's putative child and of such beneficiary's collateral blood relatives, the fact that beneficiary's husband had assigned all his right, title and interest to such income to the putative child was immaterial.

4. Executors and administrators ⇐315(6)

A decree of distribution under will was binding upon husband of beneficiary who died after entry of the decree, and was res judicata until set aside.

5. Evidence ⇐384

The parol evidence rule is a rule not only of evidence, but of substantive law.

6. Appeal and error ⇐837(11)

Where parol evidence is admitted upon trial, even without objection, it may be urged on appeal that such evidence should be disregarded.

7. Executors and administrators ⇐315(5)

In action for construction of decree of distribution under will, as respects provision in will for payment of trust income to beneficiary's "next of kin" in the event of beneficiary's death, and provision in the decree for payment of such income to "children," "issue" or "blood relations," wherein it was admitted that testator knew that a beneficiary's putative child was not beneficiary's actual or adopted child, parol evidence that testator executed will in mistaken reliance on attorney's advice that such child would inherit as beneficiary's "next of kin," though testator had concealed the child's true status from the attorney, was inadmissible in absence of ambiguity in the will or fraud, extrinsic or collateral, in obtaining the decree.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Eva Gore and others against Joseph W. Bingaman, as trustee under the will of Edward Adolphus Bushell, also called Edward A. Bushell, also called E. A. Bushell, deceased, and others, for construction of the decree of distribution of the estate of Edward A. Bushell, deceased. From a judgment for defendants, plaintiffs appeal.

Reversed, with directions.

Weinmann, Quayle & Berry, of Oakland, and George Olshausen, of San Francisco, for appellants.

Clark & Heafey and Fitzgerald, Abbott & Beardsley, all of Oakland, for respondents.

CONLAN, Justice pro tem.

This is an appeal from the judgment, in favor of respondents for declaratory relief in an action with respect to the construction of the decree of distribution of the estate of Edward A. Bushell, deceased, made and entered on June 18, 1937, by the superior court of the county of Alameda, state of California, in which said judgment it was declared: 1. That the plaintiffs and each of them take nothing from this action; 2. That the defendant Maude Dobinson Emsley is the owner of the undivided one-sixth (1/6) interest in and to the net income and profit of the residuary trust estate created by the will and by the decree of distribution of the estate of Edward Adolphus Bushell, deceased, accrued and accruing from September 15, 1934, and continuing to the termination of said trust therein mentioned.

On January 24, 1924, Edward Adolphus Bushell, a resident of Oakland, executed a

holographic will which, in part, provided as follows:

"Third: I give and bequeath to the following relatives and friends:

Mrs. Florence N. Stepson King (Niece), Fifteen Thousand Dol.	$15,000.00
Mrs. Lucy Shaw (Niece), of Wagga, N. S. W. Fifteen Thousand Dol.	15,000.00
Mrs. Muriel Hunter (Niece), Hanley, N. S. W. Five Thousand Dol.	5,000.00
Miss Blanch Hunter (Grandniece), N. S. W. Two Thousand Dol.	2,000.00
Mrs. Louisa Grace (Niece), Sidney, N. S. W. Fifteen Thousand Dol.	15,000.00
Queensland, Australia	
Mrs. Edith Phillips (Niece), Brisbane, Fifteen Thousand Dol.	$15,000.00
Mrs. Flossy Phillips (Niece), Toomba, Ten Thousand Dol.	10,000.00
Mrs. Teppie Holland (Niece), Walston, Fifteen Thousand.	
Miss Edie Martin (Grandniece), Goodna, Two Thousand Dol.	2,000.00
Mrs. Agnes Martin (Niece), East Ipswich, Fifteen Thousand Dol.	15,000.00
Mrs. Edie Wells (Niece), Nambour, Ten Thousand Dol.	10,000.00
Oakland, California	
Arthur A. Bushell (Brother), Oakland	$ 5,000.00
William C. Deans (Nephew), Fifteen Thousand Dol.	15,000.00
Norman B. Deans (Nephew), Five Thousand Dol.	5,000.00
Minnie Dobinson (Niece), Five Thousand Dol.	5,000.00
Maude A. Dobinson (Niece), Five Thousand Dol.	5,000.00

With right of representation in case of any of said legatees before my death."

"Fifth: And I further desire that Five Hundred Dollars ($500) per annum be paid to Mills College to assist in the upkeep and maintenance of the 'Annie E. Bushell Landscape Plan' and beautification of grounds and entrance, to be paid out of trust fund, for 20 years, I direct that a Life Annuity of Fifty Dollars per month be purchased for my Brother Arthur, my household effects and jewelry give to Mildred A. Woodward. After all bequests are fully paid and satisfied the remainder of my estate, be it real estate, leases, bonds, notes, deeds of trust, money or otherwise, shall be converted into a Trust Fund to exist for a period of Twenty-Four years, unless all the beneficiaries die sooner. Income and proceeds of said property to go to my Oakland Relatives and Friends, as follows: William C. Deans, Norman Deans, Minnie Dobinson, Maude A. Dobinson, Joseph W. Bingaman and Mildred A. Woodward (my faithful secretary), in equal shares, in event of either of beneficiaries death, *his next of kin shall take his share, when the trust terminates the remainder shall go to my next of kin then living.*" (Italics ours.)

On July 3, 1924, said decedent executed a codicil to the said will in which he revoked the bequests to his heirs at law of what may be left of the principal of his estate after the expiration of the trust period, and he devised the same unto the West Oakland Home, a corporation, for the exclusive purpose of erecting and maintaining a home for homeless children to be known as The Annie E. and E. A. Bushell Home for Homeless Children, to be erected in Oakland.

The decree of distribution which was signed and filed on the 17th day of December, 1925, in the superior court of Alameda county provided, in part, as follows: "Second: Said trustees and their said successors, if any, shall receive the income, rents and profits therefrom and shall pay all of the net income and profits of said property so held in said trust fund including accrued income therefrom from and after November 9th, 1925, and the income and profits thereof to the termination of said trust in equal shares to William C. Deans, Norman Deans, Minnie Dobinson, Maude A. Dobinson, Joseph W. Bingaman and Mildred A. Woodward, for the period of twenty-four (24) years after the date of this decree, unless all beneficiaries die sooner, in which event said trust shall cease and terminate at the date of the death of the last beneficiary thereof, and in case of the death of any of said persons, William C. Deans, Norman Deans, Minnie Dobinson, Maude A. Dobinson, Joseph W. Bingaman, or Mildred A. Woodward before the termination of said trust the amounts that would have been payable to each such decedent so dying from and out of said trust estate if he had not died, *shall be paid to the children*

and issue of the blood of such decedent or decedents living at the time of the death of such decedent or decedents by right of representation, and in case such decedent or decedents leave no descendants him surviving, then to the nearest blood relations of each such decedent living at the date of death of each such decedent by right of representation in the place and stead of each respective original beneficiary so dying, and in such proportions as said children, issue, descendants or blood relations, as the case may be, of said original beneficiary so dying, would inherit the estate of the said decedent so dying, under the laws of the State of California, if they were his sole heirs at law, and he died intestate. Capital improvements and services and expenses for the care of the capital of said trust fund other than State, County and municipal taxes shall not be construed to be expenses in determining net income. Said amounts of the net income and profits of said trust fund so payable and distributable to such successors of the original beneficiaries as representative of and in lieu of said original beneficiaries shall continue to be so paid and distributed by the said trustees and their successors to such respective successors of the original beneficiaries until the final termination of said trust, and that upon the final termination of said trust whether the same be by lapse of said period of twenty-four (24) years or the sooner termination thereof, that then and in that event all the residue and remainder of the said trust property existing at the date of termination of said trust shall be by this court distributed to such corporations or persons as this court may upon the hearing of petition for final distribution determine." (Italics ours.)

Among the findings of fact in the instant case is paragraph seven (7), which reads as follows: "Said Minnie Dobinson left no child or children surviving her, which child or children had been born of said Minnie Dobinson; said Minnie Dobinson left no issue of the blood or descendents surviving her; in this connection, however, it is a fact that the word 'children' as used in said provision of said decree of distribution wherein it was decreed that upon the death of Minnie Dobinson the amounts that would have been payable to Minnie Dobinson out of said trust estate if she had not died shall be paid to the 'children' of Minnie Dobinson living at the time of her death, was not used in the decree of distribution in the sense or meaning that it should include no person other than a child or children born to Minnie Dobinson, but that said word 'children' was used therein so as to include, and was intended to refer to and include, and did refer to and include, said Defendant Maude Dobinson Emsley; said word 'children' was used therein for the purpose of providing and decreeing that upon the death of Minnie Dobinson said amounts that would have been payable to Minnie Dobinson out of said trust estate if she had not died, and the whole of said amounts, shall be paid to said defendant Maude Dobinson Emsley whose status as a child of Minnie Dobinson is fixed and established by said will and by said decree of distribution."

Of the six named beneficiaries William Deans and Norman Deans were the testator's nephews; Minnie Dobinson was his niece by marriage, that is, she was his wife's niece by blood, and Maude Dobinson (Maude Dobinson Emsley) was a child whom Minnie Dobinson and her husband took into their home and reared as their child but never adopted.

Minnie Dobinson, one of the beneficiaries under the trust created by E. A. Bushell, died in 1934, nine years after the Bushell estate was distributed and by the terms of the trust had some fifteen (15) years to continue. The claimants to the share of the income of the trust fund, which would be payable to Minnie Dobinson if she were living, are the appellants who are her collateral heirs and who reside in England. The respondent is said Maude Dobinson Emsley.

Minnie Dobinson was the wife of Alfred Dobinson, and at the time of respondent's birth the Dobinsons resided in England. They never had any children of their own and when the respondent was only six (6) days old they took her into their home; she was given the name of Maude A. Dobinson and was baptized as their own child. The respondent Maude Dobinson Emsley lived in the home of Alfred and Minnie Dobinson for the next thirty (30) years, and until Minnie Dobinson's death. She was known and treated as their own child, being kept in ignorance of the fact that she was not their own child. This fact was known to not more than a score of persons, most of whom resided in England.

In 1911 the Dobinsons moved from England to Oakland, where Edward A. Bushell, whose wife was Minnie Dobinson's aunt,

had been residing for many years. They brought with them the respondent, then a child of seven years. For a short time after their arrival in Oakland, they lived with the Bushells in the Bushell home. For the next twenty-three years, until Minnie Dobinson's death, the respondent lived in Oakland with Alfred and Minnie Dobinson as their child. And for the next fourteen years, until Edward A. Bushell's death, Alfred, Minnie and Maude Dobinson, the respondent, lived in intimate relationship with Mr. Bushell, and until her death, with Mrs. Bushell. Mr. Bushell knew that the respondent was not the child of Alfred and Minnie Dobinson, but he carefully guarded the secret. He always referred to Mrs. Bushell as the respondent's aunt, and to himself, as the respondent's uncle, and to Minnie Dobinson, as the respondent's mother, and to the respondent as Minnie Dobinson's child. And he caused the respondent to regard and to refer to his wife and himself as her aunt and uncle.

The Bushell will (a holographic will) in which he referred to the respondent as his "relative" and his "niece", created a trust fund, of which Minnie Dobinson and the respondent were two of the six beneficiaries. He provided that if any of the beneficiaries died, his "next of kin" should take such beneficiary's share. And, in the decree of distribution, it was provided that if any beneficiary died his "children and issue of the blood" should take, and, in the absence of any children or issue of the blood, his "nearest blood relations" should take.

The respondent claims the share of the trust income that would be paid to Minnie Dobinson if she were living, and the trial court awarded such share of the trust income to the respondent, upon the theory that the testator intended her to receive that share; that the testator intended her at all times to be known and treated as the child of Minnie Dobinson; that although he knew that she was not in fact the child of Minnie Dobinson he intended that fact to remain a secret; that he gave her the status of such child in his will, and gave to her, as such child of Minnie Dobinson, the share of the income of the trust that would be payable to Minnie Dobinson as long as she should live.

Respondent further contends that the testator did not intend that the English claimants, or any of them, should take this share of the trust income, and that he did intend that the respondent, whose status as the child of Minnie Dobinson he expressly recognized and confirmed in his will, should take this share; that this is a fact established by clear, convincing, uncontradicted evidence which no one can successfully dispute.

The appellants contend that, even if the intention of the testator was as claimed by the respondent, and even if the true facts had been known at the time of distribution, and had been then presented to the probate court, the probate court could not have given effect to the intention of testator, and that, even if it were conceded that the probate court could have given effect to the intention of the testator, a court of equity is powerless, several years after the rendition of the decree of final distribution, to give effect to that intention.

Questions involved on this appeal:

"Where plaintiffs are the nearest blood relatives of a deceased legatee, and defendant is a stranger to the blood, taken into the legatee's household, treated as a child but never adopted, and

"(1) Where the decree of distribution provides that the legatee's share (as well as similar shares of various legatees, shall be paid to the children and issue of the blood of such decedent by right of representation * * *

"(a) Can the defendant introduce evidence of her relations with decedent as 'explanation' of the terms of the decree?

"(b) Could such evidence have any legal significance, if admitted?

"(c) Can defendant introduce such evidence together with evidence that she did not know her true status, to 'reform' the decree for mistake *nine years after its rendition,* if defendant either appeared or did not appear at the distribution proceedings?

and "(2) Where the will describes a list of legatees as 'relatives *and friends*' (although also describing each with some form of relationship) defendant, not being a blood relative; further describes certain pairs of legatees, respectively as 'niece' and 'grandniece' but describes defendant and her putative mother both as 'niece'; then leaves the share of the deceased legatee to her 'next of kin';

"(a) Is defendant designated at all either as a relative, or as a daughter of the deceased legatee?

"(b) If so designated, would this designation (contrary to fact) enlarge the ordinary meaning of 'next of kin'?

"(c) Can defendant introduce the above (or any) extrinsic evidence to bring herself within the term 'next of kin'?"

At the trial of the instant case, over the objection of the appellants, Mr. Joseph W. Bingaman, who was the testator's attorney, testified that when the testator was preparing his holographic will he showed Mr. Bingaman a pencil draft in which he had provided (as he had in the final draft) that, if any of the beneficiaries of the trust died, "his next of kin to take his share". Mr. Bingaman further testified that the testator then asked him who (under such a will) would take the Maude A. Dobinson share if Maude A. Dobinson died, and who would take the Minnie Dobinson share if Minnie Dobinson died. Mr. Bingaman told him (the testator) that if Maude A. Dobinson died, Minnie and Alfred Dobinson would each take one half (½) of her share; and that if Minnie Dobinson died, Maude A. Dobinson (the respondent) would take the Minnie Dobinson share.

The respondent contends that the appellants did not directly challenge or directly refer to these findings of the trial court, and they argue that the facts are contrary to the facts found by the trial court.

Respondent further contends that the trial court's findings, as to the intention of the testator as expressed in the will, are binding on the appellate court, even though another interpretation was equally tenable. Citing Kautz v. Zurich General A. & L. Ins. Co., 212 Cal. 576, 300 P. 34, and In re Estate of Boyd, 24 Cal.App.2d 287, 74 P.2d 1049.

Respondent further contends this rule is particularly applicable where, as here, the determination of the testator's intention depended not alone on the written instrument, but also on extrinsic evidence, and inferences to be drawn from all of the evidence.

Respondent further contends that since the respondent was not a "relative" of the testator except in the sense that she was the child of his wife's "niece", Minnie Dobinson, and since the respondent was not a "niece" of the testator except in the sense that she was the child of his "niece", Minnie Dobinson, it appears to be obvious that it was in that sense that the testator referred to the respondent in his will.

[1] We believe that this last contention is not correct. The will states "next of kin". Those words, while they may be ambiguous as to the meaning of "next of kin", being an "heir" or "blood relative", cannot be construed to include a stranger of the blood such as a person who was only known as a "child" and never adopted.

It is stated in Matter of Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193, 199: "The last clause of section 105 of the Probate Code, which is a reenactment of section 1318 of the Civil Code, provides that when an uncertainty arises on the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, but excluding the oral declarations of the testator as to his intention; and the testimony in question was introduced by appellants in furtherance of their theory that an uncertainty had arisen upon the face of the will by reason of the use of the technical term 'any annuity or annuities.' But as held by the probate court, and properly so in our opinion, no such uncertainty existed. Moreover, the testimony was doubtless incompetent for the reason that said conversations necessarily involved the declarations of the testatrix as to her intentions. And in any event, the law is well established that, in construing a will, the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will, the issue before the court being, always, not what the testator meant to do or what he intended to declare in his will or what words he meant to use therein, but what he meant by what he did declare therein and by the words he actually used in his will (In re Estate of Major, 89 Cal.App. 238, 264 P. 542; In re Estate of Ogden, 78 Cal.App. 412, 248 P. 680); and where, as here, the language of the will is clear and unambiguous, courts have no power to speculate as to the testator's intention. In re Estate of Hartman, [21 Cal.App.2d 266], 68 P.2d 744. It follows, therefore, that even though the testimony as to said conversation be deemed competent, its exclusion was not prejudicial because the statements so made by the testatrix to said attorney, whatever they may have been, cannot be allowed to alter the unambiguous terms of the will."

[2] In Matter of Estate of Willson, 171 Cal. 449, 153 P. 927, the rule is stated as follows [page 930]: "The rule is well established that where the meaning of the will, on its face, taking the words in the ordinary sense, is entirely clear, and where no latent ambiguity is made to appear by extrinsic evidence, there can be no evidence of extrinsic circumstances to show that the testatrix intended or desired to do something not expressed in the will. Where, in such cases, taking the words of the will alone, the intent is clear, that intent must be followed, and proof that the testatrix desired some other results or that the circumstances were such that such desire might be inferred, is inadmissible. 2 Underhill on Wills, § 548. The following decisions of this court affirm the rule above stated: Estate of Young, 123 Cal. [337], 342, 55 P. 1011; Estate of Tompkins, 132 Cal. [173], 176, 64 P. 268; Estate of Fair, 132 Cal. [523], 532, 60 P. 442, 64 P. 1000, 84 Am.St.Rep. 70; In re Walkerly's Estate, 108 Cal. [627], 659, 41 P. 772, 49 Am.St.Rep. 97; In re Schedel's Estate, 73 Cal. [594], 597, 15 P. 297; Rhoton v. Blevin, 99 Cal. [645] 648, 34 P. 513. See, also, 2 Words and Phrases, [First Series] p. 1128, where many additional cases are cited."

There is nothing in the language of the Bushell will which renders it ambiguous. The learned judge who signed the decree of distribution could not, from the language of the will, decree that "next of kin" meant that an unadopted person, a grandniece of the testator's wife, who was taken into the home of the niece of the testator's wife (not being the child of the niece of the testator's wife and which fact was known to the testator), was the "next of kin" of the niece of the testator's wife even though in the will this unadopted person (a stranger in blood to the testator, the testator's wife and the testator's wife's niece) was referred to as "Maude A. Dobinson, Niece" under a heading entitled "Relatives and Friends". There was no reference in paragraph "Fifth" of the will back to "Maude A. Dobinson, Niece" (mentioned in paragraph "Third" of the will) was to inherit as a "next of kin" of any of the beneficiaries.

If the learned trial judge in the decree of distribution construed "next of kin" (as mentioned in the will) to be "the children and issue of the blood of such decedent or decedents by right of representation", that construction, even if not in accord with the decision of the Supreme Court in the case of Dickey v. Walrond, 200 Cal. 335, 253 P. 706, would not affect the situation as to Maude Dobinson Emsley.

[3, 4] The fact that Alfred Dobinson assigned all his right, title and interest to the respondent (his deceased wife's niece, Maude A. Dobinson Emsley) is immaterial. The decree of distribution is binding on Alfred Dobinson and is res adjudicata until the same is set aside.

Respondent's contention here is that the decree of distribution should be construed with reference to the will; that the decree should be reformed to accord with the terms of the will and the extrinsic evidence offered on the trial; and that the evidence (including the extrinsic evidence) is sufficient to support the finding of the trial court hereinabove referred to.

If respondent's contention that the oral testimony introduced upon the trial as to the decedent's intention is correct, the decedent intended that Alfred Dobinson should take no part of the trust income in the event of Minnie Dobinson's death before the trust terminated.

However, the case was tried on the theory that Maude Dobinson Emsley was intended to take as a "child" and there was no issue presented to the trial court that Alfred Dobinson (under the will) took Minnie Dobinson's share or a part thereof as "next of kin".

There was no issue presented to the trial court that the decree of distribution should be reformed to conform to the will and that "next of kin" included Alfred Dobinson under the will the same as if the wording in the will stated "heirs" instead of "next of kin".

The case of In re Estate of Cowden, 10 Cal.App.2d 481, 51 P.2d 1165, is cited by respondent as authority for the rule that technical rules of construction "may be applied to support but not to defeat such intention" [page 1166]. An examination of this case shows that the testatrix left a will providing in part: "To my brother E. C. French the sum of two hundred dollars & my clothing & personal property. To my stepchildren by my husband Forbes C. Cowden I bequeath the rest of my estate both real & personal & wherever situated share and share alike." There were some bonds valued at about $1,500. The brother contended the will gave him all the personal property The court held the brother

should be limited to the "personal effects of the deceased" on authority of In re Estate of Norrish, 135 Cal.App. 166, 26 P.2d 530 and In re Estate of Combs, 136 Cal.App. 286, 28 P.2d 711, and that decedent having also mentioned "to my stepchildren * * I bequeath the rest of my estate both real & personal", the second bequest was in just as clear terms as the first one. There was no extrinsic evidence in this case. The trial court decided the matter upon the conflicting bequests of "personal property", giving effect to all the provisions of the will.

In the case of In re Estate of Kessing, 123 Cal.App. 119, 10 P.2d 1015, cited by respondent, the deceased made "special bequests to her sister, to three named cousins, to three brothers of her deceased husband, to her 'nephew' Ivan Kessing, who was in fact a nephew of her deceased husband" and others. The fifth clause stated "whatever of my estate is left is to be divided among these my cousins and other relations mentioned above". The sixth clause provided that the remainder of the estate should go to "my sister and my cousins and my nephew Ivan Kessing of Berkeley, California, share and share alike". The three brothers of the deceased husband contended they were included in the other relations mentioned in the fifth clause. The court held they were not, as they were not relations "mentioned above"; that the fifth and sixth clauses covered the same persons, and that these three brothers of the deceased husband could not recover. It will be noted that in the sixth clause the will stated "my nephew, Ivan Kessing" (naming him and his residence), although he was a nephew of her deceased husband.

In the instant case the will did not mention "Maude A. Dobinson" along with the "next of kin" of any of the beneficiaries. In other words, to bring the instant case within the rule laid down in Re Estate of Kessing, supra, and like cases, the will should have mentioned Maude A. Dobinson, so as to include her as having equal rights with "next of kin", she being a stranger to the blood of Minnie Dobinson and not an adopted child.

The case of In re Estate of Peabody, 154 Cal. 173, 97 P. 184, cited by respondent, states [page 185]: "Certain rules of interpretation applying particularly to wills and established by the authorities and by the Civil Code have an important bearing on the construction of this will. The important thing is the intention of the testator. Section 1317. This is to be ascertained from the words of the will, taking into view the circumstances under which it was made. Section 1318. All parts of the will are to be considered in relation to each other so as to form, if possible, a consistent whole. Section 1321. Words are to be taken in their ordinary grammatical sense, unless a clear intent to use them otherwise is apparent, and that sense can be ascertained. Section 1324. Technical words are not to be taken in their technical sense if it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense. Section 1327. 'A technical construction of words and phrases, although prima facie the one which should prevail, will not go to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas.' 1 Redp. on Wills, p. 435, § 22. See, also, Estate of Bennett, 134 Cal. [320] 322, 66 P. 370; Richardson v. Noyes, 2 Mass. [56] 60, 3 Am.Dec. 24; Homer v. Shelton, 43 Mass. [2 Metc. 194] 198; Brimmer v. Sohier, 55 Mass. [1 Cush. 118] 129; Carr v. Green, 2 McCord [S.C.] 75, 84; DeKay v. Irving, 5 Denio [N.Y.] 646."

In the Peabody Case the will was written entirely by the testator in her own hand. The court held that the word "transfer" should not be held to come within the rule in the Fair Case because the will construed in the Fair Case was drawn with great care, in language of definite technical significance, by some person skilled in law and in the use of legal technical terms, and the intention to vest the title to the real property in trustees, to be afterwards conveyed by them to the remaindermen, was so clearly and accurately expressed that no other interpretation was possible. The court in that case states (132 Cal. 523, 530, 60 P. 442, 455, 64 P. 1000, 84 Am.St.Rep. 70): "It is perfectly clear, beyond even a reasonable doubt, that the testator did not intend to devise estates in remainder to persons of the named classes, but intended to devise the whole fee to his trustees upon trusts to convey, after the expiration of a probably very long period of time, to those persons, so that the latter would receive new estates created by the conveyances."

This case is not helpful in the instant case. The intention of the testator Bushell was expressed in unambiguous terms in the will and the decree of distribution follows

the terms of the will. As expressed in the will "in the event of either of beneficiaries death, his next of kin shall take his share, when the trust terminates the remainder shall go to my next of kin then living". In the decree of distribution it provided that if any beneficiary died, the income from the trust "shall be paid to the children and issue of the blood of such decedent or decedents living", etc. The codicil, dated July 3, 1924, revoked the bequest to his next of kin then living (his heirs), and bequeathed the same to the West Oakland Home for the erection and maintenance of a home for homeless children, to be known as the Annie E. and E. A. Bushell Home for Homeless Children. The testator Bushell had legal advice when he consulted attorney Joseph W. Bingaman, and he (the testator), did not tell his attorney Joseph W. Bingaman (a personal friend of the Bushell family who believed that Maude A. Dobinson was a daughter of Minnie Dobinson and Alfred Dobinson) that she (Maude A. Dobinson) was not such a natural daughter or even an adopted child of Minnie and Alfred Dobinson.

In the case of Bacon v. Bacon, 150 Cal. 477, 89 P. 317, cited by respondent, the will of the deceased, Henry D. Bacon, contained the following provision [page 318]: "If my said estate is worth as much as two hundred and fifty thousand dollars, at my death after payment of liabilities as aforesaid I desire that my legal representatives shall pay to the wife of my said son Frank the sum of ten thousand dollars and to the husband or husbands of my said daughters Ella Etta and Carrie Jennie each the sum of ten thousand dollars." The will was admitted to probate on March 13, 1893. Shortly after the testator's death, and before the will was probated, the children and the other parties interested, except the plaintiff, met for the purpose of reading the will. In reading it, by mistake the word "ten" was read as "two" where it occurs in the above-quoted clause. This mistake was carried into all the subsequent proceedings, was not perceived by any of the interested parties or any person concerned in the administration, the respective legacies were paid as legacies of two thousand dollars each, and that sum was accepted and receipted for as payment in full by the plaintiff, all parties then believing that the legacies were each for two thousand dollars only, and a petition for distribution was thereafter filed, notice thereof duly given, and a decree of final distribution of the estate made on December 18, 1896, reciting the said legacy as a legacy for two thousand dollars. In a well-considered opinion the court states in part:

"It is urged that the power to review judgments extends only to cases where they have been procured by fraud, and that it does not exist with respect to judgment wrongfully given by reason of mistake either of the court or of the injured party. No such distinction is recognized by the authorities. The text-books all declare that such relief can be given where the former judgment was the result of a mistake, unmixed with fraud, and not the result of the negligence of the injured party.

* * * * * *

"'It may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of equity. On the other hand, it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law.'

"We are satisfied that the court below had power to entertain the suit and give the relief awarded by the judgment appealed from. It remains for us to consider the case upon its merits.

"A photographic copy of the will is inserted in the record. Upon a casual reading, a person of ordinary skill in deciphering penmanship might easily mistake the word 'ten,' in the two places where it appears therein, for the word 'two,' and believe that the legacies were each for $2,000; but, upon a careful reading, and especially upon a comparison with the formation of the same letters in other parts of the will, and without the aid of a microscope, no person of experience could doubt that the word is 'ten,' and that the legacies are each for $10,000 and not for $2,000. Without doubt the testator did bequeath to the plaintiff a legacy of $10,000. The original will was filed and probated as it was written by the testator, and consequently, the estate exceeding $250,000, the probate of the will clearly established that the plaintiff was entitled to a legacy of $10,000.

"At the time of the first reading of the will, when the words 'ten' were erroneously read by all parties present as 'two,' the attorney of the executors was present, and was directed by them to have typewritten copies of the will made and sent to the parties interested. This was immediately done; the copyist by mistake writing the amount of the legacy as 'two thousand dollars.' Thereafter these copies were used in the subsequent proceedings, and the original will was not again carefully read or examined by any person until some three years after the estate was distributed. Thus the mistake was perpetuated and repeated in the final decree. The plaintiff did not expect that any legacy would be left to her, and did not know that anything was given to her by the will, until she was informed by her husband shortly after the first reading thereof. He told her that it gave her a legacy of $2,000. A day or two later she received the copy from the executors, which gave her the same information. She had every reason to believe that the information was correct. It came from those on whom she had a right to rely. We may presume that she had been accustomed to rely on her husband, and had found him trustworthy. She did rely on them, and believed that the legacy was, in fact, $2,000, and during the whole course of the administration she had no occasion for even a suspicion that it was otherwise. Under these circumstances, the court properly found that she cannot be charged with neglect in failing to discover the mistake.

"Furthermore, the information came from persons occupying fiduciary relations toward her. Her husband first informed her, and she then received the copy from the executors. Afterwards, and before the petition for distribution was filed, upon her request for payment of the supposed balance of her legacy, the individual defendants, in their representative capacity, prepared a receipt in full, in effect stating therein that the balance of the principal of her legacy was but $1,500 ($500 having been previously paid), which they presented to her, and demanded that she should sign upon payment of said balance, which she did, and the supposed balance was then paid by them to her. This was equivalent to a statement by them that her legacy was but $2,000. Executors occupy trust relations toward the legatees, and are bound to the utmost good faith in their transactions with the beneficiary. 1 Story, Eq.Jur. § 218; Robins v. Hope, 57 Cal. [493], 497. They were also residuary legatees, and hence whatever was lacking in full payment to the plaintiff was so much gained to them. They are therefore not in any position to claim that the plaintiff, in relying on their own statements regarding the amount of the legacy, was lacking in diligence.

"At the hearing of the petition for distribution the original will, in the handwriting of the testator, was on file, but it was not produced, examined, or read by or to the court. The petition was prepared from one of the typewritten copies of the will. It stated the legacy as for $2,000, and that it had been fully paid. This statement was read or stated to the court by the attorney for the executor and executrices, and he also then stated that it was a correct statement of the contents of the will. The court accepted his statement as true, and gave judgment for distribution accordingly. That all parties concerned, including the court, were acting under the influence of the mistake is unquestionable. It is claimed that it is not extrinsic or collateral to the case that the amount of the legacies and the purport and effect of the will were the precise things which the court was to ascertain and determine by the judgment, and that the mistake in reading the will was a mistake of the court, intrinsic to the action, which cannot be reviewed in any other court.

"If the plaintiff had been present at the hearing, contending that the will gave her $10,000, had presented the point to the court, and the court had thereupon read the word 'ten' as 'two,' and had made the distribution as it was made by the judgment appealed from, no doubt she would be precluded from any relief by way of equitable review, no matter how plain the mistake of the court would appear. The mistake would then be a mere error in the consideration of the evidence in a case fully presented to the court, an error of the class which human tribunals are subject to in any case, and which cannot be reviewed in equity. There would also be a complete remedy at law. The party injured would have timely notice of the error, and could pursue the usual mode of review by motion for a new trial and appeal.

* * * * * *

"The action was not barred by the statute of limitations. The plaintiff had no actual knowledge of the mistake prior to the distribution, nor until the accidental discovery, shortly before the action was begun.

The statute did not begin to run until that discovery occurred. The causes which produced the cessation of the intimate relations between plaintiff and the defendants did not put plaintiff upon inquiry to the extent necessary to charge her with constructive notice of the mistake, prior to the actual discovery. The differences between them, as we have stated, would not necessarily affect her confidence in the honesty and integrity of the defendants, in respect to the administration of the estate.

* * * * * *

"The will was competent evidence to prove the mistake, the right of the plaintiff, and the injury to her from the erroneous distribution. Decisions holding that a will is not admissible on collateral inquiry, after probate and distribution, to prove that it was disregarded, or incorrectly construed, by the court in making distribution of the estate, have no application here. This is not a collateral attack on the decree of distribution. It is a direct attack thereon. Bergin v. Haight, 99 Cal. [52] 56, 33 P. 760. In such direct proceedings to impeach the decree the will is competent evidence to prove the error and the injury. It is unnecessary to discuss the other errors of law assigned. They are either not well taken, or they do not affect the result."

The case of Bacon v. Bacon, supra, is not in point. There was no mistake made in the instant case in probate proceedings in the reading of the language of the will.

The case of Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St. Rep. 159, also cited by respondent, holds that to authorize a court of equity to set aside and annul a former judgment on the ground of fraud in its procurement, the fraud must be extrinsic or collateral to the questions examined and determined in the action, and must have prevented a fair submission of the controversy, and the judgment will not be vacated merely because it was obtained by forged documents or perjured testimony, or by bribing a witness to swear falsely. See, also, Sullivan v. Lumsden, 118 Cal. 664, 50 P. 777. In this regard it will be noted that in the decree of distribution of the Bushell will, it was determined that in the event Minnie Dobinson died the income in question "shall be paid to the children and issue of the blood by right of representation" of Minnie Dobinson.

[5, 6] The parol evidence rule is not only a rule of evidence but one of substantive law. If such evidence is admitted upon the trial, it may be urged on appeal that such evidence should be disregarded. Even if the evidence is allowed without objection, the same rule applies. Fogler v. Purkiser, 127 Cal.App. 554, 16 P.2d 305.

[7] In the instant case the parol evidence was allowed over the objection of the appellants, and we believe the same was inadmissible. There is no mention in the will that Maude A. Dobinson was the "child" of Minnie Dobinson. Maude A. Dobinson is mentioned in the will only as "niece". The admitted facts show that Maude A. Dobinson was not adopted and that the testator Bushell knew that fact when he executed the will. She was not entitled to inherit the estate of Minnie Dobinson. In re Estate of McCombs, 174 Cal. 211, 162 P. 897.

Maude A. Dobinson was not "next of kin" of Minnie Dobinson. The record shows that the testator knew that she was not the "daughter" of Minnie Dobinson although she was treated as a "child" of Minnie Dobinson and was known as the "daughter" of Minnie Dobinson, and that she (Maude A. Dobinson) believed she was the "daughter" of Minnie Dobinson.

The cases of Bacon v. Bacon, supra, Pico v. Cohn, supra, and other cases relied upon by the respondent are not in point. In Bacon v. Bacon, supra, the language of the will was "ten" instead of "two" and mistaken typewritten copies of the will were used in the probate proceedings. In the will in the instant case the language of the will is clear and unambiguous. The intent of the testator is clearly expressed in the will. In re Estate of Bourn, supra. There is no fraud, extrinsic or collateral, to the questions examined and determined in the probate court of the Bushell will. The most that can be said in respondent's favor in the instant case is that the testator concealed from attorney Joseph W. Bingaman (the attorney for the testator, the family friend of the testator and the Dobinsons and who believed that Maude A. Dobinson was the natural child of Minnie Dobinson and Alfred Dobinson) the fact that Maude Dobinson was not the natural child of Minnie Dobinson and Alfred Dobinson, and that he (the testator) made a mistake in the execution of the will on account of the advice given to him by attorney Joseph W. Bingaman. Proof of this fact is inadmissible under the authority of In re Estate of Bourn, supra,

In re Estate of Willson, supra, and other authorities cited.

Without the assistance of the parol evidence admitted on the trial in the instant case, there is no competent evidence legally sufficient to support the findings of the trial court above mentioned.

We are of the opinion that Maude Dobinson Emsley under the will and decree of distribution has no interest whatsoever in the one-sixth income from the said trust fund which Minnie Dobinson would be entitled to if she were living.

The judgment of the lower court is reversed, with directions to the lower court to enter judgment in favor of appellants.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



29 Cal.App.2d 543

GIRAUD v. MILOVICH.

Civ. 2111.

District Court of Appeal, Fourth District, California.

Dec. 6, 1938.

1. Landlord and tenant ⇐171(1)

In order to constitute an eviction, there need not be actual dispossession of the tenant from the leased premises.

2. Landlord and tenant ⇐171(1)

An eviction may be actual, as where there is a physical expulsion, or it may be constructive, as where the tenant is not deprived of actual occupancy.

3. Landlord and tenant ⇐172(2)

Any disturbance of a tenant's possession by a landlord or by some one acting under his authority, whereby the premises are rendered unfit for occupancy for the purpose for which they are demised, or the tenant is deprived of the beneficial enjoyment of the premises, amounts to a "constructive eviction."

[Ed. Note.—For other definitions of "Constructive Eviction," see Words & Phrases.]

4. Landlord and tenant ⇐190(2), 290(3)

If a tenant is forcibly evicted from a substantial part of the demised premises, by the landlord, and the lease is not terminated, but tenant still continues to occupy under the lease the part of which he retains possession, tenant cannot be compelled to pay the rent reserved, since there can be no apportionment of rent nor can landlord recover possession from tenant because of nonpayment of rent while the eviction continues.

5. Landlord and tenant ⇐291(13)

In landlord's unlawful detainer action against tenant for failure to pay rent, evidence sustained court's finding of a substantial partial eviction by landlord's having executed a quitclaim deed to a strip of the property to the state for highway purposes. Civ.Code, § 1573, subd. 1; § 1935.

6. Landlord and tenant ⇐172(1), 190(2), 290(3).

Where landlord executed quitclaim deed to a strip of property to state for highway purposes, which amounted to a substantial partial eviction of tenant, tenant could remain in possession of the remainder of the property without liability for rent while the partial eviction continued.

7. Landlord and tenant ⇐290(3)

An action of unlawful detainer to recover possession of demised premises for nonpayment of rent would not lie where there had been an eviction by the landlord or by his procurement. Civ.Code, § 1573, subd. 1; § 1935.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action of unlawful detainer for failure to pay rent by Adelaide F. Giraud against Mijo Milovich and another. From an order denying plaintiff relief, plaintiff appeals.

Affirmed.

John T. Boynton, of San Francisco, for appellant.

Robert Richards, of Bishop, for respondent.

GRIFFIN, Justice.

The appellant, Mrs. Adelaide F. Giraud, brought this action of unlawful detainer against her tenants, P. M. Pocock and Mijo Milovich, the respondent herein, for failure to pay rent. The action was apparently abandoned as to Pocock, but was defend-

ed by Milovich, the tenant then in possession. There is some evidence to the effect that Pocock sold his interest to Milovich or at least agreed to a sale, soon after they took possession.

Milovich defended the unlawful detainer action upon the theory that he had been previously evicted by the landlord from a substantial portion of the leased premises and was accordingly relieved from the obligation to pay rent.

The parties acquired their respective interests in the property as follows: Felician Giraud, the original lessor, executed to P. M. Pocock a lease of the premises in question. It was a rectangular piece of property located an eighth of a mile south of Bishop, California. It had a one hundred foot frontage on U. S. highway No. 395 and a depth of about 50 feet.

The lease was for a term of five years from March 25, 1933, at a rental of twenty-five dollars per month. Pocock, on April 25, 1933, assigned the lease to himself and Mijo Milovich. The lease and assignment were duly recorded May 5, 1933.

The respondent entered into actual possession of the premises on April 25, 1933, on which he erected and maintained a gasoline service station, and continued in actual possession of all of it except a strip fronting on the highway which had a length of 100 feet and a depth of 20 feet, from which the court found he had been evicted.

After making the above-described lease, Felician Giraud, the original lessor, on October 31, 1933, conveyed a right of way to the state of California for highway purposes consisting of a strip of the leased premises 100 feet long by 20 feet deep where the property adjoined the U. S. highway No. 395, for the sum of $151.50.

Felician Giraud, on the same day, executed a deed to the remaining portion of the leased property to Alfred and Adele Giraud. Alfred Giraud conveyed his interest in the premises to appellant about July, 1934, prior to the commencement of this action. December 18, 1933, Alfred and Adele Giraud signed a quitclaim deed to the described 20-foot strip of property, conveying it to the state of California for highway purposes.

The deed from Felician Giraud contained the following: "And I, the said grantor, do hereby waive all claim for any and all damages or compensation for and on account of the location, establishment and construction of said state highway and do grant to the grantee the right to remove any and all trees, growths and road-building material within said right of way, and the right to use the same in such manner as the said grantee may deem proper, needful or necessary in the construction, reconstruction or maintenance of said state highway," etc. The deed from Alfred and Adelaide F. Giraud contained the following: "and we ——— release ——— and discharge ——— for ourselves ——— grantees and ——— assigns ———, the state ——— from any ——— suits ——— damages ——— or claims ——— we now have ——— by reason of the location or construction ——— of the state highway ——— and to all damages to the remaining section of our said lands by reason of the severance therefrom of the parcel ——— conveyed and quitclaimed". The state went into the possession of the 20-foot strip of land in question and forcibly ousted and evicted him therefrom, thus leaving him only the 30 feet in depth of the original 50 feet upon which to conduct and operate his business. The court found that Alfred and Adelaide F. Giraud were at all times the owners of the real property leased, although Felician Giraud held the legal title in trust for them.

From the record, which is woefully lacking in clarity, it appears that respondent testified that he had no knowledge of the execution of the deeds to the state until the authorities were about to enter and widen the highway, which date was around November, 1934. About this time respondent stated to appellant that he would be satisfied to let her sell this strip to the state and allow it to enter into possession if she would replace the strip so taken from her adjoining property, and raise the gas station, pumps and tanks. He testified that he did not know that the parcel had theretofore been sold to the state. However, the evidence is conflicting and there is in evidence an encroachment permit dated April 8, 1933, issued to P. M. Pocock, authorizing certain work to be done in reference to an approach to the oil station.

The evidence discloses that it would be necessary to make some extensive fill to the rear portion of the remaining parcel of the leased premises before it would be usable as a filling station; that respondent was compelled to move three large one-thousand-gallon gasoline tanks from the strip taken by the state and that thereafter

he had no available space on the property to place them, and was forced to store them on a portion of an unopened adjoining street.

There is considerable evidence indicating that the landlord and the representatives of the state were busily engaged in an endeavor to appease the tenant before moving upon the property. After the state took possession appellant made no attempt to secure for respondent, by lease, any additional ground and refused to raise the gas station, etc., whereupon respondent offered to do this work and withhold the cost from the monthly rental. which was refused. He also offered to sell his equipment and interest to appellant at considerable discount but appellant declined, whereupon respondent refused to pay further rent for the premises.

The rent was ordinarily paid to appellant, but she claimed none had been paid by Milovich or Pocock since November, 1934. The trial court found that Felician Giraud, Alfred Giraud and appellant Adelaide F. Giraud ousted, evicted and dispossessed the respondent from a substantial portion of the premises leased, to-wit, the 20-foot strip above described, and that such eviction still continued; that the rental value of that portion of the premises from which he had not been ousted, at the time of the signing of the findings, was 82c per day; that appellant had not sustained any damage in any sum by reason of the detention of the premises and accordingly denied appellant the relief prayed for in her complaint.

The appellant advances the contention that the lease, being for more than one year and duly recorded, and the lessor-owner having made an outright deed to a portion of the premises, that this only constituted a severance of the reversionary interest in the property and did not amount to an eviction by the lessor, and constituted no wrong to the tenant, and that therefore the law will apportion the rent. Citing 16 R.C.L. 916, note 8; 16 R.C.L. 945, note 8; Dreyfus v. Hirt, 82 Cal. 621, 627, 23 P. 193; Linton v. Hart, 25 Pa. 193, 64 Am.Dec. 691. She contends further that the state evicted the tenant, if there was an eviction, and that therefore the tenant is still required to pay the rent to the landlord for the proportionate value of that part of the land which the tenant still retained, and for failure to pay such rent the tenant should be dispossessed in an unlawful detainer action. Citing sec. 1935, Civ.Code.

Respondent answers this contention by claiming that the two deeds to the state gave the grantee full and every power and authority of immediate possession, which was its warrant for entering in and upon the premises, for taking possession thereof, and for ousting and evicting the respondent therefrom; that by virtue of this authority and the representations made it ousted the tenant.

[1-3] It is often difficult to determine what acts will constitute an eviction. It is settled, however, that there need not be actual dispossession of the tenant from the leased premises. An eviction may be actual, as where there is a physical expulsion, or it may be constructive as where, though amounting to an eviction at law, the tenant is not deprived of actual occupancy. Any disturbance of a tenant's possession by a landlord or by someone acting under his authority, whereby the premises are rendered unfit for occupancy for the purpose for which they are demised, or the tenant is deprived of the beneficial enjoyment of the premises, amounts to a constructive eviction. Riechhold v. Sommarstrom Inv. Co., 83 Cal.App. 173, 256 P. 592; Hopkins v. Murphy, 233 Mass. 476, 124 N.E. 252, 13 A.L.R. 816. In 16 R.C.L. 955, sec. 463, we find the following:

"Minority Rule: It is the rule in a few jurisdictions that when a landlord enters and dispossesses the tenant of a part of the premises a discharge of the rent will not result unless the tenant surrenders or abandons the possession entirely and that if the tenant remains in possession the rent is discharged only pro tanto to the extent of the value of the use and occupation of the part of the premises of which the tenant is dispossessed."

From 16 R.C.L. p. 953, sec. 461, we quote the following, together with some of the supporting authorities from the footnotes:

"Partial Eviction by Landlord: General Rule. When the eviction is of a part of the premises only, and is by the landlord himself, this, according to the generally accepted view, will relieve the tenant from liability for future rents, though he remains in possession and enjoyment of the balance of the premises and the law will not in such a case apportion the rent." Citing Halligan v. Wade, 21 Ill. 470, 74 Am.Dec. 108; Royce v. Guggenheim, 106 Mass.

201, 8 Am.Rep. 322; Kuschinsky v. Flanigan, 170 Mich. 245, 136 N.W. 362, 41 L.R.A.,N.S., 430, Ann.Cas.1914A, 1228; Briggs v. Hall, 4 Leigh, Va., 484, 26 Am.Dec. 326. "As has been said the landlord cannot so apportion his own wrong as to force the tenant to pay anything for the residue." Colburn v. Morrill, 117 Mass. 262, 19 Am. Rep. 415. "So an action for use and occupation cannot be maintained after such a partial eviction, as the lease is not terminated by the unlawful eviction. He still continues to occupy that part of the estate from which he has not been evicted, under and by virtue of the lease, and no implied promise to pay arises. Not only does a partial eviction by the landlord preclude the recovery of rent accruing subsequent to the eviction and while the eviction continues, but it also suspends the right of the landlord to maintain proceedings to remove the tenant for the nonpayment of rent, as the tenant ceases by the act of his landlord to become liable legally for the rent." Note, Ann.Cas.1914A, 1233. "* * * An actual partial eviction by the landlord suspends the rent only during the continuance of the eviction, and on its termination the rent revives. * * * A partial eviction by the landlord does not, it seems, where the tenant remains in possession of the balance of the premises, release the tenant from other obligations on his part independent of the covenant to pay rent, such as his covenant to repair." Smith v. McEnany, 170 Mass. 26, 48 N.E. 781, 64 Am.St.Rep. 272.

[4] The rule in California seems to be in accord with the general rule. The leading case is Skaggs v. Emerson, 50 Cal. 3, wherein the court held, in an action for unlawful detainer to recover possession from the tenant by reason of failure to pay rent, that if a tenant is forcibly evicted from a substantial part of the demised premises, by the landlord, and the lease is not terminated, but the tenant still continues to occupy, under the lease, the part of which he retains possession, the tenant cannot be compelled to pay the rent reserved, for, in such case, there can be no apportionment of rent, and that if a tenant is forcibly evicted by the landlord from a substantial part of the demised premises, but still continues to occupy the remainder under the lease, the landlord cannot, under the unlawful detainer act, recover possession from the tenant by reason of nonpayment of rent while the eviction continues. Veysey v. Moriyama, 184 Cal. 802, 805, 195 P. 662, 20 A.L.R. 1363; Kelley v. Long, 18 Cal.App. 159, 122 P. 832; Camarillo v. Fenlon, 49 Cal. 202; Automobile, Truck, etc., Co. v. Salladay, 55 Cal. App. 219, 203 P. 163; North Pac. S. S. Co. v. Terminal Inv. Co., 43 Cal.App. 182, 185 P. 205; 15 Cal.Jur. 682, sec. 92. A different rule seems to apply where the tenant remains in possession of the whole of the premises leased and claims a constructive eviction. Veysey v. Moriyama, supra, and cases cited; Riechhold v. Sommarstrom Inv. Co., supra; Agar v. Winslow, 123 Cal. 587, 56 P. 422, 69 Am.St. Rep. 84; 15 Cal.Jur. 680, sec. 90; Barrow v. Simon, 2 Cal.App.2d 500, 38 P.2d 197.

[5-7] The evidence sufficiently supports the finding that there was a substantial partial eviction and accordingly, under the above-cited authorities, the tenant may remain in possession of the remainder and not be liable for the rent while the partial eviction continues. Therefore, an action of unlawful detainer to recover possession of the premises for nonpayment of rent will not lie if such eviction, under the evidence, was an eviction by the landlord or by his procurement. The evidence seems to justify a conclusion on the part of the trial court that the lessor and his successors authorized the state of California to take immediate possession of the leased premises by virtue of the two deeds in evidence and the subsequent acts of the appellant in making the claimed false promises without any intention of performing them, whereby the eviction was accomplished to the detriment of the tenant, and therefore can be said to be wrongful. Civ.Code, sec. 1573, subd. 1.

The original lessor granted this right of way to the state and retained the entire proceeds from the sale. Had the state instituted condemnation proceedings (and there was some evidence it intended to do so) and had an award been given, the tenant would have been entitled to share in the proceeds thereof according to his interest in the property. This would not have terminated the lease nor have absolved the lessee from his covenant to pay the full rent. City of Pasadena v. Porter, 201 Cal. 381, 257 P. 526, 53 A.L.R. 679.

The case of McWilliams v. Harper, 177 La. 728, 149 So. 437, decided by the supreme court of Louisiana, July 7, 1933, seems to be entirely in accord with the facts and this holding. In the cited case

the plaintiff (the tenant) took possession of the property leased by him, made improvements on it, used one of the buildings on it for a small grocery store and also as a filling station. In 1929, preparations were being made to hard-surface and improve the highway. The police jury of Bossier parish concluded to run the old road, which ran immediately in front of the store and filling station, a little farther to the north, and caused a survey to be made with that end in view. The survey thus made ran through the store building and filling station. The defendant landlord objected to the new route, since it would destroy his property. An expropriation suit was threatened if defendant would not sell a right of way. Defendant promised a right of way north of the store on condition that the police jury would place the store and all outhouses on the property in the same position with reference to the new road as they were then occupying with reference to the old road. The police jury, on the completion of the highway, turned the buildings around as promised. The new route reduced the area of the property appreciably and cut off a part of plaintiff's truck patch and, as above said, necessitated the moving of the buildings around, so as to face the new road. Plaintiff was not consulted about the making of the dedication, nor was his consent obtained for the new route, so far as that route might affect his rights in the leased premises, nor were any legal proceedings had by the police jury to obtain such rights. On January 11, 1930, plaintiff brought a suit, alleging that defendant, by making the dedication in disregard of his rights, breached and abrogated the contract of lease and caused his eviction. Defendant presented the argument that the lease, being of record, when the dedication was made, the police jury, by operation of law, accepted the dedication subject to it, and that whatever wrong may have been done to plaintiff in ignoring his lease, was done, not by defendant, since it had a right to dedicate its property, whether leased or not, but by the police jury. In disposing of this contention the court said [page 439]: "Under the facts of the case, as we find them, defendant does not occupy the position of a third person in whatever wrong was done plaintiff. He made the dedication, without reference to plaintiff's right to the use of the property, and without consulting him. He had every reason to know at the time that the construction of the road would not be delayed until the expiration of the lease which still had several years to run. He acquiesced in the construction of the road, without regard to plaintiff's rights, and did the little he could do in furtherance of its prompt construction, as, for instance, the permission granted by him as to the removal of dirt."

This holding is so applicable to the facts in the case before us that we adopt it as a proper disposition of the question raised here. Our conclusion is that appellant at least stood as a participator in the wrong done.

Accordingly the order of the trial court must be and is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



29 Cal.App.2d 528

MORRISON et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 6153.

District Court of Appeal, Third District. California.

Dec. 2, 1938.

Rehearing Denied Dec. 31, 1938.

Hearing Denied by Supreme Court Jan. 30, 1939.

1. Workmen's compensation ⇐1509

Evidence supported Industrial Accident Commission's finding that mine worker died as the result of silicosis which was incurred in the course of his employment. St. 1937, pp. 304, 305, §§ 5950–5953, formerly St.1917, p. 875, § 67.

2. Workmen's compensation ⇐1683

Evidence supported Industrial Accident Commission's finding that mine worker, who died from silicosis which was incurred in course of employment, possessed knowledge or information that he had a compensable disability more than six months before filing of claim for compensation, as respects six months' limitation statute. Gen.Laws 1931, Act 4749, § 11(b) (1); St.1937, p. 294, § 5400 et seq., formerly St.1917, p. 841, § 11; St.1937, pp. 304, 305, §§ 5950–5953, formerly St.1917, p. 875, § 67.

3. Workmen's compensation ⇐1939

When there is an entire lack of evidence to support a finding of the Industrial Accident Commission either granting or denying a compensation award, proceedings may be reviewed by the appellate court. St.1937, pp. 304, 305, §§ 5950–5953, formerly St.1917, p. 875, § 67.

4. Workmen's compensation ⇐1939

In compensation proceeding, findings of the Industrial Accident Commission on questions of fact may not be reviewed when there is substantial evidence to support the findings, and if reasonable inferences may be drawn from the evidence in support of the findings adopted by the commission, its award or denial of compensation may not be disturbed. St.1937, pp. 304, 305, §§ 5950–5953, formerly St.1917, p. 875, § 67.

5. Workmen's compensation ⇐1280

Where mine worker suffered from occupational disease which disabled him and subsequently resulted in death, date of injury, as respects limitations, was deemed to be time when the disease culminated in a compensable disability incurred in the course of employment and traceable to the ailment as the primary cause therefor, or when, by the exercise of reasonable diligence, that information could have been acquired by the worker. Gen.Laws 1931, Acts 4749, § 11(b) (1); St.1937, p. 294, § 5400 et seq., formerly St.1917, p. 841, § 11.

6. Workmen's compensation ⇐1726, 1939

The question of an employee's knowledge that an occupational disease suffered by him has culminated in a compensable disability is one of fact, the determination of which will not be disturbed on review if it is supported by substantial evidence or by reasonable inferences necessarily drawn from the testimony. Gen.Laws 1931, Act 4749, § 11 (b) (1); St. 1937, p. 294, § 5400 et seq., formerly St.1917, p. 841, § 11.

7. Workmen's compensation ⇐1293, 1294

In proceeding to recover compensation for death of mine worker from silicosis, fact that employer, with knowledge of worker's affliction, made payments to worker while he was on sick leave, tolled the limitation statute requiring compensation claim to be filed within six months after worker became aware of affliction, since such payments were deemed to constitute payment of compensation rather than payment of wages or gratuity. Gen.Laws 1931, Act 4749, § 11 (b) (1); St.1937, p. 294, § 5400 et seq., formerly St. 1917, p. 841, § 11.

8. Limitation of actions ⇐182(5)

The statute of limitations is a defense personal to the debtor, which will be waived if not pleaded.

9. Workmen's compensation ⇐1382

In proceeding to recover compensation for death of mine worker who died from silicosis, wherein employer asserted that claim was barred because not presented within six months of time of injury, burden of proving that claim was barred was on employer. Gen.Laws 1931, Act 4749, § 11(b) (1); St.1937, p. 294, § 5400 et seq., formerly St.1917, p. 841, § 11.

10. Workmen's compensation ⇐1382

In proceeding to recover compensation for death of mine worker who died from silicosis, it was assumed, in absence of contrary evidence, that knowledge of employer's physicians, that worker was a victim of silicosis for a period of six months at least immediately before he became totally disabled, was known to employer, as respects whether payments to worker tolled limitation on filing of claim. St.1937, p. 294, § 5400 et seq., formerly St.1917, p. 841, § 11.

11. Workmen's compensation ⇐1269

The statute of limitations requiring claim for compensation to be filed within six months of injury is a mere rule which limits the time within which a claim must be presented, and was adopted to encourage diligence and prevent injustice. Gen.Laws 1931, Act 4749, § 11(b) (1); St.1937, p. 294, § 5400 et seq., formerly St.1917, p. 841, § 11.

12. Workmen's compensation ⇐1302

The limitation statute requiring a compensation claim to be filed within six months of injury is a mere defense which may be waived and should not become a trap to defeat just claims. Gen.Laws 1931, Act 4749, § 11(b) (1); St.1937, p. 294, § 5400 et seq., formerly St.1917, p. 841, § 11.

13. Workmen's compensation ⇐1292

Payment of compensation to a disabled workman under proper circumstances will toll the limitation statute requiring a compensation claim to be filed within six months of injury. Gen.Laws 1931, Act 4749, § 11 (b) (1); St.1937, p. 294, § 5400 et seq., formerly St.1917, p. 841, § 11.

Certiorari proceeding by Charlotte S. Morrison and others against the Industrial Accident Commission of the State of Cali-

fornia to review orders of the commission denying compensation for the death of the husband and father of petitioners, who was an employee of the original Sixteen to One Mine, Incorporated.

Orders annulled, and cause remanded, with directions.

Michael F. Shannon, Thomas A. Wood, and Charles W. Wolfe, all of Los Angeles, for petitioners.

Edmund D. Leonard, of San Francisco (Everett A. Corten, and Keith & Creede, all of San Francisco, of counsel), for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

By means of certiorari, the widow and minor children of Murdoch D. Morrison, a deceased miner, seek to review the orders of the Industrial Accident Commission, denying compensation for his death as a result of silicosis incurred in the course of his employment in a quartz mine, and also denying a rehearing thereof. It was determined that the claim is barred by the provisions of section 11 (b) (1) of the Workmen's Compensation Act of 1917, as amended (2 Deering's Gen. Laws of California of 1931, pp. 2272, 2284, Act 4749), which provided that all claims of the nature here involved must be commenced within six months of the date of the injury.

The petitioners claim that the deceased filed his claim for compensation, prior to his death, within six months of the time he became aware of the fact that he was afflicted with silicosis, a compensable occupational disease attributable to his employment in the mine, and that the payment of compensation as late as August 17, 1935, suspended the running of the statute of limitations, so that his claim, which was filed October 18, 1935, was not barred.

Murdoch D. Morrison was continuously employed as a miner in The Original Sixteen to One Mine at Alleghaney, California, from 1928 until the summer of 1935. He died April 23, 1936, leaving surviving him, his widow, Charlotte S. Morrison, and three minor children, who are the petitioners in this proceeding.

Until the fall of 1934, Mr. Morrison was a strong, able-bodied man, with no apparent physical ailments. The mine in which he worked was permeated with mineral dust. Before February, 1935, he lost considerable weight; his voice was husky so that he could scarcely talk above a whisper, and he became very weak. He then consulted Doctor Padgett, the physician for the mine, who told him he had "a paralyzed vocal cord" and he gave him "a shot for tuberculosis". The doctor advised him to obtain an X-ray picture of his lungs. The picture was taken February 17th by Doctor Atkinson at Grass Valley. After Doctor Padgett examined the picture, he told Mr. Morrison there were spots on his lungs "like it is on mostly all miners", but that he need not be alarmed at that. The doctor then sent a specimen of his sputum to a laboratory at Berkeley for examination, which resulted in a report that it indicated a condition of tuberculosis. The sputum test was reported in a letter dated July 26, 1935. He was then advised to consult a specialist. He left his work in the mine July 20, 1935. Doctor Hardie testified that Mr. Morrison was looking badly in 1932. He examined him several times, the last occasion being in August, 1934. He testified that Morrison had then lost considerable weight; that he was short of breath, with rales throughout the chest and lungs; that he had low blood pressure, subnormal temperature and decided hoarseness, not being able to speak above a whisper. He said that he later examined the X-ray picture which Doctor Padgett procured, and diagnosed the ailment as miner's consumption, or silicosis, which he said was then in an advanced stage. He said his condition was caused from inhaling mineral dust, or silica in the course of his work in the mine. The doctor told him "he was developing the same (disease) as most miners get" and advised him to "get out from underground". He testified:

"I made it clear to him that it was due to his occupation, * * * I don't recall that I told him he had silicosis or tuberculosis or anything like that. It is rather a difficult thing to tell a person that sometimes. * * *

"Q. In other words without telling him the medical term for the disease or his disability, you did make clear to him the fact that he had a disability, you did make clear to him the fact that he had a disability which was attributable to his employment? A. Yes, I did. * * * I advised him to take a vacation as long as he could and perhaps a change of environment. * * *

"Q. And you made that clear to him also, did you doctor? A. I did.

"Q. How long ago was this, doctor? A. August of 1934. * * *

"Q. * * * You didn't tell him he had silicosis? A. I don't recall I did, because I doubt if he would have understood the term.

"Q. * * * He was able to work. A. Well, he was in no condition to try to work, no. He was able to walk about. * * * I believe he did return after a month or so and worked for a while."

It appears that Mr. Morrison worked regularly in the mine until the month of August, 1934, during which time he was on leave with full pay for eleven days. He was also on leave with full pay for fifteen days in September, 1934. He then worked steadily until July, 1935, taking eleven days' vacation on account of illness in that month on full pay. The following month of August he also received $85 pay, but did not work in the mine. His claim for compensation for total disability on account of silicosis incurred in the course of his employment in the mine was filed October 18, 1935. The hearing on that claim was commenced February 7, 1936. Mr. Morrison died on April 23, 1936, before the hearing was completed. His widow was duly appointed guardian of the minor children and her claim for compensation was filed May 22, 1936. The findings of the Commission were not filed until June 16, 1938. It was determined that the deceased person was employed in the mine from 1927 until August, 1934, and from October, 1934, to July, 1935, and that "The employee became disabled in August, 1934, from a condition which he was advised by a physician was the result of his occupation as a miner. His application was not filed until October 18, 1935, more than six months thereafter and the claim is barred, therefore, by the provisions of Chapter 2, Part 4, Division 4 of the Labor Code, St.1937, p. 294, § 5400 et seq., formerly section 11 of Chapter 586, p. 841, of the Laws of 1917. The claim of the application herein filed May 22, 1936, is likewise barred by the foregoing provisions."

[1, 2] We are of the opinion there is substantial evidence that the deceased person died as a result of silicosis, an occupational disease which was incurred in the course of his employment as a miner in The Original Sixteen to One Mine, and that, as a reasonable person, he possessed knowledge or information that he had a compensable disability on that account in February, 1935. We are, therefore, bound by the findings of the Industrial Accident Commission in that regard.

[3, 4] When there is an entire lack of evidence to support the finding of the commission either granting or denying an award of compensation, the proceedings may be reviewed by the appellate court. Market St. Ry. Co. v. Ind. Acc. Comm., 193 Cal. 178, 224 P. 95; Nielsen v. Ind. Acc. Comm., 220 Cal. 118, 122, 29 P.2d 852; Hubbert v. Ind. Acc. Comm., 14 Cal. App.2d 171, 58 P.2d 171; sec. 67, St.1917, p. 875, Workmen's Compensation Act of 1917 and amendments; secs. 5950–5953, Labor Code, St.1937, pp. 304, 305. But findings of the commission on questions of fact may not be reviewed when there is substantial evidence to support the findings. 27 Cal.Jur. 578, sec. 218. Even if reasonable inferences may be drawn from the evidence in support of the findings adopted by the commission, its award or denial of compensation may not be disturbed. Hartford Acc. & Indemnity Co. v. Ind. Acc. Comm., 202 Cal. 688, 693, 262 P. 309, 58 A.L.R. 1392.

In the present case, in support of the findings to the effect that Mr. Morrison "became disabled * * * from a condition which * * * was the result of his occupation as a miner", and was so advised by his physician, is the testimony of the claimant himself that Doctor Padgett, the physician for the mine, told him so, and it is corroborated by the evidence of Doctor Hardie. It is true that Doctor Hardie did not confirm his belief that Mr. Morrison was afflicted with silicosis by his examination of the X-ray picture and the report of the analysis of the sputum until July, 1935. But it is true that Doctor Hardie told him long before that date that he had spots on his lungs; that he must get out of the mine, and that his ailment was due to his occupation. The claimant admitted that Doctor Padgett gave him "a shot for tuberculosis". From such evidence, in support of the findings, we must assume from the reasonable inferences to be drawn therefrom, that the claimant then knew he had a compensable disability directly traceable to his work in the mine, even though he did not know that particular miners' disease was commonly called silicosis.

[5, 6] It is true that the date of the injury under the circumstances of this case, is deemed to be the time when the

occupational disease culminated in a compensable disability incurred in the course of employment and traceable to the ailment as the primary cause therefor, or when, by the exercise of reasonable diligence, that information should have been acquired by the claimant. Marsh v. Ind. Acc. Comm., 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563; Price v. Ind. Acc. Comm., 9 Cal.App.2d 213, 215, 49 P.2d 294; Argonaut Min. Co., Ltd., v. Ind. Acc. Comm., 21 Cal. App.2d 492, 499, 70 P.2d 216. The question regarding the possession of that knowledge by the workman is one of fact, the determination of which will not be disturbed on review, provided it is supported by substantial evidence or by reasonable inferences necessarily drawn from the testimony adduced.

The petitioner, however, contends that the claim in this case is not barred because compensation was paid to Mr. Morrison as late as August 17, 1935, which is only two months prior to the time when the original claim was filed in this proceeding.

[7] We are convinced the record contains no substantial evidence to support the finding of the commission that the petitioners' claim is barred by the statute of limitations. On the contrary, the evidence is uncontradicted, that Mr. Morrison, while he was on sick leave in the month of July, 1935, was paid by The Original Sixteen to One Mining Company his full wages in the sum of $80, and that during the month of August, 1935, while he was on sick leave, he was paid his full wages to the 17th of that month, in the total sum of $85. Since the employer mining company had full knowledge of the fact that the claimant was afflicted with silicosis incurred in its mine in the course of his employment, from February, 1935, and that he was completely disabled from performing his service in July and August of that year, prior to the times these payments were made, the last-mentioned payments, under uniform authorities of California, are deemed to constitute the payment of compensation for his injury which has the effect of tolling the statute of limitations, and his claim is, therefore, not barred. Bulger v. Ind. Acc. Comm., 218 Cal. 716, 725, 24 P.2d 796; London Guarantee & Acc. Co. v. Ind. Acc. Comm., 92 Cal.App. 298, 268 P. 670; Howell v. Lanfair, 5 Ind.Acc.Comm., 176; Oders v. Great Western E. C. Co., 6 Ind.Acc. Comm., 95; Evans v. Los Angeles Ry. Corp., 216 Cal. 495, 14 P.2d 752; Evans v. L. A. Ry. Corp., 18 Ind.Acc.Comm. 273; 27 Cal.Jur. 458, secs. 130, 131; Honnold on Workmen's Comp., p. 766, sec. 214; Bradbury's Workmen's Comp., p. 1199, sec. 6. In the Bulger Case, supra, the Supreme Court, approving the principle previously announced, said in that regard [page 800]:

" 'Under the provisions of section 11 (c) of the Workmen's Compensation Act the payment of compensation shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the last payment, and, as stated, the evidence here shows without dispute that, while Read was totally disabled in the hospital, his wages were being constantly paid by his employer. We are of the opinion that the payment of such wages, under the circumstances above related, constituted the payment of compensation for the injury, and that therefore, since Read's application was filed within six months after the last payment of such compensation, his claim was not barred by the statute of limitations.

" 'There appears to be no case adjudicated by the courts upon this particular point, but it has long been the rule of the commission that where, as here, an employee is totally disabled, and his employer continues to pay him full wages during the period of his disability, such payments do not constitute wages or gratuities, but are payments of compensation which operate to toll the statute during their continuance * * * and we find nothing unreasonable in the construction thus placed upon the terms of the act.' "

In response to the foregoing rule of construction of the statute of limitations prescribed by the Workmen's Compensation Act, the respondents quote from 1 Campbell's Workmen's Compensation, section 947, wherein a definition of the term "compensation" is given, and it is there said the question as to whether compensation has been paid depends upon the facts of the particular case from which the understanding of the respective parties in regard thereto is to be determined, in the light of the surrounding circumstances. The author of that text then says: "Where the existence of disability is recognized, and the employee renders no service for the employer during such time, the payment of wages to the injured during part of the disability operates to toll the statute during that time. Mere

payment of salary by the employer during the time that the employee was off from work does not constitute a payment of compensation within the meaning of the act sufficient to toll the statute, where the employer did not know and the employee did not claim that such absence was due to injury."

[8-10] The statute of limitations is a defense personal to the debtor, which will be waived if not pleaded. 16 Cal.Jur. 396, sec. 6. The burden of proving that the claim for compensation was barred by the statute of limitations in the present case was upon the respondents who seek to defeat that claim on the ground that it was not presented within six months of the time of the injury complained of. Argonaut Mining Co., Ltd. v. Industrial Accident Commission, supra. The record in this case is uncontradicted to the effect that Mr. Morrison worked for The Original Sixteen to One Mining Company for about eight years; when he began working in that mine he was a large, strong man with no apparent ailment; he was six feet four inches tall, and weighed over two hundred pounds; in August, 1934, Doctor Hardie, the physician for the mine, examined him and diagnosed his affliction as silicosis, advised him to get out of the mine, and gave him a shot for tuberculosis. In February, 1935, Doctor Padgett, another physician for the mine, examined the workman, and definitely knew he was a victim of silicosis. He found that Morrison had lost weight; that he was weak; his voice was husky and he was unable to speak above a whisper; he procured the taking of an X-ray picture and a scientific examination of his sputum, which corroborated his former conclusion that Morrison was suffering from silicosis; he advised him to leave the mine. The claimant was on sick leave, under full pay twenty-nine days in September, 1934; he was on sick leave twenty-eight days, without pay, in October, 1934, and he was on sick leave, on full pay, twenty-eight days in July and August, 1935. During the last-mentioned period there can be no doubt the company knew he was physically disabled and unable to render service on account of silicosis. It must be assumed, in the absence of evidence to the contrary, that the knowledge of the regular physicians of the mine that he was a victim of silicosis for a period of six months, at least, immediately before he became totally disabled, was known to the owners of the mine. For two months of that period he was totally disabled. Under the foregoing authorities upon that subject, the payment of full wages to the disabled workman on sick leave will be construed to be compensation for his injury, and not mere wages of a man who was expected to return to his work. Nor was it a mere gratuitous contribution. Such payments result in tolling the statute of limitations. The claim of the workman is not barred under such circumstances.

[11-13] It is argued that the enforcing of the above wholesome and just rule will result in employers refusing to pay wages to workmen who are temporarily ill, for fear that it would bind them to pay compensation in the event of future disabilities. We think not. We assume that employers will not seek for technical grounds to escape the payment of just compensation which they legally owe to one who has been disabled or injured in their employ. Compensation is an obligation created by law in accordance with justice. The statute of limitations is a mere rule which limits the time within which a claim must be presented. It is adopted for the purpose of encouraging diligence and preventing injustice. It is a mere defense which may be waived, and should not become a trap to defeat just claims. The foregoing rule that the payment of compensation to a disabled workman under proper circumstances will toll the statute of limitations is fair and wholesome. It is characteristic of all human beings who are afflicted with incurable diseases, particularly with tuberculosis, to hope for recovery, and not to admit they are afflicted with an incurable disease so as to forfeit their jobs as a means of livelihood, until it becomes absolutely necessary to do so. The payment of wages to one who is afflicted with silicosis encourages him to believe he may continue in his employment. The payment of wages to one who is known to be fatally injured or afflicted is likely to lull him into false hopes and cause him to delay presenting his claim until the statute of limitations has barred it. The discontinuance of the payment of wages to a workman whom the employer knows to be afflicted with total disability may become a flag of warning to prevent the victim from waiving his right to compensation. At least this court may not hesitate to decide the present case in accordance with the established rule announced, merely because it may result in

loss to others who are not involved in this litigation.

For the reason that the findings of the Commission to the effect that the claim for compensation is barred by the statute of limitations, is not supported by substantial evidence, the orders are annulled, and the cause is remanded with directions to the Commission to hear and determine the claim on its merits.

I concur: PULLEN, P. J.



DE GRAF v. ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO et al.*

Civ. 10714.

District Court of Appeal, First District, Division 2, California.

Dec. 1, 1938.

Hearing Granted by Supreme Court Jan. 30, 1939.

1. Landlord and tenant ⇐164(1), 165(1, 6)

Owner of building owed to lessee and lessee's employee the duty of exercising ordinary care to keep stairway, corridors and elevators in a reasonably safe condition.

2. Landlord and tenant ⇐165(6)

Employee of lessee was entitled to go to his office at any time, day or night, where terms of tenancy did not provide otherwise, and fact that he was told by management of building that building would be open to receive lessees and their friends for purpose of viewing a parade neither extended nor limited the rights of the employee, as regards building owner's liability for injuries sustained by employee in a fall into an open elevator shaft.

3. Landlord and tenant ⇐165(6)

In action by lessee's employee for injuries sustained in a fall into an open elevator shaft, fact that glass cover required by regulation of Industrial Accident Commission to prevent general use of emergency release which could be used to operate elevator while doors were open was broken and permitted use of emergency device regardless of whether emergency existed did not render lessor liable in absence of evidence showing that violation of regulation was a proximate cause of the accident.

4. Landlord and tenant ⇐165(6)

Where office building was opened to receive lessees and their friends for purpose of viewing a parade, front of building was lighted, lessee's employee went through unlighted shipping room to use freight elevator in rear of building and fell into an open elevator shaft, failure of lessor to have light in shipping room or a light in elevator did not constitute act of negligence on part of lessor, in absence of evidence that room and elevator were lit when tenancy began, since invitation was not one to inspect entire building.

5. Landlord and tenant ⇐164(1), 165(1, 6)

Lessee's employee had no greater rights in the use of premises than lessee to whom lessor owed no duty except to maintain stairway, corridors and elevators in the same condition they were in at date of letting.

6. Landlord and tenant ⇐168(1)

Where lessee's employee groped through darkness to find freight elevator, he was not entitled to make assumption that others would obey the law and had done so.

7. Landlord and tenant ⇐168(1)

Where lessee's employee groped through unlighted shipping room in attempting to find unlighted freight elevator and fell into open elevator shaft, the employee assumed all risks attendant upon his movements including risk resulting from lessor's failure to have glass, required by Industrial Accident Commission's regulation, over emergency release so as to prevent operation of elevator while doors were open.

SPENCE, J., dissenting.

Appeal from City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Gerald De Graf against the Anglo California National Bank of San Francisco, sued as the Anglo California Trust Company, and another for personal injuries. From a judgment for plaintiff and from an order denying a motion for judgment notwithstanding the verdict, defendants appeal. Reversed, with directions.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

*For subsequent opinion see 92 P.2d 899.

Glensor & Schofield, of San Francisco, for respondent.

STURTEVANT, Justice.

Plaintiff sought damages for injuries sustained in a fall into an open elevator shaft in a building owned by defendants. Upon a trial by jury, plaintiff had judgment. Defendants appeal from said judgment and from the order of the trial court denying their motion for judgment notwithstanding the verdict.

The building was known as 557 Market street in San Francisco and it extended from Market street in the front to Stevenson street in the rear. It was a three-story office building, the tenants consisting mainly of manufacturers' agents. Plaintiff was the manager of the Catalog Filing Company, one of the tenants on the third floor.

The first floor of the building consisted of a large display room provided by defendants for the use of the tenants. A passenger elevator was located near the front thereof and defendants furnished an operator for said elevator during regular business hours. There was also a flight of stairs near the front of the building permitting passage to and from the various floors. At the rear of the display room was a shipping room which could be entered from the display room or from Stevenson street. The freight elevator shaft adjoined this shipping room and there were doors between the shipping room and the elevator shaft. It was into this shaft that plaintiff fell on the night of November 14, 1936.

The question of plaintiff's status at the time and place in question is raised on this appeal and it is therefore appropriate to set forth certain further facts bearing upon this question. There is no evidence showing the terms of the tenancies of any of the tenants of the building and for aught that appears, there may have been no express agreements between the owners and the tenants other than oral agreements for month to month tenancies at specified rentals. It appears that it was customary to lock the front door of the building each day at the end of the regular business hours and at 1:30 p. m. on Saturday, but any tenants who desired keys to the building for the purpose of entering at other times were furnished with the same. It further appears that the Stevenson street door was left unlocked at times on Saturday afternoons on account of delayed freight. No operator was furnished for the freight elevator at any time but the tenants and their employees operated said freight elevator whenever they had occasion to do so. There was also evidence to show that it was used by the tenants for passenger service without objection. In fact, one of the tenants, called as a witness by defendants, testified he and his assistant had used said freight elevator on certain occasions for passenger service in getting up to his office at night. This witness so used said elevator on the night of the accident. Plaintiff had used said elevator but had not previously had occasion to use said elevator at night. His business apparently had not required his presence in the building at night and he had not asked for a key to the building.

The accident happened on November 14, 1936, on which night a parade was held in celebration of the opening of the bay bridge. This parade was to pass along Market street in front of said building. Plaintiff had been advised by the manager of the building that said building would be kept open on that evening. At about 6:30 that evening, plaintiff entered the building with his wife and other members of his family. The passenger elevator was not running and plaintiff decided the family would view the parade from the sidewalk. He further decided to obtain some chairs and boxes from his office on the third floor and to use the freight elevator for the purpose of obtaining the same. He therefore walked through the large display room which was lighted and into the shipping room which was not lighted except by some indirect lighting through transoms from the toilet which adjoined the shipping room and from the display room. The condition of the shipping room was described in various terms by the witnesses, but it is sufficient to state it was dark but not too dark for plaintiff to see the doors to the elevator, which were open.

The freight elevator may be described as similar in many ways to the freight elevators in general use. It was a large elevator with no top but with a solid board siding which appears to have extended practically all the way around three sides thereof. It was suspended by cables attached to the overhead metal beam of the elevator. The doors to the elevator were double doors which were very high and contained large glass panels. Said elevator was normally operated by entering, closing the doors and merely pulling on a rope or cable to start and stop the same. It was so designed that, except by use of the emergency release, which will be hereinafter mentioned, it

could not be operated unless all the elevator doors at all floors other than the basement were fully closed. Furthermore, the doors were so designed that they could not be opened from the outside at any floor, other than the basement, even though the elevator was resting at that floor. This last statement should be qualified but only to the extent of stating it was physically possible to open said doors at any time by the difficult and unusual method of prying the double doors apart and then reaching in and releasing the latch. By reason of the design of said elevator, it was customary to keep said elevator at the first floor with the doors open when said elevator was not in use and the owners maintained a large sign in the elevator reading "Elevator Must Be Returned to First Floor When Empty".

The elevator was equipped with an emergency release which could be used in an emergency for the purpose of operating said elevator while the doors were open. Said emergency release, as its name implies, was not intended for ordinary use. On the contrary, one of the elevator safety orders issued by the Industrial Accident Commission, being order No. 301¾, provided, "The emergency release shall be so arranged that to operate the car under emergency conditions it shall be necessary for the operator to break a glass cover protecting the emergency release and to hold the emergency release in operating condition. The emergency release shall be so constructed and installed that it cannot be readily tampered with or plugged into the operating position." The emergency release on this freight elevator was not in the prescribed condition at the time in question. The glass cover had been previously broken and it had remained in that condition in violation of said safety order for at least several months preceding the happening of the accident, but it was in working order November 14, 1936, and when examined November 17, 1936.

The elevator was also equipped with an electric light which was not lighted at any time on the night in question so far as the evidence shows. Said light was located in a protected and inconspicuous place, high on the side of the elevator between two braces connecting the overhead beam and the side beam of the elevator.

Returning to the events on the night of the accident, it appears plaintiff boarded said elevator at the first floor and lit several matches in an attempt to locate a light in the elevator. He was unsuccessful in his search for the light and he proceeded to run the elevator to the third floor where he obtained the desired chairs and boxes. He then returned the elevator to the first floor and left it there with the doors open as he had found them. He took the chairs and boxes to the street, witnessed the parade and then went to the shipping room for the purpose of using the elevator to return the chairs to his office. The conditions were apparently the same as when he had left the elevator. Plaintiff saw that the door was open and, assuming the elevator was still at the first floor, he stepped across the entrance way with a chair in either hand. The elevator had been moved to the third floor during plaintiff's absence from the building and he fell down the shaft to the basement. After the plaintiff had taken his chairs out of the elevator on the first floor and before he returned, Mr. Winter and Mr. Mullin, also tenants on the third floor, had also used the elevator and had forcibly parked it at the third floor.

[1, 2] Cuvier Green was a tenant of the building doing business as Catalog Filing Company. That company occupied rooms on the third floor. The owner of the building owed to the lessee the duty of exercising ordinary care to keep the stairway, corridors, and elevators in a reasonably safe condition. Reuter v. Hill, 136 Cal.App. 67, 72, 28 P.2d 390. The plaintiff was the manager for Catalog Filing Company and to him the lessor owed the same duty it owed to his employer. The plaintiff was therefore entitled to go to his offices at any time, day or night, unless the terms of the tenancy otherwise provided. Nothing to the contrary appears in the record. The fact he was told by the management that the building would be open to receive the tenants and their friends for the purpose of viewing the parade neither extended nor limited the rights of the plaintiff.

[3-5] The defendants assert that they were not guilty of negligence—that they did not leave undischarged any duty which they owed to the plaintiff. The latter controverts that assertion and states that the defendants were negligent because (1) they failed to have a glass cover over the box in which was located the emergency relief switch which controlled the doors of the elevator; (2) they failed to maintain a light in the elevator; and (3) they failed to maintain a light in the shipping room. Before discussing those specifications it should be noted there was no evidence showing

that anyone could have anticipated any person would on that evening have occasion to visit or use the rear portion of the building, and, in particular, the freight elevator. The first specification was in no manner shown by the evidence to be in any manner connected as a cause, proximate or otherwise, of the accident. In 19 California Jurisprudence 636, the author says: "The principle that violation of statute or ordinance imposing a duty is negligence per se is subject to the limitation that the act or omission must contribute directly to the injury; if it does not, it matters not how improper or illegal the act may have been in the abstract." The plaintiff contends that because the glass was missing it was an invitation to use the emergency device whether an emergency existed or otherwise. The same thing could be said regarding prying open the doors of the elevator—an act which it is admitted could be done. It is sufficient to state there was no evidence that either act was done, nor that either act was a proximate cause of the plaintiff's injury. Nor was the failure to have a light in the shipping room, or a light in the elevator, an act of negligence on the part of the defendants. The plaintiff cites no authority to the effect that the owner of an office building is under any duty, in the absence of a contract to the contrary, to keep any portion of said building lighted at night. The plaintiff was invited to go to the building and witness a parade to be held in Market street. It will not be controverted that the Market street side of the building should have been and that it was lighted. No part of that invitation was so broad as to be considered an invitation to inspect the entire building. There is not a particle of evidence that it was. The rule applicable was stated by the Supreme Court of Massachusetts in Blaufarb v. Drooker, 251 Mass. 201, 146 N.E. 242, 39 A.L.R. 291, in the following language [page 243]: "But the plaintiff had no greater rights in the use of the premises than the tenant, to whom the defendant owed no duty except to maintain the entry and stairs in the same condition they were in at the date of letting. In the absence of evidence that the little hallway or entry was lighted when the tenancy began, the failure of the defendant thereafter to light it, or to reconstruct the stairs, furnishes no proof of negligence." The defendants also assert that the plaintiff assumed the risk of the injury. Quinn v. Recreation Park Ass'n, 3 Cal.2d 725, 46 P. 2d 144.

[6, 7] The plaintiff says it may not be claimed he assumed the risk resulting from defendants' failure to have a glass over the relief switch and the resulting consequence, viz., someone moving the elevator without closing the doors. We think he is mistaken. If on attempting to board the elevator the plaintiff was exercising due care for his own safety he was entitled to assume that others would obey the law and had done so. But, when as in the instant case, under the uncontroverted facts, the plaintiff was exercising no care whatever, but groping through the darkness, he was not entitled to make any such assumption. When, nevertheless, he proceeded as shown above, he assumed all risks attendant on his movements. One of the leading cases in America on that subject is Miner v. Connecticut River R. Co., 153 Mass. 398, 26 N.E. 994. In that case, 26 N.E. at page 995, the Supreme Court of Massachusetts said: "Independently of any relation of master and servant there may be a voluntary assumption of the risk of a known danger, which will debar one from recovering compensation in case of injury to person or property therefrom, even though he was in the exercise of due care. In other words, it may be consistent with due care to incur a known danger voluntarily and deliberately; and this may be so when the danger arises from the known or apprehended neglect or carelessness of others. Ordinarily, in actions to recover damages for injuries to person or property, an instruction as to the effect of contributory negligence on the part of the plaintiff will cover all that need be said to the jury upon this branch of the case. But the principle that one may be debarred from a recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests, and in proper cases this ought to be explained to the jury. One may (with his eyes open) undertake to do a thing which he knows is attended with more or less peril; and he may, both in entering upon the undertaking and in carrying it out, use all the care he is capable of; but whether or not he thereby assumes the risk may depend on other circumstances. One may, without fault of his own, be in a situation where he must choose a perilous alternative. The degree of danger, the stress of circumstances, the expectation or hope that others will fully perform the duties resting on them, may all have to be considered." That case has been repeatedly cited and followed in other jurisdictions.

In the case of Campion v. Chicago Landscape Co., 295 Ill.App. 225, 14 N.E.2d 879, one of the appellate courts of Illinois in 1938 made an extended examination of the authorities. Having done so it reversed the judgment of the trial court which had refused to direct a verdict in favor of the defendant in an action in which the latter had pleaded and proved a defense based on assumed risk. See, also, Restatement of the Law "Torts", secs. 331, 332 and 341 [a]; Schlemmer v. Buffalo, etc., Ry. Co., 220 U.S. 590, 596, 31 S.Ct. 561, 55 L.Ed. 596.

In view of the conclusions just expressed, it becomes unnecessary to discuss any other points presented by the defendants.

The propositions which we have discussed above were repeatedly presented to the trial court ending with a motion for judgment notwithstanding the verdict. From what we have said it clearly appears the last mentioned motion should have been granted.

The judgment is reversed and the trial court is directed to enter a judgment in favor of the defendants.

I concur: NOURSE, P.J.

SPENCE, Justice.

I dissent. Respondent was the manager of the tenant company and I am entirely in accord with the majority opinion where it holds that appellants owed the same duty of care to respondent as they owed to his employer and other tenants. Ordinarily a tenant of an office building has the right, by virtue of the tenancy, to enter the building at any time and to use those portions of the building, including its facilities such as elevators, which are used in common by the tenants of the building. While this right might be altered by lease or otherwise there is nothing in the record to show that the rights of any of the tenants of the building in question were restricted in any manner. The shipping room and freight elevator were furnished for the common use of the tenants and were so used. Appellants furnished no operator for the freight elevator at any time and the uncontradicted evidence shows that it was operated by the tenants and their employers whenever they desired, night or day, for either passenger or freight service. It therefore appears that respondent, by virtue of his status as the manager of the tenant company, was entitled as a matter of right to enter the building and to use the freight elevator at the time and place in question and appellants' claim that respondent was a mere licensee finds no support in the evidence.

On certain other points considered, I cannot agree with the conclusions reached in the majority opinion. I am of the opinion that there was ample evidence to support the implied finding of the jury to the effect that appellants were guilty of negligence which was the proximate cause of the injuries. Only one of the specifications of negligence need be considered, namely the failure to maintain a glass cover over the emergency release in violation of the safety order set forth in the majority opinion. The purpose of this safety order was obviously to prevent the type of accident involved in this case as well as other types of accidents. It was entirely foreseeable that the failure to maintain such cover over the emergency release would be likely to result in the operation of said elevator with the doors open and to create the hazard encountered by respondent. The evidence shows that the glass cover had been broken at least several months prior to the accident and that appellants had neglected to restore it to the prescribed condition during that time. The maintenance of said emergency release in that condition in violation of said safety order constituted negligence as a matter of law (Howell v. San Joaquin Light & Power Corporation, 87 Cal.App. 44, 261 P. 1107), and there was evidence from which the jury might infer that said negligence was the proximate cause of the accident. The evidence shows that after respondent had left the elevator at the first floor, it had been moved by other tenants and that the first floor doors remained open. Appellants produced certain tenants as witnesses who testified that they had operated the elevator to the third floor but had not left the doors open at the first floor or operated the elevator by use of the emergency release. A reading of the testimony of said witnesses, including their testimony regarding the drinking of alcoholic beverages on that evening, shows that the jury was justified in disbelieving portions of their testimony and in concluding that said tenants had left said doors open and had operated said elevator by use of the emergency release. Such action by the tenants would not break the chain of causation. Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 29 P.2d 781; Barbieri v. Law, 209 Cal. 429, 287 P. 464; Restatement of the Law of Torts, secs. 442-453.

Again, I cannot agree that it may be said as a matter of law either that respondent was guilty of contributory negligence or that he assumed the risk of injury. Jacobi v. Builders' Realty Co., 174 Cal. 708, 164 P. 394, L.R.A.1917E, 696; McKeon v. Lissner, 193 Cal. 297, 223 P. 965. The evidence showed that the normal position of the elevator, when not in use, was at the first floor; that there was a sign in the elevator directing that it be returned to the first floor when empty; that it normally could not be at any floor other than the first floor when the first floor doors were open; that respondent did not know that the elevator could be operated under any circumstances without all doors closed; that respondent had left the elevator at the first floor with the doors open and returned later to find the conditions apparently the same. Under these circumstances, I believe that the issue of contributory negligence and the issue of assumption of risk were issues for the determination of the jury and that the jury's implied findings on these issues are binding upon this court.

The majority opinion is based largely upon the case of Miner v. Connecticut River R. Co., 153 Mass. 398, 26 N.E. 994. The only point involved in that case was whether the defendant was entitled to an instruction on the issue of assumption of risk. On page 995 of 26 N.E. of the opinion, the court said: "We have not to consider whether upon the evidence the defendant was entitled to prevail on this ground, but only whether he was entitled to go to the jury upon it." Here the jury was instructed upon that issue at the request of the appellants and the jury decided that issue adversely to appellants. The cases of Quinn v. Recreation Park Ass'n, 3 Cal.2d 725, 46 P.2d 144, and Campion v. Chicago Landscape Co., 295 Ill.App. 225, 14 N.E.2d 879, are also cited in the majority opinion. These cases involved respectively injuries to a spectator at a baseball park and injuries to a participant in a golf game. The hazard in each of said cases was one of which the injured person had full knowledge and the injured person was said to have assumed the risk. In the present case, the jury was justified in finding that the hazard was one caused by the negligence of appellants of which the respondent had no knowledge. It therefore cannot be said as a matter of law that respondent assumed such risk.

I find no prejudicial error in the giving and refusing of instructions as claimed by appellants and in my opinion the judgment and the order denying the motion for judgment notwithstanding the verdict should be affirmed.



29 Cal.App.2d 625

PEOPLE v. PARODI.

Cr. 2043.

District Court of Appeal, First District, Division 2, California.

Dec. 12, 1938.

Criminal law ⇐1182

Where judgment of conviction was entered August 24, 1938, and defendant gave notice of appeal and transcript was filed in District Court of Appeal on October 3, 1938, and no brief was filed by defendant within the time granted for that purpose, and cause was regularly placed on calendar for oral argument on December 12, 1938, and counsel for defendant consented to an affirmance of the judgment, judgment would be affirmed. Pen.Code, § 288; St.1937, p. 1033, § 702.

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Constantino Parodi was convicted of two charges of violation of section 288 of the Penal Code, and on violation of section 702 of the Welfare and Institutions Code, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court in the city and county of San Francisco of felonies, two charges of violation of section 288 of the Penal Code, and of a misdemeanor, violation of section 702 of the Welfare and Institutions Code (St.1937, p. 1033). Judgment was duly entered August 24, 1938, and defendant gave notice of appeal from the judgment. The transcript was filed in this court on Octo-

ber 3, 1938. No brief has been filed on behalf of appellant and the time granted for that purpose has long since expired. The cause was regularly placed on the calendar for oral argument on December 12, 1938. Counsel for appellant and for respondent both appeared at that time. Counsel for respondent moved that the judgment be affirmed and counsel for appellant consented thereto.

The motion is granted and the judgment is affirmed.



29 Cal.App.2d 593

OWENS et al. v. SCHNEIDER et al.

Civ. 2167.

District Court of Appeal, Fourth District, California.

Dec. 9, 1938.

1. Principal and agent ⇐180

Ordinarily, the knowledge of an agent is imputed to his principal, but where an agent is interested in the result of a transaction adversely to the interests of his principal, the rule of imputed knowledge of the principal no longer obtains.

2. Principal and agent ⇐180

In action for damages for fraudulent representations inducing plaintiffs to exchange improved city property for orange grove, through medium of a common agent, plaintiff could not be charged with agent's uncommunicated knowledge of actual condition and productivity of the defendants' orange grove, since agent was also acting for the defendants upon a commission basis, thereby making his interest adverse to plaintiffs.

3. Principal and agent ⇐171(4)

In action for damages for fraudulent representations inducing plaintiffs to exchange improved city property for an orange grove, through medium of a common agent, defendants, having obtained the benefit of agent's acts, was bound by the representations and concealments of the agent.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by David J. Owens and Cora L. Owens against Julius J. Schneider, Laura C. Schneider, and Carl C. Rasmussen, for damages for fraud in exchange of property. From a judgment for the plaintiffs, Julius J. Schneider and Laura C. Schneider appeal.

Affirmed.

Roger C. Dutton, of Anaheim, and Forgy, Reinhaus & Forgy and A. M. Bradley, all of Santa Ana, for appellants.

William L. Waters, of Fullerton, for respondents.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiffs $3,000 for damages for fraud in the exchange of properties. Defendant Carl C. Rasmussen has not appealed.

Respondents were the owners of improved property in Long Beach. Appellants were owners of an orange grove near the city of Anaheim. Both respondents and appellants employed Rasmussen, a realtor, to effect an exchange of their properties. All parties knew of the common agency.

Rasmussen misrepresented the condition and productivity of the orange grove. Respondents believed and relied upon these misrepresentations and were damaged thereby in the sum of three thousand dollars. The trial court particularly found that appellants neither knew of nor authorized in any manner any of the misrepresentations made by Rasmussen and as far as they themselves were actually and personally concerned were innocent parties in the transaction.

Appellants urge that the findings do not support the judgment under the following rule as announced in Fuchs v. Leahy, 321 Mo. 47, 9 S.W.2d 897, 900:

" 'Where two or more principals employ the same agent, whether as a means of dealing with one another or to protect their common interests, one cannot charge the other not actually at fault with the misconduct of the common agent. The latter owes no more duty to one than to the other; each of the principals is under an equal duty to supervise the agent and to protect his own interest, and there is no reason why the misconduct of the agent should be imputed to one principal rather than to the other.' 2 Mechem on Agency (2d Ed.) § 2140. See, also, Austin v. Rupe (Tex.Civ.App.) 141 S.W. 547; Ringer v.

Wilkin, 32 Idaho, 330, 183 P. [986] 988, 989; Walker, Real Estate Agency (2d Ed.) 300; Brown & Co. v. St. John Trust Co., 71 Kan. 134, 80 P. 37; Blair v. Baird, 43 Tex.Civ.App. 134, 94 S.W. 116; Smith v. Farrell, 66 Mo.App. 8; First Nat. Bank of New Milford v. Town of New Milford, 36 Conn. 93."

This rule is followed in many jurisdictions where the principals have knowledge of the common agency. Boss v. Tomaras, 251 Mich. 469, 232 N.W. 229; Greig v. Interstate Inv. Co., 121 Or. 15, 253 P. 877; Mason v. Burnett, 126 Wash. 498, 218 P. 255.

Respondents rely upon the cases of Herdan v. Hanson, 182 Cal. 538, 189 P. 440, and Hamilton v. French, 78 Cal.App. 289, 248 P. 281. See, also, Proctor v. Arakelian, 208 Cal. 82, 280 P. 368. Appellants seek to distinguish these cases from the instant case, because nowhere in the opinions does it appear that the principals knew of the common agencies.

[1-3] We have examined the record on appeal in Herdan v. Hanson, supra. The trial court found on ample evidence that the agent was acting for both parties. It also appears from the record that both parties signed an exchange agreement on May 22, 1913. In that agreement Hanson authorized the agent Reiss to act for him as his agent in the exchange and promised to pay Reiss four hundred dollars commission for his services. Herdan also agreed to pay a commission for effecting the exchange. It therefore appears from undisputed documentary evidence that both parties knew of and consented to the common agency. Therefore, the facts of that case cannot be distinguished from the instant case and it must be considered as controlling here. The Supreme Court affirmed a judgment of four thousand six hundred dollars in favor of plaintiff as damages for the fraud of the common agent in misrepresenting defendant's property. In so doing it was said [page 443]:

"In contending that the evidence as thus outlined does not support the findings complained of, it is argued that Reiss was the agent of the plaintiff, and that therefore the knowledge of Reiss, obtained from the defendant, was that of the plaintiff. Ordinarily the knowledge of an agent is imputed to his principal. Civ.Code, § 2332. But, assuming that Reiss was the agent of the plaintiff, it is the rule that, where an agent is interested in the result of a transaction adversely to the interest of his principal, the rule of imputed knowledge on the part of the principal no longer obtains. 31 Cyc. 1595. In the present case, there was sufficient evidence to support the finding of the trial court that Reiss was acting as agent for defendant in securing the exchange in question. Since he was acting for defendant, upon a commission basis, his interest was adverse to plaintiff, and plaintiff cannot be charged with his uncommunicated knowledge of the actual conditions. On the other hand, having accepted the advantages obtained thereby, defendant was bound by the representations and concealments of Reiss, his agent. Bonnarjee v. Pike [43 Cal.App. 502], 185 P. 479; Civ.Code, § 2330."

It therefore follows that under the rule thus announced the findings support the judgment.

Judgment affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



29 Cal.App.2d 626

PEOPLE v. LONG.

Cr. 2045.

District Court of Appeal, First District, Division 2, California.

Dec. 12, 1938.

Criminal law ⇐1182

Where no appearance was made for appellant when cause was called for hearing and no brief was filed for appellant during time granted for that purpose, conviction would be affirmed.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Lee Long was convicted of robbery in the first degree, and he appeals.

Affirmed.

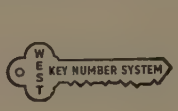
Nathan C. Coghlan and James B. Boland, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court in the city and county of San Francisco of a felony, robbery in the first degree. Judgment was duly entered upon the verdict on September 1, 1938, and defendant gave notice of appeal from the judgment and the order denying his motion for new trial. The transcript was filed in this court on October 11, 1938. The cause was regularly placed upon the calendar for oral argument on December 12, 1938. No appearance was made for appellant at the time the cause was called for hearing. No brief has been filed in his behalf, and the time granted for that purpose has long since expired.

The motion of the attorney-general for an affirmance is granted and the judgment and order denying a new trial are affirmed.



29 Cal.App.2d 627

PEOPLE v. AVILA.

Cr. 1651.

District Court of Appeal, Third District, California.

Dec. 12, 1938.

1. Criminal law ⇐938(1)

Trial court did not err in refusing to grant a new trial to permit defendant to present newly discovered evidence where evidence proposed to be introduced was merely cumulative and was not such as to render a different result probable upon a new trial.

2. Criminal law ⇐958(3)

Where the affidavits filed by defendant did not show that the evidence proposed to be introduced at the new trial could not, with the exercise of reasonable diligence, have been produced on the original trial, nor that the evidence was unknown to the defendant at the time of the trial, trial court properly refused to grant a new trial to permit defendant to present newly discovered evidence.

3. Criminal law ⇐1170(1)

In prosecution in which defendant was jointly charged with robbery and burglary, refusal to admit testimony concerning an alleged brawl in barber shop near the restaurant where the criminal act of defendant was alleged to have occurred shortly prior to the alleged crime did not prejudice rights of defendant.

4. Burglary ⇐41(1)
Robbery ⇐24(1)

Testimony of complaining witness that defendant took money from her person in restaurant operated by her jointly with her husband, together with testimony of a bystander that she saw defendant take the money from complaining witness, and of another bystander that immediately after alleged robbery the complaining witness shouted, "police, police, somebody stole my money," was sufficient to sustain conviction under an information jointly charging defendant with robbery and burglary.

5. Witnesses 370(1)

District attorney could properly ask witnesses for the defense on cross-examination whether they belonged to same Filipino lodge as that in which defendant was a member, since such a question went merely to credibility of witnesses.

6. Criminal law ⇐1160

Where witnesses both for the prosecution and for the defense were Filipinos, who brought into the case all of their prejudices and partisanship, weight to be given testimony of such witnesses was in the first instance for jury, and, upon motion for a new trial, for trial judge, and would not be disturbed on appeal.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Amador Avila was convicted of robbery and burglary, and he appeals.

Affirmed.

M. Logan Rich, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Amador Avila, appellant herein, with one Gapol, was jointly charged by information of crimes of robbery and burglary.

From a judgment of conviction of Avila and from an order denying his motion for a new trial, this appeal is taken.

It is charged that on July 5, 1938, defendants stole, took and carried away about

$100 in lawful money from the person of one Julia Cabebe. In the second count it was charged that the defendants at the same time did unlawfully and burglariously enter a certain building with the intent of then and there to commit theft.

From the testimony it appears that Julia Cabebe and her husband, Vincent Cabebe, were joint proprietors of a restaurant in Stockton, which was largely patronized by members of the Filipino race.

On the morning of July 5th, Mrs. Cabebe counted her money which she had taken from her restaurant the day before, and found there was $194.50. When she finished counting this money she placed it in a leather purse and placed the purse in the bosom of her dress, and went to her place of business. About 6 o'clock on the evening of that day the defendant Amador Avila came into the restaurant and ordered a glass of milk. Mrs. Cabebe served the milk, and after Avila paid for the same he walked out onto the sidewalk and poured the same in the gutter. When he returned Mrs. Cabebe asked him why he did that, and he thereupon seized the front of her dress, tearing it open, took out the leather purse, and extracted a handful of bills, which the evidence disclosed was afterward found to be of the value of $100. At the time this act occurred there were three or four patrons in the restaurant, and many persons outside. Mrs. Cabebe immediately called for help and a small riot took place in the restaurant. Within a few moments police officers arrived, and forced the spectators, all of whom were Filipinos, into a rear room of the restaurant. While the officers were attempting to restore order, the two defendants, Avila and Gapol, escaped. They were soon apprehended and returned to the restaurant, where Avila was identified by Mrs. Cabebe and other witnesses as the man who had seized her purse and took the money.

Four points are raised by this appeal. It is first charged that the trial court erred in refusing to grant a new trial to permit Avila to present newly discovered evidence. This motion was presented upon affidavits from which it appeared that appellant claims that the dress of Mrs. Cabebe was not torn; that Avila did not run from the restaurant but was ordered out; that a fight then occurred on the sidewalk, and that no assault was made upon Mrs. Cabebe, and also contradicted Mrs. Cabebe's testimony in other particulars.

[1, 2] It would appear that this evidence is merely cumulative and is not such as to render a different result probable upon a retrial. Neither does it appear from the affidavits that the evidence proposed to be introduced at the new trial could not, with the exercise of reasonable diligence, have been discovered or produced on the original trial. Nor is there a showing that the evidence in question was unknown to appellant at the time of the trial. We do not believe the court erred therefore, in refusing to grant a new trial.

[3] The next point presented on appeal was that the trial court erred in refusing to admit certain testimony concerning an alleged brawl in a barber shop near the restaurant shortly prior to the alleged crime charged in this information. We do not see where this testimony can be particularly material upon the issues in the criminal charge, and while it would not perhaps have been error to have admitted the same, it certainly was not prejudicial to the rights of defendant to refuse to admit the testimony.

[4] The third point urged for reversal is that the evidence was insufficient to support the judgment. It is claimed that there was no evidence corroborating the fact that Mrs. Cabebe lost her money. It was testified, however, by Mrs. Domasco, as follows:

"* * * I turned around and Mr. Avila was holding her dress. * * *

"Q. You just demonstrate to the members of the jury how he had a hold of Mrs. Cabebe? A. He had a hold—she had a zipper on the front of her dress, and he had a hold of her this way; with his right hand he took out a roll of bills.

"Q. Did you see him take out a roll of bills? A. Yes, I seen it in his hand.

"Q. You saw the roll of bills in his hand? A. Yes, sir."

We have the testimony of a bystander that immediately after the alleged robbery Mrs. Cabebe was shouting, "police, police, somebody stole my money". We also have the testimony of the complaining witness, Mrs. Cabebe, to the effect that the defendant took her money and that she missed $100 from her purse. The only direct evidence contradicting this testimony is that of the defendant himself.

[5] It is also claimed the district attorney erred in that he asked several of the witnesses for the defense if they be-

longed to the same Filipino lodge as that in which defendant was a member. This question went merely to the credibility of the witnesses.

[6] The testimony is not as clear and convincing as might be desired but all of the interested parties including the witnesses were Filipinos, who apparently brought into the case all of their prejudices and partisanship, and it is difficult for us to say exactly where the truth might lie. That, however, was the duty in the first instance of the jury and, upon the motion for a new trial, for the trial judge. They were apparently convinced of the guilt of the defendant, and there is nothing in the record to justify us in now determining otherwise.

It is also urged that the court erred in refusing to give certain instructions. We have read these instructions, and nothing would be gained by setting them forth in this opinion. The instructions given covered the charge fairly and completely, and we can find no reason for complaint.

The judgment and order from which this appeal is taken must therefore be affirmed, and it is so ordered.

I concur: THOMPSON, J.



29 Cal.App.2d 608

BERRYMAN v. QUINLAN et al.

Civ. 10715.

District Court of Appeal, First District, Division 1, California.

Dec. 10, 1938.

1. Trial ⇐243

Instructions that an owner of automobile is liable for injury to any person resulting from negligent operation of the automobile with owner's permission, that if driver were liable, and driver was driving with permission of owner, owner also would be liable, that "no matter how negligent you may find the defendant to have been, negligence alone will not warrant recovery," and that guest could not recover unless injury proximately resulted from willful misconduct of driver, were inconsistent.

2. Automobiles ⇐192(12)

In guest's action against driver and owner who was also riding in automobile, for injuries sustained in automobile accident, where evidence showed that driver had owner's permission to drive but there was no proof of master-servant or principal-agent relation, owner was not liable to guest for driver's willful misconduct.

3. Appeal and error ⇐169

Generally, an appellate court will not consider questions raised for the first time on appeal.

4. Appeal and error ⇐193(9)

Where facts necessary and essential to the statement of a cause of action are wanting, the point may be presented for the first time upon appeal. Code Civ.Proc. § 434.

5. New trial ⇐7

In guest's action against driver and owner who was also riding in automobile for injuries sustained in automobile accident, where complaint did not state a cause of action against owner and it appeared that complaint could not be amended to state a cause of action against owner, order granting guest a new trial as against owner could not be sustained even if errors of law were present, since such errors would be subordinate to owner's right to be confronted with allegations giving the court jurisdiction to try the case.

Appeal from Superior Court, Santa Clara County; J. J. Trabucco, Judge.

Action by Delma Berryman, a minor, by Ernest R. Berryman, her guardian ad litem, against Thomas Quinlan and another to recover for injuries sustained in an automobile accident. From an order granting plaintiff a new trial, defendants appeal.

Affirmed as to the named defendant, and reversed as to defendant Reuben Selleck.

Frank V. Campbell and Walter E. Rankin, both of San Jose (Robert E. Hayes, of San Jose, of counsel), for appellants.

Norman S. Menifee, of Redwood City, and Gregory P. Maushart, of Los Banos, for respondent.

WARD, Justice pro tem.

Plaintiff, by her guardian ad litem, brought suit against the defendants for personal injuries, alleging wilful misconduct. A jury returned a verdict against

the plaintiff. Defendants appeal from the trial court's order granting a motion for a new trial, based on the ground of the insufficiency of the evidence.

Appellants in their opening brief exhaustively quote and argue almost persuasively from cited wilful misconduct cases in an effort to uphold their contention that defendant Quinlan, the driver of the car at the time of the accident, was not guilty of wilful misconduct, but we feel impelled, in reference to defendant Quinlan, to follow the conclusion reached in Chandler v. Quinlan and Selleck, 25 Cal.App.2d 646, 78 P.2d 235, wherein a petition to have the cause heard in the Supreme Court was denied. The decision in that case, affirming the judgment in favor of plaintiff, is not controlling, but the plaintiff was the other guest, the defendants the same, and the evidentiary facts almost identical. In the Chandler Case the court said: "Mrs. Chandler, the plaintiff, together with Miss Berryman, Selleck, and Quinlan left Redwood City on a pleasure trip to go to Toll House in Fresno county, approximately 200 miles from Redwood City. They stopped at Los Banos for lunch, and upon leaving Los Banos Mr. Quinlan took the wheel, Mr. Selleck riding in the front seat with him, and Miss Berryman and Mrs. Chandler occupied the rumble seat. Upon leaving Los Banos Quinlan drove at about 45 miles an hour, increasing the speed gradually until they had attained a speed of approximately 55 to 60 miles an hour. Some few miles out of Los Banos they approached an 'S' curve. As they were approaching the turn both plaintiff Mrs. Chandler and Selleck told Quinlan to slow down on account of the approaching curve. To one of these warnings Quinlan stated, 'Oh, I guess I can make it.' Quinlan, the driver, was warned a second time by Selleck, who said, 'Slow down, Tommy, there is a bad curve ahead of us,' and to this Quinlan again replied that he thought he could make it. The car was proceeding at a too rapid speed to negotiate the turn, as the result of which it skidded onto the gravel shoulder of the highway, causing the car to get out of control, going into a ditch, striking a fence, and causing the injuries to plaintiff here complained of. The weather was clear and the highway approaching the curve was straight, and not only was the curve known to the driver, but some 300 feet before entering the curve there was a state highway sign upon the road indicating an 'S' curve. * * * Here the evidence discloses that defendant Quinlan, when about 500 yards distant, could plainly see the curve he was approaching and continued at the rate of from 50 to 60 miles an hour into the curve, and was warned not only by two of his passengers, but by the state highway insignia of an 'S' curve. Under these circumstances it would seem that one indulging in such conduct, had some knowledge that danger was likely to result therefrom, and was knowingly flirting with danger without necessity compelling him taking a chance, and was guilty of willful misconduct."

The principal point of difference in the two cases, relied upon by appellant, is the factual set-up that in the Chandler Case the decision refers to an "S" curve, whereas in the instant case a diagram indicates that the topography of the roadway ran nearly straight, with two slight bends, one some three hundred feet from a caution sign, and the other near the scene of the accident. Relative to the defendant Quinlan, we feel that the facts as presented in this case merit the same decision as in the Chandler Case.

The complaint in this case alleged that plaintiff was a guest, and that the driver of the car was the defendant Quinlan, who operated the car with the permission and consent of the defendant Selleck. All allegations of wilful misconduct were directed toward the defendant Quinlan. The evidence does not indicate any actual wilful misconduct on the part of defendant Selleck. On the contrary, before reaching the bend in the road, Selleck advised and requested Quinlan to slow down the speed of the car.

[1] The court instructed the jury that the owner of a motor vehicle was liable and responsible for injury to any person resulting from negligence in operating the vehicle with the permission of the owner. The jury was also instructed that if a verdict was found against Quinlan, and if Quinlan was driving with the permission and consent of the owner of the vehicle, and if Selleck was found to be the owner, then in such event a verdict should be returned against the owner Selleck. Subsequently the jury was instructed that: "* * * no matter how negligent you may find the defendant to have been, negligence alone will not warrant a recovery by this plaintiff." The jury was also instructed that unless the injury proximate-

ly resulted from the wilful misconduct of the driver, plaintiff was not entitled to a right of action against the driver or against anyone legally responsible for such driver. These instructions were inconsistent.

In Weber v. Pinyan, 9 Cal.2d 226, 238, 70 P.2d 183, 189, 112 A.L.R. 407, the court said: "In short, therefore, we find the Civil Code section imputing to the owner liability for negligence and the guest law adopted at the same time declaring that he shall not be held liable for negligence to a guest. We conclude, therefore, that the express and unambiguous language of section 1714¼ means that, in absence of some other relation such as that of master and servant or principal and agent, the owner of a vehicle who permits another to operate it is liable for injuries arising from the latter's 'negligence' as that term is defined herein, but that he is not liable for injuries arising from the driver's willful misconduct or intoxication. We also conclude that liability under section 141¾ of the Vehicle Act was limited to acts of the owner or driver arising from the intoxication or willful misconduct by the owner or driver as the case may be, and that the owner who merely permits another to drive his car, and where no other relation exists, is not liable under either statute for injuries to a guest arising from the intoxication or willful misconduct of the driver. For these reasons the complaint failed to state a cause of action against the respondent, and her demurrer was properly sustained."

[2] The evidence in the present action shows permission by Selleck, the owner, to Quinlan, to drive the car, but no proof was offered indicating the relation of master and servant or principal and agent. We conclude, therefore, that Selleck was not legally liable to plaintiff. This point was not presented in Chandler v. Quinlan and Selleck, supra.

In this case no demurrer to the complaint was filed, and no special objection on behalf of Selleck made to the introduction of the evidence. Plaintiff presented her case upon the theory that the defendant Selleck would be liable if judgment was rendered against defendant Quinlan. No mention of the point was made on the motion for a new trial, but the record shows the presentation of a motion on behalf of both defendants for a directed verdict, which motion was denied. The denial of this latter motion is not referred to in the briefs filed by respondent.

[3, 4] The general rule, subject to exceptions, is that an appellate court will not consider questions raised for the first time on appeal. One of the exceptions is where the complaint does not state a cause of action. Code Civ.Proc. § 434. The court in Reid v. Thomas, 99 Cal.App. 719, 721, 279 P. 226, 227 held: "Where a complaint absolutely fails to state a cause of action, a demurrer is not necessary, but the defect may be raised at any stage of the proceeding and in any manner which presents the grounds of objection." "The question of jurisdiction may be raised for the first time on appeal, since the parties cannot by their consent confer jurisdiction." Emery v. Pacific Employers Ins. Co., 8 Cal.2d 663, 665, 67 P.2d 1046. If necessary and essential facts to the statement of a cause of action are wanting, the point may be presented for the first time upon appeal. Cameron v. Ah Quong, 8 Cal.App. 310, 312, 96 P. 1025. In Norager v. Mountain States Life Ins. Co., 10 Cal. App.2d 188, 192, 51 P.2d 443, 445, the court said: "Appellants filed no demurrer to the complaint, nor was the question of want of jurisdiction suggested by answer or during the course of the trial; but being a jurisdictional question, it may be raised for the first time on appeal. (Hallock v. Jaudin, 34 Cal. 167, 173; 21 Cal.Jur. p. 268)."

[5] The complaint in the instant case does not state a cause of action against the defendant Selleck. The order granting plaintiff and respondent a new trial against defendant Selleck cannot be sustained. The order for a new trial was granted on the ground of the insufficiency of the evidence to justify the verdict. Respondent contends that certain instructions were erroneous, and that a new trial should have been granted upon the ground of errors of law. Assuming that certain instructions were erroneous, the errors in this respect were collateral and subordinate to the right of the defendant Selleck to be confronted with a statement of facts giving the court jurisdiction to try the case.

Respondent in her brief admits that upon a new trial it would be necessary to amend the complaint against Selleck. Under the decision in Weber v. Pinyan, supra, and the facts as set forth in the transcript of testimony, it does not appear that the complaint could be amended to state a cause of action against Selleck, and re-

spondent does not even suggest a means of doing so.

The order granting a new trial against defendant Quinlan is affirmed, and the order granting a new trial against defendant Selleck is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



29 Cal.App.2d 580

HARMON v. M. H. SHERMAN CO. et al.

Civ. 11585.

District Court of Appeal, Second District, Division 1, California.

Dec. 9, 1938.

Rehearing Denied Jan. 3, 1939.

Hearing Denied by Supreme Court Feb. 6, 1939.

1. Health ⇐32

A city ordinance, enacted "for the preservation of the public health and safety" and prohibiting installation of water closets without tanks containing at least 4 gallons of water or supplied with water directly from street service or building supply, is sufficiently broad to show intention to provide protection against hazards endangering public safety and well being, as well as necessary sanitation to safeguard public against disease.

2. Health ⇐32

A city ordinance, prohibiting use of toilet fixtures, bowls of which are supplied with water direct from street service or building supply, is not obsolete as prohibiting use of modern type of fixture generally in use, particularly in certain hotel and city hall of large city.

3. Health ⇐20

The city of Hermosa Beach could determine type of toilet fixtures to be used within its corporate limits.

4. Negligence ⇐2

Failure to perform duty imposed by law is sufficient evidence of negligence.

5. Landlord and tenant ⇐169(6)

Evidence that building owner installed toilet in washroom of restaurant therein without any flush tank and supplied with water directly from building supply in violation of city plumbing ordinance was sufficient evidence of such owner's negligence, in action for injuries to restaurant proprietor's employee burned by scalding water and steam when she attempted to flush toilet bowl.

6. Torts ⇐15

An original wrongful act may be so continuous that third person's act precipitating disaster will be regarded in law as not independent, but conjoining with original act to produce accident.

7. Landlord and tenant ⇐165(1)

A building owner's continuing negligence in installing and maintaining toilet fixture, directly connected with building's general water supply system without interposition of flush tank, in washroom of restaurant in building, contrary to city ordinance, *held* to have concurred with restaurant proprietor's negligence in so installing and negligently regulating gas heater that quantities of hot water and steam backed up in main water supply line as proximate cause of injury to restaurant proprietor's employee burned by scalding water and steam when she attempted to flush toilet bowl.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Juanita Harmon against the M. H. Sherman Company, sued as the Sherman Land Company, a corporation, the Hermosa Beach Land & Water Company, and Alex McDonald and another, doing business under the fictitious name and style of the "Dog House," to recover damages for personal injuries sustained through defendants' alleged negligence. From a judgment for plaintiff against defendants McDonald and Hermosa Beach Land & Water Company, and an order denying the latter's motion for a new trial, it appeals.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles (John J. Ford, of Los Angeles, of counsel), for appellant.

Willis O. Tyler and Ivan J. Johnson, III, both of Los Angeles, for respondent.

YORK, Presiding Justice.

The respondent Juanita Harmon, a pianist, was employed as an entertainer by defendant Alex McDonald at his café

known as the "Dog House" located in the city of Hermosa Beach, California, and on the evening of August 4, 1934, while using a toilet in the washroom of said café, she attempted to flush the bowl thereof and was severely burned by an ascending stream of scalding water and steam which poured into the said toilet bowl and upon the person of said respondent. Thereafter, she brought the instant action for damages for the injuries so sustained by her through the alleged negligence of the defendants. Defendant McDonald failed to appear and answer and his default was duly entered by the clerk of the court. A nonsuit was granted as to the Sherman Land Company and the motion of defendant Hermosa Beach Land and Water Company to reopen the case for further evidence and argument was denied. Judgment was entered on May 18, 1937, against the defaulting defendant McDonald for the sum of $16,703.50, and against the defendant Hermosa Beach Land and Water Company, a corporation, for the same amount. The said corporation alone prosecutes this appeal from the judgment, as well as from the order by which its motion for a new trial was denied.

It is shown by the record herein that appellant corporation was the owner and lessor of the premises where the "Dog House" café was located, and that defendant McDonald was the lessee thereof, under a written lease dated June 6, 1934, said lessee paying as rental to the said lessor 7½ per cent of the gross receipts from the restaurant business which it was provided in the lease should be conducted upon the said premises.

The toilet in question abutted a partition separating the kitchen from the dining room and bar of the said café, and was located in a small room approximately 4x6 feet near the end of the bar, its entrance being sheltered by a screen. This toilet fixture had been installed by appellant as owner and was so installed before the lease of the premises was made to defendant McDonald, and was the only toilet provided or available for use upon the said leased premises.

In order to provide hot water necessary in the conduct of his business, defendant McDonald installed a gas heater in a small alcove in the kitchen. The toilet and the water heater were located in different rooms but were served by water pipes entering the same wall from opposite sides, and at or near the same general location in the said wall which separated the kitchen from the dining room and the bar.

The respondent alleged and proved in her case in chief, and the court found as a fact, that there had been in effect since April 22, 1913, a plumbing ordinance No. 217 in the city of Hermosa Beach, and which was in effect at the time of the installation of the toilet fixture and also at the time of the injury, said ordinance providing, among other things, as follows: "Section 11. * * * First: No water closet shall be put into or upon any property, house or building except those flushed by a tank containing no less than four (4) gallons of water. Plunger closets. Philadelphia hoppers, pan closets or any other closets, where the supply to the bowl is direct from the street service or building supply are prohibited in all cases and where such exist, shall be removed and replaced with water tank closets."

The amended complaint alleged that defendants installed and maintained said toilet in direct violation of the plumbing ordinance, supra. Upon this particular issue, the court found as follows:

"The court finds that the type of toilet installed and maintained in the defendant corporation's premises was in violation of the city ordinance then in effect hereinbefore referred to and was in violation of said ordinance when installed by the defendant corporation.

"The court further finds from the evidence that said toilet was of the type and kind prohibited from being maintained in any building in the city of Hermosa, both at the time of installation and at the time of the injury to the plaintiff.

"The court further finds that the water supply to the toilet bowl was direct from the building water supply and there was not a flushing tank between the toilet bowl and the main building water supply.

"The evidence shows and the court finds that instead of getting water from the flushing tank (of not less than four gallons of water as provided by the ordinance) into the toilet bowl when the plaintiff tripped the lever there flowed and rushed steam and super heated water and scalding water directly from the building water supply. This was supplied in great quantities, instantaneously and with pressure directly into the toilet bowl and upon the plaintiff."

Because there was a conflict in the testimony of the experts, who testified as to plumbing and plumbing fixtures and particularly with reference to the operation of a flush tank toilet, the court made the following finding: "In this connection the court must say that there is substantial evidence to the effect that with a flush tank toilet common in use and type complying with the plumbing ordinance in question, it is possible that the plaintiff might or probably could have been burned. On the other hand, it is beyond any question of doubt and a certainty that she was burned and seriously so with the flush valve type. The court is of the opinion from the evidence and must find that it is probable that she could have been burned and scalded with a tank type toilet under similar conditions; *this finding has some limitations shown by the evidence being that she could not have been burned as badly, or in the degree in which the evidence shows she was burned in this case. And further it is equally probable and possible that she may not have been burned at all.*" (Italics added.)

Respondent also contended that the defendants installed and maintained the gas water heater upon the premises in violation of the same plumbing ordinance, which provides: "Section 14. Every gas heater used or intended to be used for the heating of water or otherwise, except small portable stoves, shall be provided with a vent pipe not less than three inches in diameter extending to the open air."

As to this issue, the court found if any such violation occurred, it was occasioned alone and solely by the act of the defendant McDonald installing said heater without a permit or an inspection, and in not having it installed by a licensed plumber.

In accordance with said findings of fact the court concluded as a matter of law, "that the toilet did not have a flush tank containing no less than four gallons of water and that the water supply came directly from the building supply to the bowl of the toilet, that applying the general rules of law of construction applicable to the plumbing ordinance involved herein, that the conduct of the defendant corporation in installing the water toilet and in leasing the building with the flush valve type of water toilet, as it did, was in violation of the ordinance, and that it was such a violation that it makes the defendant corporation guilty of negligence per se.

"The court further concludes that the proximate cause of the injuries to the plaintiff is the conduct of the defendant corporation (violations of the ordinance) conjoining with the negligence of the defendant McDonald (the violation of the ordinance in installing the heater and in permitting the same to become over-heated)."

As to the conduct of the respondent Harmon, the court found that "she contributed in no manner or form to the injury she received.

"The court finds that as the direct result of said injury she was seventeen (17) weeks in a hospital, suffered excruciating pain and suffering, and underwent treatment many months. She also underwent skin grafting operations as the direct and proximate result of said injury. She was treated by physicians and nurses at the county hospital and also by her own private physician. Her own physician called upon her some fifty-six different times and administered treatment, both palliative and other kinds, to relieve pain and to prevent contraction of the scar tissue of the skin and to aid mobility of the joints. The testimony showed that the plaintiff was burned on the shoulder to the elbow and from the hips to the knee, and the knee completely encircled with burns; burns completely encircling other thigh to the knee; private parts, buttocks and hips burned. Biggest part of her burns were third degree burns. She was burned to such an extent that she had to walk in a squatted position and could not straighten up; that her injuries are permanent, accompanied more or less by continual pain and annoyance, particularly when the scar tissue dries for lack of natural oil in the skin. It appears that she was a piano player by profession, and her ability in this connection is disabled to at least forty per cent (40%) and sixty per cent (60%) in total disability, all of which was the direct and proximate result of said injuries received from said burns received as aforesaid." The various items of special damages were itemized which, added to the sum of $15,000 allowed as general damages, totaled the sum of $16,703.50, for which judgment was entered in favor of said respondent.

It is here urged by appellant corporation that (1) The finding that appellant

had violated ordinance number 217 of Hermosa Beach is not supported by the evidence; (2) There is no evidence either that appellant was negligent or that any negligence of appellant proximately contributed to respondent's injuries; (3) The judgment is not supported by the findings of fact in that there are no findings upon which the legal conclusion can be predicated that appellant was negligent and that any negligence of appellant proximately contributed to respondent's injuries; (4) The uncontradicted evidence conclusively shows that even if it be conceded that appellant was negligent, the intervening negligence of defendant McDonald was the proximate cause of the accident and of respondent's injuries; (5) The judgment and conclusions of law are not supported by the evidence.

Appellant urges that there can be no violation of the ordinance here in question because it is merely directory or advisory and that the violation of an ordinance does not constitute negligence unless the injury results from the hazard at which such ordinance is directed.

[1-3] This ordinance was enacted "for the preservation of the public health and safety", and is sufficiently broad to include within its scope not only an intention to provide for the necessary sanitation to safeguard the public against disease, but as well to provide protection against such hazards as endanger their safety and well-being. It expressly prohibits the use of a toilet fixture "where the supply to the bowl is direct from the street service or building supply", and requires that the prohibited type of fixture shall be removed and replaced with "water tank closets". Moreover, it imposes a penalty for failure to conform to any of its terms. It was in full force and effect when the fixture here involved was installed, as well as when the injury was sustained. Appellant's argument that the ordinance is obsolete because it prohibits the use of a modern type of fixture which is generally in use, particularly in the Hotel Biltmore and in the city hall of the city of Los Angeles, is wholly without merit. The municipality of Hermosa Beach has full power and authority to decide the type of fixture which shall be used within its corporate limits.

[4, 5] It is the settled law in California that the failure to perform a duty imposed by law is sufficient evidence of negligence. In the instant case the evidence specifically shows that appellant, the owner of the building where the restaurant was located, in violation of the plumbing ordinance installed a toilet without any flush tank whatsoever, and that the supply of water to the bowl of the said toilet was directly from the building supply.

[6, 7] With regard to appellant's contention that the negligence of defendant McDonald was the sole proximate cause of the injury, and even conceding that appellant was negligent, that the negligence of the said McDonald was the efficient intervening and sole cause of respondent's injuries, the court found that it was the concurrent negligence of both appellant and McDonald which constituted the proximate cause of the said injuries. It is perfectly obvious that the injuries were not caused solely by McDonald's negligent installation and operation of the water heater. With the type of toilet fixture here involved, the injury could have been caused by any heater which allowed hot water and steam to back up in the main water supply system, whether such heater were located upon the premises or upon premises in the immediate vicinity of the building. Upon this appeal, we cannot speculate as to what might have or might not have happened had a tank been interposed between the main supply line and the toilet itself. It is clear from the evidence adduced at the trial herein that respondent was injured through the agency and instrumentality of the direct connection of the toilet valve with the main water supply line which direct connection was prohibited by law.

It is well established that the original wrongful act may be so continuous that the act of a third person precipitating the disaster will be regarded in law not as independent, but as conjoining with the original act to produce the accident. Rauch v. Southern Cal. Gas Co., 96 Cal.App. 250, 256, 273 P. 1111; citing Carroll v. Central Counties Gas Co., 74 Cal.App. 303, 240 P. 53; Merrill v. Los Angeles Gas & Electric Corp., 158 Cal. 499, 111 P. 534, 31 L.R.A.,N.S., 559, 139 Am.St.Rep. 134; Marton v. Jones, 44 Cal.App. 299, 186 P. 410; Sawyer v. Hooper, 79 Cal.App. 395, 249 P. 530. Applying this settled doctrine to the facts in the instant case, there can be no question but that the continuing negligence of appellant in installing and maintaining the toilet fixture directly connect-

ed with the general water supply system without the interposition of a flush tank, which was a violation of the ordinance, concurred with the negligence of defendant McDonald, who installed and so negligently regulated the heater that quantities of hot water and steam were allowed to back up into the main water supply line, and that these two concurring acts of negligence constituted the proximate cause of respondent's injuries. See Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 29 P.2d 781.

The finding of fact, the conclusions of law and the judgment are substantially supported by the evidence.

For the foregoing reasons, the judgment is affirmed. The appeal from the order denying appellant's motion for a new trial is dismissed.

We concur: DORAN, J.; WHITE, J.



29 Cal.App.2d 631

MAU v. McMANAMAN et al.

Civ. 6057.

District Court of Appeal, Third District, California.

Dec. 12, 1938.

1. Wills ⇐67

An heir of a deceased landowner could maintain action to quiet title and to determine interests in certain land, which landowner had allegedly conveyed to other heirs in violation of agreement to devise all his property to children in equal shares, under statute authorizing heirs to bring suit for the possession of realty or for the purpose of quieting title. Probate Code, § 581.

2. Equity ⇐39(1)

The equity court will, in one action, grant all the relief to which the parties are entitled, although at law such a result might strictly require several actions.

3. Appeal and error ⇐907(3)

On appeal on the judgment roll alone, reviewing court does not have the evidence before it, and must presume that the findings and judgment based thereon are fully supported by evidence, properly introduced and admitted.

4. Appeal and error ⇐1071(6)

A judgment will not be reversed for want of a finding unless it appears there was evidence or lack of evidence which required a finding in appellant's favor.

5. Wills ⇐67

Where father executed agreement to devise all property of which he should die possessed to his children in equal shares, in consideration of children's release of their interest in mother's estate to father, father's subsequent attempt to convey his realty to sons to the exclusion of daughter was a violation of the agreement, against which equity would afford relief.

6. Wills ⇐67

A father's deed of realty to sons, to the exclusion of daughter, in violation of agreement to devise property equally in consideration of children's release of their interests in mother's estate, which sons induced father to execute without daughter's knowledge at the age of 82, when father was afflicted with senile dementia, was properly set aside in equity.

7. Appeal and error ⇐907(3)

On appeal on the judgment roll alone, reviewing court must assume that evidence supported trial court's findings and uphold the trial court's conclusions in absence of negative findings upon any of the material issues.

8. Wills ⇐67

Where father executed agreement to devise all property of which he should die possessed equally among children, in consideration of children's release of their interests in mother's estate, but conveyed realty to sons to exclusion of daughter, the sons, as distinguished from innocent purchasers, could not take advantage of the conveyance.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Kathryn Mau against Rufus M. McManaman and others, to quiet title and to determine adverse interests in land. From a decree for plaintiff, the named defendant appeals on the judgment roll.

Affirmed.

Paul Overton and R. G. Blanchard, both of Los Angeles, for appellants.

Alvan M. Palmer and Earl G. Read, both of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff, as an heir of Isaiah W. McManaman, brought this action by virtue of section 581 of the Probate Code to quiet title and to determine adverse interests to certain parcels of land in the county of Los Angeles.

The complaint alleges that the three brothers of plaintiff, fraudulently taking advantage of the weakened mental condition of their father, obtained from him a conveyance of practically his entire estate, thereby violating not only the trust imposed by the fiduciary relationship of father and sons but also an express agreement between the father and his children that in consideration of a conveyance by the children to him of their interest in the estate under their mother's will he would devise all of his property to them in equal shares. As the execution of the agreement the court found:

"After the death of Emma Catherine McManaman and in order to avoid a partition of her interest in the real property described in paragraph I hereof, plaintiff and her said brothers, on December 31st, 1931, entered into a written agreement with their father, whereby they conveyed to him their respective interests in their mother's estate in consideration of his promise to make a Will and to thereby devise and bequeath to them, share and share alike, all property of which he was possessed. * * At the time said agreement was entered into it was the intention of the parties thereto that Isaiah W. McManaman, now deceased, should have the free use and management of all of the said property during his lifetime, but that he would not dispose thereof by gift or for less than full consideration, or in any way favor any of his children at the expense of the others, and that he would devise and bequeath to his said children, share and share alike, all of the property of which he was then possessed and seized, or the fruits and products thereof. Pursuant to said agreement, and the intention of the parties thereto, said Isaiah W. McManaman, on December 31st, 1931, made and executed his Last Will and Testament, devising and bequeathing to his said four children, share and share alike, all of the property of which he was possessed." About one year after this agreement McManaman made the attempted conveyance to the sons, which is the subject of this litigation.

The several answers of the defendants denied the allegations of the complaint bearing upon the question of undue influence and fraud, and also denied any violation of the agreement entered into, setting out that the agreement of the father was to devise to his children all the property of which he might die possessed, and that it did not prevent him from conveying, as he did, any of his property, during his lifetime.

Trial was by the court, which found that the real property in question was a part of the estate of Isaiah W. McManaman, deceased, and subject to the regular course of administration, and that the deed to the sons should be cancelled and of no effect.

This appeal, prosecuted by one of the brothers only, is upon the judgment roll, and contends, first, that no cause of action existed on behalf of the estate, and that the judgment is not supported by the findings in that there is no finding of fraud, undue influence, duress or incompetency of deceased, and that the court erred in holding that the conveyance was in violation of the contract.

[1] As to the first point section 581 of the Probate Code, formerly section 1452 of the Code of Civil Procedure, seems to warrant the filing of the complaint.

"The heirs of the deceased were expressly authorized to bring suit for the possession of real estate, or for the purpose of quieting title to the same. Code Civ.Proc. § 1452. The decree sought was, in effect, both to quiet title to the land against defendant's claim of ownership, and to establish a right to possession, subject to the rights of the administrator of the estate, and it was proper and necessary in the case to determine whether or not the plaintiff was an heir or devisee, and thus entitled to bring the suit. We think it unnecessary to pass upon any other point presented by the appellant, as the rules of evidence with relation thereto are well settled." Collette v. Sarrasin, 184 Cal. 283, page 289, 193 P. 571, page 574.

[2] Here the decree required the real property to be returned to decedent's estate, thereby facilitating the fixing of inheritance taxes, the rights of creditors, as well as obtaining an equitable distribution. It is one of the firmly established rules of equity that the court will, in one action,

grant all the relief to which the parties are entitled, although at law such a result might strictly require several actions. Newport v. Hatton, 195 Cal. 132, 231 P. 987.

[3] This appeal being on the judgment roll alone, we do not have the evidence before us, and it must be presumed that the findings and the judgment based thereon are fully supported by evidence, properly introduced and admitted.

[4] "A judgment will not be reversed for want of a finding unless it appears there was evidence or lack of evidence which required the court to make a finding in favor of the appellant. Bliss v. Sneath, 119 Cal. [526] 529, 51 P. 848. The evidence is not before this court." Terry v. Southwestern Bldg. Co., 43 Cal.App. 366, page 370, 185 P. 212, page 214. See, also, Sacre v. Imperial Water Co., 206 Cal. 13, 272 P. 1044.

There is no dispute that plaintiff, together with her brothers, conveyed her interest in these lands to her father. In turn the father executed an agreement, prepared by a relative of one of the defendants, which recited that in consideration of the release of the interest of the children to the father he would devise to them all property of which he died possessed, as set out in his will, a copy of which was made a part of the agreement.

[5] We find no error in the holding of the trial court that the attempted conveyance by the father, after the execution of this agreement, of practically all of the real property of the estate to the sons to the exclusion of the daughter, was a violation of the agreement. The case of Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728, although dealing with an oral agreement, is in other respects very similar to the instant case, and the court there held the attempted disposition of the property was either a fraud in law or a constructive fraud upon the agreement, whether he intended it as a fraud or not. This being an action in equity the power of the court was ample to protect the parties.

[6] Appellants claim the findings do not establish fraud. The court does find, however, that at the time the deeds were executed the father was of the age of eighty-two years and affected with senile dementia. The court also found the defendants procured their father's execution of the deed. Also that the sons concealed the making of the deeds from plaintiff.

[7] As held in Payne v. Payne, 12 Cal. App. 251, 107 P. 148, a deed was properly set aside in equity, where the grantor, though not mentally incompetent, was, among other failings, enfeebled by age, had no independent advice as to the deed, which was executed without the knowledge of and the fact concealed from the party interested and whose rights were affected by the instrument. Furthermore, as the court there said, an elderly person who has become feeble and whose mental and physical powers are waning should not be allowed to become the victim of designing persons. True, in the case just cited, the entire record was before the court, and it appeared the plaintiff herself was seeking the recovery of the property, but here, although no record is before us, the court made its findings and held the deed invalid. We must assume the evidence supported those findings, and there being no negative findings upon any of the material issues, we must uphold the conclusions of the trial court. In Bowers v. Union Trust Co., 117 Cal.App. 259, 3 P.2d 614, the court said [page 616]:

"The facts found would not support a judgment in favor of the appellant, and we are required to assume, in the absence of a bill of exceptions or reporter's transcript of the testimony, that the failure of the trial court to find other facts favorable to appellant's contention was due to the fact that no evidence was produced which would justify such finding. Ouzoonian v. Vaughan, 194 Cal. 139, 228 P. 8. When an appeal is to be determined upon the judgment roll alone, all intendments will be made in support of the judgment and all proceedings necessary to its validity will be presumed to have been regularly taken. 2 Cal.Jur. 521."

Gathering the facts from the findings it would seem that for the court to have held that the conveyance here complained of was not a violation of the agreement between the father and his children, would have been a miscarriage of justice. Plaintiff, without consideration, and without independent advice, conveyed to her father all her interest in this property, clearly with the intention to thereby give the father the use and enjoyment of the property during his lifetime. Attached to the agreement was a will dividing the property in equal shares among the children. Clearly it was assumed he would die possessed of all the property then conveyed to him;

at least we may so infer from the findings or lack of findings upon that question.

[8] If this property were now found in the hands of an innocent purchaser a different situation would apply, but for the sons to take advantage of this situation, should not be sanctioned by the law.

The judgment is affirmed.

We concur: MAXEY, Justice pro tem.; THOMPSON, J.



29 Cal.App.2d 637

In re ANDERSON'S ESTATE.

Civ. 10862.

District Court of Appeal, First District, Division 1, California.

Dec. 14, 1938.

Hearing Denied by Supreme Court Feb. 9, 1939.

1. Wills ⇐163(2)

Where one who unduly profits by will as beneficiary thereunder sustains confidential relation to testator and has actually participated in procuring execution of will, the burden is on him to show that will was not induced by coercion or fraud.

2. Wills ⇐163(2)

A presumption of undue influence arises from proof of confidential relation between testator and beneficiary unduly profiting by will, coupled with activity on part of such beneficiary in preparation of will.

3. Wills ⇐163(2)

Evidence that confidential relation existed between deceased and husband and wife who were beneficiaries of will and that wife actively participated in execution of will gave rise to presumption of undue influence against which the jury was required to waive the other evidence in the case and to determine as a question of fact whether the presumption had been overcome.

4. Wills ⇐386

In will contest, the jury's finding of fact as to whether presumption of undue influence had been overcome would not be disturbed on appeal.

5. Wills ⇐318(3)

In will contest, findings that deceased was of unsound mind and that will was not properly subscribed were not inconsistent with finding of undue influence.

6. Trial ⇐358

Where a finding is made upon an issue which determines a cause, other issues bearing upon the same cause become immaterial, and the fact that other findings are made not in any way inconsistent with the findings which dispose of the case is of no consequence.

7. Appeal and error ⇐110

An order denying a motion for a new trial is not "appealable."

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Oscar Anderson, deceased, wherein Clara Hedendahl filed a contest to the will of Oscar Anderson, deceased. The contest was opposed by Frank Winkler and Elizabeth Winkler. From a judgment denying probate and from an order denying a motion for a new trial, Frank Winkler and Elizabeth Winkler appeal.

Judgment affirmed and appeal from order dismissed.

Norman Johnson, of Fort Bragg, and Thomas & Thomas, of Ukiah, for appellants.

Sven H. Svenson, of San Francisco, for respondent.

JONES, Justice pro tem.

This is an appeal from a judgment denying probate to the purported will of one Oscar Anderson and from an order denying a motion for a new trial.

By the terms of this will the decedent bequeathed all of his property to the appellant Elizabeth Winkler, and named her husband, Frank Winkler, executor thereof. A sister, Clara Hedendahl, was named and bequeathed one dollar. The case was tried before a jury and special issues were submitted.

The appellants concede that no error was committed in the conduct of the trial,

or in instructing the jury. The only claim for a reversal of the judgment is made on the ground that the verdict of the jury on the special issues submitted is not supported by the evidence. The contest to the will was filed by the sister, Clara Hedendahl, who is alleged to be the only near relative and heir of said decedent. The contest is in three separate counts. The first count alleges unsoundness of mind; the second, undue influence; and the third, that the will was not properly executed.

Anderson had resided in San Francisco for many years, and, through saving, had accumulated over seven thousand dollars. He was on friendly terms with his sister. In 1926 he made a will in which he named her as sole beneficiary. A regular correspondence was carried on between the two. In many of the letters to his sister, who lived in New York, he mentioned that he was in poor health and intended that she should have his property upon his death. Several witnesses testified that Anderson stated on numerous occasions, and as late as April, 1935, that he had arranged for his sister to receive what he had left upon his death. This last statement was made as he was leaving San Francisco for the home of the Winklers in Fort Bragg, and about three weeks before his death. The testimony shows that he had the will which he had made in 1926 with him at this time. There is nothing to show that any estrangement ever existed between him and his sister, or that she was not the natural object of his bounty.

The decedent became acquainted with the appellant Frank Winkler about the year 1902, and later with his wife, Elizabeth Winkler. He visited the Winklers regularly at their home in Fort Bragg, and for periods of from two to three weeks at a time. In April, 1935, his health became particularly poor. He left San Francisco to go to the Winklers and arrived in Fort Bragg on April 24th. His health continued to fail and in a short time he took to his bed and died on May 15th. The cause of his death is given as chronic myocarditis and acute alcoholism. During his entire stay in the Winkler home he was cared for and ministered to by Mrs. Winkler. He would not have a doctor and none was called to attend him until a day or so before his death.

On May 13th, two days before he died, according to the testimony of Mrs. Winkler, Anderson asked her for a pencil and paper, and made the further request that she call in some one to write for him. She asked in two of her neighbors, a Mrs. Berkovits, who had had some legal experience, and another neighbor, Mrs. Howard. The decedent, Anderson, then stated how he wished to dispose of his property, and Mrs. Berkovits proceeded to write down his statements in the form of a will, which is the contested document here. After the will was written, Mrs. Winkler assisted the others in propping Anderson up in bed so that he could sign it, which he did. It was then signed by Mrs. Berkovits and Mrs Howard as witnesses. The will was then taken and kept by Mrs. Winkler, and by her handed to her attorney after Anderson's death.

[1, 2] As stated in the Estate of Graves, 202 Cal. 258, 262, 259 P. 935, 937: "The rule is well settled that: '"Where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud" (Estate of Baird, 176 Cal. 381, 384, 168 P. 561; Estate of Nutt, 181 Cal. 522, 528, 185 P. 393), and that "a presumption of undue influence arises from proof of the existence of a confidential relation between the testator and such a beneficiary, coupled with activity on the part of the latter in the preparation of the will" (Estate of Higgins, 156 Cal. [257] 261, 104 P. 6).' Estate of Relph, 192 Cal. 451, 465, 221 P. 361, 367."

[3, 4] All of the factors essential to the existence of a confidential relation are present in this case, and there is also present an active participation in the execution of the will. This situation gives rise to a presumption of undue influence. Against this presumption the jury was required to weigh the other evidence in the case, and to determine as a question of fact whether the presumption had been overcome. By its finding upon the special issue of undue influence, it decided that the presumption had not been overcome, and under well-established rules this finding of the jury upon a question of fact will not be disturbed on appeal.

[5, 6] The finding of the jury upon the issue of unsoundness of mind is not inconsistent with the determination on the issue of undue influence. In Estate of

Little, 23 Cal.App.2d 40, 44, 72 P.2d 213, 215, it is stated: "The jury's findings that decedent was of unsound mind and also executed the document dated September 28, 1935, under undue influence are consistent. Estate of Olson, 19 Cal.App. 379, 386, 126 P. 171; Estate of Motz, 136 Cal. 558, 562, 69 P. 294."

Likewise, the finding that the purported will was not properly subscribed is not inconsistent with the finding of undue influence. Where a finding is made upon an issue which determines a cause, other issues bearing upon the same cause become immaterial, and the fact that other findings are made not in any way inconsistent with the findings which dispose of the case is of no consequence. Estate of Baker, 176 Cal. 430, 168 P. 881; Warden v. Gries, 120 Cal.App. 187, 7 P.2d 342; C. O. Bashaw Co. v. Wood & Stevens, Inc., 72 Cal. App. 94, 236 P. 346.

[7] The notice of appeal recites that an appeal is taken from the order denying a motion for a new trial. Such an order is not appealable. Estate of Ivey, 110 Cal.App. 561, 294 P. 420.

The judgment is affirmed. The appeal from the order denying a motion for a new trial is dismissed.

We concur: KNIGHT, Acting P. J; CASHIN, J.



29 Cal.App.2d 623

FORD v. EVANS.

Civ. 10670.

District Court of Appeal, First District, Division 1, California.

Dec. 12, 1938.

Hearing Denied by Supreme Court Feb. 9, 1939.

1. Husband and wife ⇐333(1)

In wife's action for alienation of husband's affections, wife must show that husband was induced to abandon her by some active interference on the part of the defendant.

2. Husband and wife ⇐325

Mere proof of abandonment of wife by husband, or that husband voluntarily separated from his wife because of matrimonial differences, is not sufficient to entitle wife to recover for alienation of affections, but it must appear that any alienation was caused directly by the defendant, and by intentional and wrongful conduct on her part.

3. Appeal and error ⇐1061(3)

Action of court in stating the grounds upon which motion for a nonsuit was based was without prejudice, where plaintiff totally failed to make out a case, and there was no evidence which would support a favorable finding for plaintiff.

4. Husband and wife ⇐335

In action by wife for alienation of husband's affections, evidence justified judgment of nonsuit.

5. Appeal and error ⇐110

An order denying a motion for new trial is not appealable.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Anna Ford against Elsie Evans to recover damages from the respondent for alleged alienation of the affections of plaintiff's husband, Richard Ford. From a judgment of nonsuit, and from an order denying a motion for new trial, plaintiff appeals.

Judgment affirmed, appeal from order denying motion for new trial dismissed.

Kenneth Carlton Zwerin, of San Francisco, for appellant.

Leon Samuels and A. E. Levinson, both of Los Angeles, for respondent.

JONES, Justice pro tem.

This is an appeal by the plaintiff from a judgment of nonsuit, and from an order denying a motion for a new trial.

The action was commenced by the appellant to recover damages from the respondent for alleged alienation of the affections of appellant's husband, Richard Ford. The evidence discloses without conflict that discord existed between the appellant and her husband for a considerable period of time, due primarily to the excessive use of alcoholic liquors by the appellant. This discord finally culminated in a divorce action. Mrs. Evans, the respondent, and her husband were on friendly terms with the Fords, the relationship beginning in 1928. Visits were exchanged

and the two families took frequent vacation trips together. Eventually, Mrs. Ford was excluded from the Evans home on account of her frequent intoxication and resulting obnoxiousness. Mr. and Mrs. Evans continued in their home life and were still living together in a happy and contented state at the time of the trial. Mr. Ford continued to be an occasional guest at their house. The evidence discloses nothing which tends to show that Ford ever bestowed any affection upon Mrs. Evans, the respondent, or that there was the slightest conduct upon her part which led to the separation of the Fords.

[1, 2] In order to recover in this kind of an action, the plaintiff is required to show that her husband was induced to abandon her by some active interference on the part of the defendant. Mere proof of abandonment by the husband, or that he voluntarily separated from his wife because of matrimonial differences, is not sufficient. It must appear that any alienation was caused directly by the defendant, and by intentional and wrongful conduct on her part. Anything short of this is not sufficient. Berger v. Levy, 5 Cal.App.2d 554, 43 P.2d 610.

Upon the conclusion of plaintiff's case, counsel for defendant made a motion for a nonsuit, and while making the motion the court interrupted, stating in effect that the plaintiff had failed to produce any evidence sufficient to show that the defendant had alienated the affections of plaintiff's husband, and that no case at all was made. Thereupon, the motion for a nonsuit was granted.

[3, 4] While it may be somewhat irregular for the court to state the grounds upon which the motion for a nonsuit is based, such action is without prejudice where the plaintiff has totally failed to make out a case, and there is no evidence which would support a favorable finding. Estate of Higgins, 156 Cal. 257, 104 P. 6; Van Wyke v. Burrows, 98 Cal.App. 415, 277 P. 190; Gursky v. Rosenberg, 105 Cal.App. 410, 287 P. 575. The record here discloses no evidence which would support a finding for the plaintiff.

[5] The notice of appeal recites that an appeal is taken from the order denying a motion for a new trial. Such an order is not appealable. Estate v. Ivey, 110 Cal. App. 561, 294 P. 420; Walter v. Ayvazian, 104 Cal.App. 360, 25 P.2d 526.

The judgment is affirmed. The appeal from the order denying a motion for a new trial is dismissed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



29 Cal.App.2d 614

PEOPLE v. RICE.

Cr. 372.

District Court of Appeal, Fourth District, California.

Dec. 10, 1938.

1. Criminal law ⇐511(3)

The testimony of an accomplice need not be corroborated by direct evidence, but it is sufficient if accused's connection with alleged crime may be inferred from corroborating evidence.

2. Criminal law ⇐511(6)

Possession of stolen property may be sufficient corroboration to warrant a conviction on the testimony of an accomplice.

3. Criminal law ⇐511(6)

The possession of stolen property as corroboration of the testimony of accomplices need not be manual possession, and accused need not have the property actually on his person.

4. Criminal law ⇐511(6)

The possession of stolen property, as corroboration of testimony of accomplices, may be joint or individual, and two or more persons may be in possession where they have the power to control and the intent to control jointly.

5. Criminal law ⇐511(4)

Flight, either from the scene of a crime or at the time of arrest, is sufficient to connect accused with offense, in corroboration of testimony of accomplices.

6. Criminal law ⇐511(4, 6)

Evidence that accused accompanied accomplices to pier 70 miles distant from where stolen bait net was taken, with the net cut in two pieces and loaded in the automobiles of accomplices, in an endeavor to sell the net, and that a man with a shaved head

identified by witness as accused fled as accomplices were arrested, in corroboration of testimony of accomplices, was sufficient evidence of possession and flight to sustain conviction for grand theft. Pen.Code, § 1111.

7. Criminal law ⇐260(11)

A finding by trial court sitting without a jury in support of conviction for grand theft that stolen bait net was worth in excess of $200 would not be disturbed by the District Court of Appeal where evidence was conflicting.

8. Criminal law ⇐1137(1)

One who has assented to or recognized the validity of matters or proceedings not constituting fundamental error may not complain thereof on review where the errors are not prejudicial.

9. Criminal law ⇐1167(4)

Where length of stolen net in exact footage was not material to sufficiency of charge of grand theft, amendment of information, to which no objection was made at the time, so as to allege theft of a "1080-foot bait net" instead of an "800-foot bait net," was not ground for reversal, although made without accused again being arraigned or a plea entered.

10. Criminal law ⇐1169(2)

In prosecution for grand theft, where accomplices were on the high seas at time matter was called for trial, and their testimony given at preliminary hearing was read into record with consent of counsel for accused, but over week-end recess accomplices were apprehended, admission by court sitting without a jury of testimony of accomplices respecting conversations between accomplices and witness for accused while confined in jail was not prejudicial, though offered in rebuttal and reiterating many of the facts already read into the evidence.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Tommy Rice was convicted of grand theft, and he appeals.

Affirmed.

G. Vernon Brumbaugh, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

GRIFFIN, Justice.

The defendant was charged in an information with the crime of grand theft, alleged to have been committed as follows: That on or about the 12th day of March, 1938, in the county of Orange, he did wilfully, unlawfully and feloniously take and carry away certain personal property, to-wit, one 800-foot bait net of the value of $300 lawful money of the United States, the personal property of Lawrence Fisher. On the date of the trial an amended information, including a charge of prior conviction of a felony, was filed against him. He entered a plea of not guilty to the theft charge and denied the prior conviction. Thereafter and during the trial, the district attorney moved to amend the description of the bait net in the amended information by deleting therefrom the figures "800" and interlining in their stead the figures "1080" so that the description would read "1080-foot bail net". The motion was granted and it was so amended without objection. The trial then proceeded and the court, sitting without a jury, found the defendant guilty of the offense charged. After denying a motion for new trial, judgment was pronounced. From this judgment the defendant appeals.

The testimony may be briefly summarized as follows: On March 11, 1938, Lawrence Fisher owned a fish bait net. On the evening of that day he left the net in the center of a street approaching Lido Isle in Newport Beach. The next morning when he returned the net was gone. In the afternoon of that day Fisher, with three other members of his fishing crew, went to a pier in Santa Monica. Standing near the end of the pier were Tommy Coltrup, Alonzo Whyte and appellant, Tommy Rice, engaged in a conversation with another man. When Fisher and his party walked past the group to the end of the pier, the man to whom Coltrup, Whyte and Rice were talking drove off in a truck and the three separated. Coltrup started down the pier but changed his mind and came back to Alonzo Whyte's coupe which was parked at the end of the pier a few feet from where they had been standing. Whyte went to his automobile and Rice disappeared. Fisher jumped on Whyte's car and in the rear of this car found half of his bait net. The other half was found in Tommy Coltrup's car which was parked on a main street in Santa Monica. Coltrup and Whyte were

arrested by some police officers who were present, and they were subsequently charged with grand theft. They pleaded guilty to the charge and later testified as witnesses in the present case. Generally speaking, their testimony was to this effect:

That Tommy Coltrup, Alonzo Whyte and Tommy Rice were working as fishermen upon the boat Erm II; that on the 11th day of March, 1938, while on this boat, Rice said he knew where he could get rid of a bait net in Santa Monica, and he suggested that all of them steal Fisher's bait net; that Rice didn't like Fisher "too well"; that Whyte and Rice went in Whyte's car and Coltrup went in his own car to the place where the net was left; that Coltrup went over first and cut the wings off the net; that half of the net was placed in Whyte's car and half in Coltrup's car; that they took the net to Whyte's sister's home in Long Beach and left it there and then returned to Newport Beach; that the three went after the net the next morning and took it to Santa Monica, Rice riding with Whyte; that Coltrup parked his car up town a few blocks from the pier and rode with Whyte and Rice; that Whyte drove his car out on the pier and parked it near a truck; that they all got out of the car and Rice talked to a man who was near the truck, about buying the net; that Whyte saw Fisher and his crew coming and said: "We better get out of here"; that Whyte and Coltrup went over to the car and Rice left them.

The manner of his leaving was described by the witness Fisher in his direct examination as follows:

"Q. Now as you approached what did they (Coltrup, Whyte and Rice) do? * * A. As we went up, they turned around and they all three started to leave. Tommy Coltrup started to go down off the pier and suddenly changed his mind when he saw Alonzo Whyte, and got in the coupe and backed it up, and they started to swing out to go down the pier, and Tommy Coltrup changed his mind suddenly and decided to go back and get in the coupe, but by the time he got back, I was standing on the running board and got the engine stopped.

"Q. What did Tommy Rice do? A. I saw him make a run and that's the last I saw. I don't know where he went to or anything about it."

On cross-examination he stated:

"Q. Now you say you saw Tommy Rice run away, is that correct? A. I wouldn't say. I saw him run. Where he went to, I don't know.

"Q. All right, which way did he run? A. When I turned around, I saw someone go down, that is on the side of the pier there, and Tommy at that time had his hair shaved, and he was the only one of the three that had his hair shaved. A head without any hair is what I saw going down there.

"Q. Going down where? A. Down the pier.

"Q. Going back towards town? A. No, at one side of the pier.

"Q. Which side of the pier? A. When those three fellows started to run, I saw Tommy Coltrup and I also saw the bald hair going towards some steps off the side there, and from then on I paid no attention to any of them. My main object was to recover my net and I went and jumped on the car and stopped the motor * * *

"Q. Now when did you see Tommy Rice run? A. When we turned around they was more or less scattering of them and those three fellows left, and the man that was in the truck that they were talking to, he drove on off the pier."

The above evidence is in corroboration of the testimony of the accomplices. One of the accomplices, Whyte, testified as follows:

"Q. Now, did Tommy Rice try to run off the end of the pier when you saw Mr. Fisher? A. I thought he run down on the lower deck of the pier."

The accomplice Coltrup testified:

"Q. Now what did Tommy Rice do? A. I just saw him, he says, 'Jiggers, here comes Fisher', and he was away and I didn't see him after that."

Fisher testified that he paid $300 for the net, second hand, during the fall of 1937, and that it was still worth $300. Coltrup, called on behalf of the appellant, testified that in his opinion the value of the net was between $175 and $250. Other witnesses placed the value ranging downward as low as $100.

The principal point involved in this case is whether there is sufficient evidence to corroborate the testimony of the accomplices, Whyte and Coltrup, under the provisions of section 1111 of the Penal Code.

It seems quite obvious from the transcript before us that other witnesses could have been called to further connect the appellant with the crime charged. However, these three facts stand out as evidence established by corroboration: First, appellant's association with the accomplices the morning after the net was stolen approximately 70 miles from the place where it was taken; second, his presence near, or possession of, the stolen property, and his endeavor to dispose of it the day following the theft at a place far removed from the place where the net was taken; and third, his flight at the time of the arrest of the accomplices.

[1] The rule relative to the evidence necessary to corroborate the testimony of accomplices may be found in People v. Yeager, 194 Cal. 452, 473, 229 P. 40, 49, where the court holds: "It has been held that to corroborate an accomplice the evidence need not establish the actual commission of the offense, nor extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, nor prove that the accomplice has told the truth. The corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than a mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case, it is sufficient."

In the case of People v. Sandow, 133 Cal.App. 559, 24 P.2d 521, this court had before it a similar question. The defendant there, as in the instant case, was in possession of some stolen property. Soon after his arrest he made an escape from the officers and fled. The evidence showed that a portion of the stolen property was found in the room occupied by defendant and the accomplice and that some of it was removed to the home of defendant's mother. When arrested he stated one article belonged to his sister but later denied that statement. He offered to sell a stolen motor, saying he got it down the street. It was held that there was sufficient evidence, independent of the testimony of the accomplice, to support the verdict.

The case before us is not dissimilar, with respect to corroborative evidence, from the facts in the case of People v. Armstrong, 114 Cal. 570, 46 P. 611, where it appears that a horse was stolen by one of three accomplices who were rather intimate prior to the theft. The defendant, who was charged with the theft, fled from the district by a circuitous route and after being overtaken, expressed astonishment at being accused of committing the theft. In affirming the judgment of conviction the court stated [page 612]: "We think the facts here stated tended strongly to corroborate the testimony of Barlow to the effect that the horse was stolen as the result of a conspiracy for that purpose between himself, Morgan and defendant; in which case it was not important whether defendant or Barlow—as the latter claimed—was the person who tarried at the common rendezvous while the other conspirators led the animal from its owners' corral."

[2-4] It is well established that possession of stolen property may be sufficient corroboration to warrant a conviction upon the testimony of an accomplice. People v. Williams, 17 Cal.App.2d 122, 61 P.2d 813; People v. Ciani, 104 Cal.App. 596, 286 P. 459; People v. Melson, 84 Cal. App. 10, 257 P. 555; People v. Bettencourt, 64 Cal.App. 243, 221 P. 403; People v. Braswell, 103 Cal.App. 399, 284 P. 709. It must be observed, in connection with the possession of the stolen net, that it was not actually on the person or in the manual possession of the appellant. It is quite obvious that it could not have been. The net was of such size that it had to be cut in two pieces in order to be transported in a passenger automobile. However, it was shown that Rice had accompanied the accomplices to the Santa Monica pier in an endeavor to sell the article and that the three men had joint possession of the stolen article at the time the accomplices were arrested. To be in possession of stolen property one need not have it in his manual possession or actually on his person. Such possession may be joint or individual, and two or more persons may be in possession where they have the power to control and the intent to control jointly. State v. McHenry, 207 Iowa 760, 223 N.W. 535.

[5] It is well established that flight, either from the scene of a crime or at the time of arrest, is sufficient to connect the accused with the offense. People v. Nikolich, 93 Cal.App. 356, 269 P. 721; People v. Mazzola, 99 Cal.App. 682, 279 P. 211.

[6] It has been held that corroboration need not be by direct evidence, but the entire conduct of the defendant may be looked to for corroborating circumstances and if, from those circumstances, his connection with the crime may be fairly inferred, the corroboration is sufficient. People v. Taylor, 70 Cal.App. 239, 232 P. 998; People v. Nikolich, supra; People v. Davis, 135 Cal. 162, 67 P. 59; People v. Taber, 13 Cal.App.2d 27, 55 P.2d 1189; People v. Martinez, 19 Cal.App.2d 599, 66 P.2d 161. Under the facts of this case, we are of the opinion that there was sufficient evidence as a matter of law to satisfy the requirements of section 1111 of the Penal Code.

[7] The appellant next contends that there was not sufficient evidence to sustain a finding that the bait net was worth in excess of $200. It will be observed that there was merely a conflict in the evidence as to the value of the bait net, which was resolved by the trial court against appellant. Under such circumstances this court will not disturb the finding. Donato v. Lopopolo, 20 Cal.App.2d 409, 66 P.2d 1256.

[8, 9] The appellant next objects to the ruling of the trial court in permitting the amendment to the information by interlineation and substitution of certain figures after the trial was commenced without the defendant again being arraigned nor a plea entered. It is contended that an amended information supersedes all former pleadings and has the same effect and should be treated as an original information. Citing People v. Moody, 69 Cal. 184, 10 P. 392. It will be noticed that this amendment merely struck out the figures "800" and substituted the figures "1080" in describing the length of the net. This amendment was made after the owner of the net testified that it was a regulation bait net, with two wings, an apron and a sack, a lead line, and a cork line; that there was a distance of 1080 feet around the cork line and about 800 feet around the lead line. After this testimony was given, the deputy district attorney moved to amend the information by interlineation of the figures "1080" in place of the figures "800" which were stricken out, so that the description then read "1080-foot bait net". The court then directed an inquiry to the attorney for the appellant as follows: "Any objection?" to which he replied: "No objection". The court then ordered the amendment to be made and proceeded with the trial of the case without objection. Appellant cannot now with good grace raise this question on appeal for it is well settled that where one has assented to or recognized the validity of matters or proceedings not constituting fundamental error, he may not complain thereof on review where the errors are not prejudicial (5 C.J., sec. 227). The particular portion of the description of the net, i. e., the length in exact footage, as alleged in the information, was not material to the sufficiency of the charge, and we see nothing in this point to justify a new trial of the action. People v. Myers, 1 Cal.App.2d 620, 37 P.2d 191; People v. Cuff, 122 Cal. 589, 55 P. 407.

[10] The appellant also objects to the introduction into evidence of the testimony of the accomplices given at the preliminary hearing. At the time the matter was called for trial the accomplices were not available as they were then on the high seas. When this was made known to the court their testimony given at the preliminary hearing was read into the record with the consent of counsel for appellant. However, it should be stated that during the course of the trial a recess was taken over the week-end. During this time the two accomplices had been apprehended and ordered brought into court for the apparent purpose of clearing up some of the evidence offered by appellant as to certain conversations between the accomplices claimed to have taken place while they were confined in jail with a certain prisoner who testified as a witness for appellant. On the Monday following the week-end recess the accomplices gave their testimony personally in open court. It covered many of the facts related in the transcript of their testimony already read into the evidence. Appellant argues that it was error for the trial court to allow the witnesses for the prosecution to reiterate their testimony under the guise of rebuttal evidence. People v. Van Ewan, 111 Cal. 144, 43 P. 520. It is to be noted that the trial was conducted before a judge sitting without a jury. No objection was made at the time this testimony was sought to be introduced, although it is true that after the district attorney had asked a few

questions, appellant objected to any further questioning on the ground that the testimony was not proper on rebuttal. The court overruled the objection. Under the circumstances as related it cannot be said that the court erred in bringing the accomplices before the court to testify or that the reception of their testimony was prejudicial. People v. Dykes, 107 Cal. App. 107, 290 P. 102; Unruh v. Nelson, 212 Cal. 130, 297 P. 888; People v. Grider, 10 Cal.App.2d 287, 51 P.2d 881; People v. Henry, 23 Cal.App.2d 155, 72 P.2d 915.

We have carefully examined the entire record and conclude that appellant's contentions are without merit.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



29 Cal.App.2d 575

FOY v. CARLTON.

Civ. 11613.

District Court of Appeal, Second District, Division 1, California.

Dec. 9, 1938.

Hearing Denied by Supreme Court Feb. 6, 1939.

1. Trial ⇐142

The right of a court to direct a verdict is, with regard to the condition of the evidence, the same as the right of court to grant a nonsuit which may be granted when disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for the plaintiff if such verdict were given.

2. Negligence ⇐136(9)

Contributory negligence is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that the plaintiff is guilty of contributory negligence, but if reasonable minds might draw different conclusions, question of contributory negligence is one of fact for the jury.

3. Automobiles ⇐217(6)

A pedestrian who sustained injuries when struck by automobile when crossing street intersection was guilty of contributory negligence as a matter of law, where pedestrian's evidence showed that he, knowing that motorist was approaching only 60 feet away at an estimated speed of between 50 and 60 miles per hour, walked in front of approaching automobile. St.1935, p. 188, § 562.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Joseph Foy against Theodore R. Carlton for injuries sustained when defendant's automobile struck plaintiff while walking across intersection. From an adverse judgment, plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

Milan Medigovich and Ralph C. Curren, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles (W. I. Gilbert, Jr., of Los Angeles, of counsel), for respondent.

YORK, Presiding Judge.

This is an action to recover damages for injuries sustained by appellant in an automobile accident which occurred at the intersection of Third and Lorraine streets in the city of Los Angeles on November 27, 1936, at about 7 o'clock in the evening. At the conclusion of the trial before a jury, the court directed a verdict in favor of respondent on the ground that appellant was guilty of contributory negligence as a matter of law. Upon this appeal from the judgment which was subsequently entered, appellant urges that the court erred in granting the motion for a directed verdict for the reason that the question of negligence should have been submitted to the jury.

At the point where the accident occurred, Third street runs east and west, Lorraine north and south, the two streets intersecting at a right angle. Third street is approximately 60 feet wide and is traversed by two sets of car tracks, one for eastbound and the other for westbound traffic. It is 25 feet from the north curb of Third street to the most northerly rail of the north car tracks carrying westbound traffic. A safety zone for westbound passengers which is approximately 4 feet wide and 60 feet long is located north of the

north car tracks and east of Lorraine street. Appellant lived on the east side of Lorraine north of Third street, and immediately before the accident, he was walking south toward Third street on the sidewalk on the east side of Lorraine. When he reached the curb at the northeast corner of the intersection, he stopped to allow a number of automobiles to pass. As he stepped off the curb he looked to the east and to the west and observed a street car moving east on Third street west of Lorraine. He also observed respondent's automobile traveling west on Third street in the north car tracks at a distance of 350 or 400 feet east of the said intersection. Appellant testified that he walked directly across Third street and when he reached a point which was about 22 feet from the curb and 2 or 3 feet from the most northerly rail of the north car tracks, he again observed respondent's automobile, which was then 50 or 60 feet from him, traveling in the north car tracks. Appellant then took another step or two forward, and as respondent's car struck him he "made one step back or wheeled to the side" and was thrown 6 or 7 feet in a northwesterly direction, thereby sustaining severe injuries to his left leg and ankle which have resulted in permanent disability.

Respondent admitted that he did not see appellant until the moment of the impact and that he did not apply his brakes until after the collision. He testified that his speed was 20 to 25 miles per hour, and a witness called in his behalf estimated the speed of his automobile at 30 miles per hour. Appellant testified that in his opinion respondent's speed was 50 or 60 miles per hour. After the collision, respondent swerved south and stopped his car facing south at the southwest corner of the intersection.

The crosswalk leading to the center of the intersection from the northeast corner thereof was not marked at the time of the accident and there seems to be some question as to whether appellant was walking within or without the confines of said unmarked crosswalk.

In attempting to fix the point of impact, the trial court asked appellant if the end of the sidewalk on the east end of Lorraine and the north side of Third "were connected with the sidewalk on the east side of Lorraine and south of Third street —where would such extension of the sidewalk across Third street be in relation to the point where you were struck?" Appellant answered, "I cannot determine that exact point with the sidewalk over here. You see, the sidewalk curves over here.

"The Court: Forget that curve. If you extended the sidewalk, started your extension from a point where it starts to curve to the west, and made the extension in line with that across Third street to meet the sidewalk on the east side of Lorraine east of Third street, where would that sidewalk as extended across Third street be in relation to the point where you were struck? A. I walked straight across the street.

"The Court: That does not answer my question. Maybe this will clear it. In the first place, there is a grass parking between the east curb line of Lorraine and the sidewalk on Lorraine? A. Yes.

"Q. How wide is that parking space? A. That is 6 or 7 feet, I presume.

"Q. That is the best of your recollection? A. That is the best of my recollection.

"Q. 6 or 7 feet? A. Of grass.

"Q. Now, I believe you testified on your examination in chief that you were at a point which is approximately the point where the eastern curb line of Lorraine crosses the north rail of the westbound car track, that is, if extended? A. Yes.

"Q. Is that correct? A. Yes, sir.

"Q. Then, if this sidewalk was extended across Third street it would be about 6 or 7 feet east of the point where you were struck, is that correct? A. Yes, sir."

Respondent contends that having in mind that appellant was on the east side of the street going south, his position is definitely fixed at about 6 or 7 feet outside an unmarked crosswalk at the time of the impact, and that therefore he should have yielded the right of way to all vehicles upon the roadway in conformity with the terms of section 562 of the Vehicle Code (St.1935, p. 188).

Appellant in answer to this urges that the court did not extend the sidewalk across the street from its boundaries at the curb, but from its boundaries before the sidewalk started to curve to the west; that "It is clear that the sidewalk turned toward the west and toward the east curb of Lorraine, thereby cutting off the 6- or 7-foot parkway which appears between the

curb and the sidewalk farther north. Consequently, if we extend the boundaries at the curb the sidewalk would be 6 or 7 feet west of where it would be if you extend the boundaries before the turn. Therefore, we submit, the crosswalk defined by the court was not the crosswalk defined by law, and when the plaintiff said he was 6 or 7 feet west of the crosswalk defined by the court, he was nevertheless in the crosswalk defined by law."

Respondent testified that the impact occurred at a point at least 15 feet west of the imaginary extended curb line of Lorraine street, and the motorman of the street car which was traveling east on Third street testified that he saw appellant lying in the intersection after the accident at a point 18 or 20 feet west of the east line of Lorraine.

In granting the motion for directed verdict, the court said: "To my mind the evidence clearly shows that plaintiff was himself guilty as a matter of law of contributory negligence in several respects. In one particular, that he was in a position of safety when he was beyond the safety zone and was protected by it, and he stepped out from the protection thereof to a place of danger, and according to his own testimony the defendant's car was going 50 or 60 miles an hour when it was 60 feet away. Under the law if a man steps from a place of safety into the path of a car going 50 or 60 miles an hour and when it is only 60 feet away, he is guilty of contributory negligence; so assuming for the sake of the motion that the defendant was guilty of negligence, it is also the inevitable conclusion of the court that the plaintiff was guilty of negligence, guilty of contributory negligence which was one of the proximate causes of the accident, and therefore my one instruction to you is that you return a verdict in favor of the defendant."

Regardless of whether appellant was inside or outside the limits of the unmarked crosswalk, his own testimony reveals that he walked directly across the street when he knew a car was approaching him from the east; that when he observed said car approaching at a distance of 60 feet, traveling on the north car tracks at a speed which appellant estimated to be 50 or 60 miles per hour, he had reached a point in the intersection which was 3 feet north of the north car tracks and slightly west of the westerly end of the safety zone. His testimony upon cross-examination further reveals that had he walked a few steps squarely to the east at that moment, he would have been within the confines of the safety zone. Instead, he continued to walk forward to the point of impact.

[1] "It is settled in California that the right of a court to direct a verdict is, with regard to the condition of the evidence, absolutely the same as the right of a court to grant a nonsuit; and also that a court may grant a nonsuit when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. [Citing cases.]

[2] "It is equally well established that 'contributory negligence "is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence. * * * When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." [Citing cases.] * * *'" Rapp v. Southern Service Co., 116 Cal. App. 699, 702, 4 P.2d 195, 196.

[3] While there is a conflict in the evidence with respect to the speed of respondent's automobile as it approached the intersection, appellant's own testimony establishes the fact that he was guilty of contributory negligence, in that he continued to walk forward, knowing that respondent was only 60 feet away, and although he believed that respondent was traveling at a rate of speed which he estimated at that time to be between 50 and 60 miles per hour. Appellant's conduct showed a total disregard for his own safety.

Giving to appellant's testimony all the value to which it is legally entitled, it is

readily apparent that it is of such character that it will support no other legitimate inference than that he was guilty of contributory negligence as a matter of law, and that the trial court did not err when it granted respondent's motion for a directed verdict.

The judgment appealed from is therefore affirmed.

We concur: DORAN, J.; WHITE, J.



29 Cal.App.2d 596

ROY v. ROY.

Civ. 2191.

District Court of Appeal, Fourth District, California.

Dec. 9, 1938.

1. Divorce ⇐130

Evidence of husband's association with another woman warranted grant of divorce to wife on ground of cruelty.

2. Divorce ⇐108

In divorce proceeding where wife sought to set aside property settlement agreement, and allegations of complaint were insufficient for that purpose, and husband by answer put validity of the property settlement agreement in issue, wife without filing further pleading was entitled to attack the settlement agreement on ground of mistake, undue influence or fraud.

3. Husband and wife ⇐279(2)

Evidence that husband after wife had filed action for separate maintenance induced wife to dismiss action and sign property settlement agreement by representing to her that he would get rid of a certain nurse who was the cause of the marital difficulties and made other representations and hurried wife into signing contract without seeing an attorney, and that husband thereafter failed to live up to promises, warranted the setting aside of the property settlement agreement.

4. Divorce ⇐201

Generally, jurisdiction of court with respect to disposal of property in divorce action is limited to disposition of the community property, and court is without power to pass upon dispute as to separate property or disposition thereof. Civ.Code, § 137 et seq.

5. Divorce ⇐201

Where an issue is made in divorce proceeding by the pleadings as to separate property, and both parties without objection have submitted the question to the court, court under its general jurisdiction has power to hear the questions raised as to the ownership of separate property and to make proper disposition thereof. Civ.Code, § 137 et seq.

6. Divorce ⇐201

In divorce proceeding wherein it was alleged that most of the property was community property, and that a general accounting was necessary which allegation was denied by husband, husband's meeting the issue raised by his denial of allegation was not a waiver of his right to object as respects court's jurisdiction to a general accounting when the issue was changed, and it appeared that there was no community property.

7. Divorce ⇐201

In divorce proceeding wherein wife alleged that most of the property was community property and prayed for general accounting, and on trial it was admitted that there was no community property and no question of alimony rights, it was error to overrule objections to a general accounting, as against contention that husband by setting up a property settlement agreement in answer submitted issue as to whether that agreement was fair and just and thus opened the door for and consented to a general accounting.

8. Divorce ⇐201

In divorce proceeding wherein wife alleged that since 1929, approximately $50,000 in money, stocks, bonds and securities had been intrusted to the husband for which he refused to account, and husband tried to meet the issue both by answer and statements in court, husband consented to the submission of a limited accounting beginning with the year 1929 to the court. Civ. Code, § 137 et seq.

9. Divorce ⇐254

Where court in divorce proceeding found that value of securities for which husband was to account to wife was $54,991.19 as of

October 15, 1936, entry of judgment for such sum with interest from such date to date of entry of judgment was error, since interest provided by law for judgment would not attach until judgment was entered.

10. Divorce ⇐254

In divorce proceeding wherein wife was entitled to a limited accounting from period after 1929, inclusion of items in accounting covering period prior to 1929 was error.

11. Divorce ⇐254

In divorce proceeding wherein property settlement agreement under which wife conveyed to husband an undivided one-half interest in certain property in another state was set aside, judgment decreeing that husband and wife were each owner of an undivided one-half interest in such property was proper.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Divorce proceeding by Ruth Sutton Roy against Charles L. Roy. From an adverse judgment, defendant appeals.

Modified and, as modified, affirmed.

Swing & Swing, of San Bernardino, for appellant.

Duckworth & Harrison, of San Bernardino, and Benjamin Harrison, R. E. Parsons, and Earl C. Demoss, all of Los Angeles, for respondent.

BARNARD, Presiding Judge.

This is an action for divorce on the ground of cruelty, a large number of specific incidents being set forth in the complaint. It was alleged that the parties had acquired as community property various parcels of real estate and certain personal property, including stocks, bonds and securities. It was then alleged in paragraph V of the complaint that during the course of their married life and since 1929 the plaintiff had intrusted to the defendant money, stocks, bonds and securities worth approximately $50,000, which was the separate property of the plaintiff, which was still in possession of the defendant and for which he refused to account. The complaint further alleged that on September 10, 1934, the defendant by fraud and misrepresentation induced the plaintiff to sign and enter into an agreement, a copy of which is attached to the complaint, which purported to settle the property rights of the parties. The prayer was for a divorce, that the purported property settlement agreement be set aside, that plaintiff be awarded her just and lawful share of the community property, and that the defendant be required to account to the plaintiff for $50,000 worth of stocks, bonds and cash which she had intrusted to him.

An answer was filed and the trial, during which many continuances were had, extended over a period of many months. During the course of the trial the defendant filed an amended answer, setting forth the property settlement agreement above mentioned, alleging that it constituted an accord and satisfaction, that it extinguished all previous obligations between the parties, that the plaintiff was estopped thereby from asking for an accounting, and that the plaintiff was guilty of laches. At the conclusion of the trial the court made findings in favor of the plaintiff, finding that she was entitled to a divorce, that the property settlement agreement should be set aside, that each of the parties was possessed of certain property as their separate property, and, as the result of an accounting covering a period of some thirty years and running back to the marriage of the parties in 1906, finding that certain amounts were owed to the plaintiff by the defendant, and that he was entitled to certain credits. In the judgment which followed a divorce was granted, and the defendant was ordered to deliver to the plaintiff certain securities or in lieu thereof to pay to her the sum of $59,043.73. He was further ordered to pay to her the sum of $4,338.20, being the amount of dividends he had collected on these securities with interest, and to pay her the additional sum of $51,328.39 as the balance due upon "the open account". From the judgment so entered this appeal was taken.

[1] It is first contended that the evidence is not sufficient to establish grounds for a divorce and that the respondent's testimony in this regard was not sufficiently corroborated. The record and briefs are voluminous and it would serve no useful purpose to review the evidence in detail. It appears that the parties lived together harmoniously from 1906 to 1933 when the appellant became ill and went to a hospital. There he became acquainted with a young nurse and when he returned to a hotel in Redlands, which was owned by the parties hereto and in which they had been making their home for some years, he brought this

nurse with him. In the three years which intervened between that time and the trial of this action he kept this nurse with him most of the time in spite of his wife's objections. While he insists vigorously that the condition of his health during that time required the services of this particular nurse, there is an abundance of evidence which justifies the inference that his interest in her was not confined to her professional services and his need therefor. This branch of the evidence, which is amply corroborated, is entirely sufficient to support the findings and judgment in this regard. In addition, there is evidence that the appellant during this period was cold and indifferent toward the respondent, that he told her that he did not love her and repulsed her advances, that he ignored her and refused to talk to her, that he refused to eat with her, and that on one occasion he absented himself for two or three months without letting her know where he was. His wife went to Seattle, their former home, and started an action for separate maintenance. The appellant went there and, promising to get rid of the nurse and take his wife back, induced her to dismiss her action and to enter into the property settlement agreement. He then returned to Redlands saying he would get rid of the nurse and send for his wife. After four weeks, not having received an invitation to come, the respondent returned to Redlands where she found the nurse still occupying a portion of the appellant's quarters in the hotel. He then got his wife out of town long enough to enable the nurse to move out but thereafter continued his association with the nurse. There is evidence that after she returned to Redlands he called the respondent a "lying thief" and a "snake", that on one occasion he threatened to shoot her, and that on another occasion he attempted to cause her physical injury. A part of this evidence was corroborated and while there is much conflicting evidence it cannot be held that the findings in question are not sufficiently supported.

[2] It is next contended that the court erred in setting aside the property settlement agreement of September 10, 1934. That agreement purported to divide all of the assets in which both parties had an interest and also contained a provision that any property not mentioned therein which was in the possession of either party was the separate property of that party. The appellant contends that the allegations of the complaint in this regard were not sufficient to justify the setting aside of the contract and, further, that the evidence was not sufficient for that purpose. While the allegations of the complaint in this respect were probably insufficient, as was at one time held by the trial court, the appellant, as above noted, later filed an amendment to his answer in which he set up this contract as a defense against an accounting of any sort. This necessarily applied to and included the limited accounting based on paragraph V of the complaint, as well as the general accounting he had been forced to meet under the rulings of the court. Irrespective of any insufficiency in the complaint the amended answer placed the validity of the property settlement agreement in issue and under our practice the other side, without filing a further pleading, was entitled to attack it on the ground of mistake, undue influence or fraud. Walsh v. Jacobson, 3 Cal.App.2d 477, 39 P.2d 455.

[3] There was evidence that the appellant went to Seattle where his wife had filed an action for separate maintenance; that he induced his wife to dismiss that action and sign this contract by representing to her that he would get rid of the nurse and have nothing to do with her, that he was in love with his wife and wanted a reconciliation above all other things; that he hurried her into signing the contract which was prepared by his attorney; that he persuaded her not to submit the contract to her attorney before it was signed; and that he promised to bring her back to Redlands and continue their married life as it had been before the interruption. There is also evidence that he did not fully disclose to her the true situation with respect to the property owned by each and that she was without knowledge thereof; that after securing the execution of the contract he returned to Redlands, but persuaded the respondent to remain in Seattle on various pretexts; that when she finally came to Redlands she found the nurse still occupying a portion of his quarters; that although the nurse then moved the appellant continued his association with her; and that in many respects the appellant failed to keep the promises by means of which he had induced his wife to sign the agreement. Without reciting the evidence in detail we are convinced that it is sufficient to support that part of the judgment which annulled and set aside this agreement. Patterson v.

Blackburn, 47 Cal.App. 362, 190 P. 483; Estate of Cover, 188 Cal. 133, 204 P. 583; Brison v. Brison, 90 Cal. 323, 27 P. 186.

The appellant contends that the court erred in going into a general accounting as between the parties running back to their marriage in 1906, both because a general accounting as to separate property of the spouses cannot be had in an action for divorce and because the complaint here did not state a cause of action justifying a general accounting. It appears that at the time of the marriage the appellant possessed some $150,000 worth of property and the respondent had property of the value of about $40,000. Subsequently the respondent inherited more than $100,000 worth of property. Throughout their married life the parties kept their property separate and no community property was acquired. In a few instances they bought property together, the interest of each being kept separate. The appellant made many investments for his wife with her money and kept an account of such transactions.

The complaint alleged that all property therein mentioned was community property with the exception of paragraph V, which alleged that since 1929 approximately $50,000 in money, stocks, bonds and securities belonging to the wife had been intrusted to the husband, for which he refused to account. A general demurrer was filed and, later, an answer. At the trial evidence was received relating to a general accounting. After the trial had proceeded three or four days counsel for the respondent admitted that there was no community property belonging to the parties and that they did not seek alimony of any kind. Thereupon counsel for the appellant moved to strike out paragraph V of the complaint and all evidence relating to an accounting and strenuously objected to any accounting on the grounds that an accounting as to separate properties could not be had in such an action and that, in any event, the complaint was insufficient for that purpose. The motions were denied and the objections overruled, and an adjournment was taken to enable the parties to obtain reports from auditors. Later a motion made by the respondent for permission to amend her complaint was granted over objection of the appellant, but when the amendment was offered an objection thereto was sustained and it was never filed. The appellant, however, amended his answer by setting up the property settlement agreement. Over the constant objection of the appellant the court proceeded with a hearing on a general accounting and incorporated the results thereof in its findings and judgment.

[4, 5] The jurisdiction of the court with respect to the disposal of property in a divorce action is found in section 137 et seq. of the Civil Code. As a general rule, and subject to certain exceptions not material here, the power of the court is limited to a disposition of the community property and the court is without power to pass upon a dispute as to separate property or the disposition of the same. Allen v. Allen, 159 Cal. 197, 113 P. 160; Reid v. Reid, 112 Cal. 274, 44 P. 564; Glass v. Glass, 4 Cal.App. 604, 88 P. 734; Callnon v. Callnon, 7 Cal.App.2d 676, 46 P.2d 988. Another exception to the general rule arises where an issue is made by the pleadings as to separate property and both parties, without objection, have submitted the question to the court, in which case it has been held that under its general jurisdiction the court has power to hear the questions raised as to the ownership of separate properties and to make proper disposition thereof. Glass v. Glass, supra; Carr v. Carr Co., 39 Cal.App. 53, 177 P. 856; Marshall v. Marshall, 138 Cal.App. 706, 33 P.2d 416.

[6, 7] In applying these rules to the instant case it must be remembered that under the original complaint it was alleged that most of the property was community property, which was denied in the answer, and it then appeared that a general accounting was not only proper but necessary. The appellant was forced to meet that issue during the first days of the trial and the fact that he did so was not a waiver of his right to object to a general accounting when the issue was changed. When that occurred and it was admitted that there was no community property and no question of alimony rights he promptly objected to any accounting and, in particular, to a general accounting. His objections were overruled then and frequently thereafter, and he was compelled to go into a general accounting running back to 1906. In so far as a general accounting is concerned that was error, both under general rules and because the complaint did not state a cause of action for such a general accounting and no such issue was presented by the pleadings. In this connection the respondent argues that by setting up the property settlement agreement in his amended answer the appel-

lant submitted the issue as to whether that agreement was fair and just and thus opened the door for and consented to a general accounting. We think this does not follow. While, as we have held, the validity of this agreement was thus placed in issue and evidence could be and was received justifying its being annulled and set aside, that was the only issue thus raised and the result of setting that agreement aside was merely to place the parties in the same position as if the agreement had not been signed. The amendment was filed largely, if not entirely, because the appellant had been forced to meet the issue of a general accounting, and it cannot be held that he thereby consented to having that issue added to the limited accounting which was asked for in the complaint, or that he voluntarily submitted the issue of a general accounting about which nothing was said in the complaint.

[8] While the allegations of paragraph V of the complaint are subject to the criticism that they are not too clear in laying a foundation for the prayer for an accounting as to the items therein mentioned, they are sufficient, in the absence of a special demurrer, to show a distinct request for an accounting of money, stocks, bonds and securities worth approximately $50,000 which had since the year 1929 been intrusted by the respondent to the appellant. Both by his answer and his statements in court the appellant sought to meet this issue and under the above noted exception to the general rule it must be held that he consented to the submission of this limited accounting, beginning with the year 1929, to the court. While it is true that the allegations of paragraph V seem to relate more especially to a certain group of securities which, as shown by the evidence, the respondent had placed in the hands of the appellant, this paragraph also alleges that since 1929 certain money had also been intrusted by the respondent to the appellant. It appears from the evidence that late in 1929 the appellant took $10,190 from money which the respondent had received from the sale of securities which she had inherited and placed this amount in his own bank account. He was unable to explain what he did with this money and his own auditor admitted that he should be charged with that amount. While the paragraph in question alleges that both the money and securities were of the approximate value of $50,000 and while the court found that at the time of the trial the securities alone were of the value of about $54,000, there is also evidence that at the time the complaint was filed these securities were worth much less than $50,000. Under all of the circumstances we think it must be held that the appellant consented and submitted to the jurisdiction of the court in so far as these two items, arising since 1929, are concerned.

It follows that the court correctly went into the accounting between these parties in so far as the appellant's handling of money and securities belonging to the respondent from and after the year 1929 is concerned, but erred in requiring such an accounting and passing on the same for the period prior to 1929.

[9] In the judgment it was ordered that the appellant deliver to the respondent certain named securities or that, upon his failure so to do, the respondent should have judgment for the sum of $59,043.73 with interest, and that the respondent further have judgment for the sum of $4,338.20 with interest, being the amount of dividends, with interest, collected by the appellant on the above-mentioned stocks. These portions of the judgment are responsive to the issues presented by paragraph V of the complaint. However, the court found that the value of the securities thus ordered returned to respondent was $54,991.19 "as of October 15, 1936", which was just a week before the last day of the trial. That is in accord with the evidence. The judgment was not filed until November 8, 1937, and the amount named in that part of the judgment, to be entered in case the securities are not returned, is $59,043.73, which was arrived at by adding interest on $54,991.19 at 7 per cent from October 15, 1936, to November 8, 1937. The allowance of such interest is not supported by pleading, evidence or finding, and the interest provided by law for judgments would not attach until judgment was entered. The amount of that alternative portion of the judgment should be reduced from $59,043.73 to $54,991.19.

[10] The judgment further orders that the respondent recover from the appellant the additional sum of $51,328.39 with interest, "being the balance due plaintiff with interest on the open account". In arriving at that figure the court included certain items amounting to $25,878.31 which were charged against the appellant for various matters between 1906 and 1923, and also included and charged the appellant with interest on these various sums in the total amount of $34,453.43 or a total charge for these items of $60,331.74. There was also

included and the appellant charged with $8,592.04 as the respondent's one-half of the profit realized from operating the Redlands Hotel from and after the year 1924, although the evidence shows that this investment was made and all of this profit was received prior to 1929. These three items, amounting to $68,923.78, arose from the general accounting covering the period prior to 1929 and not being within the issues pleaded or voluntarily submitted were erroneously included in the judgment. On the other hand, and in that connection, the appellant was given a credit for paying a mortgage on the hotel property in 1926, one-half of which was owed by the respondent, which credit with the interest allowed amounted to $26,075. Deducting this credit from the improper charge against the appellant of $68,923.78 leaves $42,848.78 which was erroneously charged against the appellant because of the general accounting. That amount should be deducted from this portion of the judgment awarding the respondent $51,328.39, and that part of the judgment accordingly reduced to $8,479.61.

The judgment further decreed that certain described real property in the city of Seattle, which had formerly been occupied by the parties as a home, is the separate property of the respondent. It appears that each of the parties owned an undivided one-half interest in this property, that in the property settlement agreement the appellant conveyed his interest therein to the respondent, and that the respondent later sold the property to a third party. Although the property settlement agreement was set aside the property cannot be returned and the only effect of this part of the judgment is to confirm the right of the respondent to pass title to the purchaser. Since the appellant was credited with one-half of the proceeds in accounting for the transactions after 1929, and since he claims no further interest in the property, that portion of the judgment need not be disturbed.

[11] The judgment further ordered and decreed that each of the parties is the owner, as his or her separate property of an undivided one-half interest in a property situated in the state of Washington, known herein as the "Woodland Farm", and also in the hotel property in Redlands, together with the furniture and fixtures therein. While this portion of the judgment is not responsive to the original issues in the case it is proper since the court set aside the property settlement agreement under the terms of which the appellant conveyed his one-half interest in the first of these properties to the respondent and the respondent conveyed her half interest in the other property to the appellant. The court concluded, and properly so, that the respective interests in these properties which had been conveyed by the agreement which was set aside should be returned to the original owners, respectively. It should be noted in this connection, however, that while it is decreed that the respondent is the owner of an undivided one-half interest in and to the hotel property the question of whether she still owes her share of the mortgage which was paid off in 1926 and whether she has received her share of the profits therefrom since the year 1924, when the property was acquired, has been eliminated from this case and has not been determined herein.

That portion of the judgment awarding the respondent an alternative judgment of $59,043.73, in the event the named securities are not returned, is reduced from $59,043.73 to $54,991.19. That part of the judgment awarding the respondent $4,338.20 is affirmed. That part of the judgment awarding the respondent $51,328.39 is reduced to $8,479.61. As so modified the judgment is affirmed. Each party to pay his own costs on appeal.

We concur: MARKS, J.; GRIFFIN, J.

WAGNER et al. v. SHOEMAKER et al.

Civ. 2183.

District Court of Appeal, Fourth District, California.

Dec. 14, 1938.

Hearing Denied by Supreme Court Feb. 9, 1939.

1. Mortgages ⇐211

A contract executed during period of general business depression, under which time for payment of indebtedness secured by trust deed was extended, and the amount of the indebtedness was reduced, was not void for want of consideration, where the owners of the property agreed to apply to the government for new loan on the property to pay the reduced indebtedness.

2. Mortgages ⇐300

A holder of note secured by trust deed, who rejected tender on sole ground that it was inadequate in amount, waived all other grounds of objection. Civ.Code, § 1501.

3. Mortgages ⇐300

Where mortgagors tendered full amount necessary to pay principal and interest of indebtedness secured by trust deed, and the tender was rejected on ground that it was inadequate in amount, the property was discharged from the lien of the trust deed, as against contention that the tender was required to be followed by a deposit in a bank.

Appeal from Superior Court, Riverside County; V. N. Thompson, Judge.

Action by George W. Wagner and another against Clyde C. Shoemaker and another, to have title to certain land quieted in the plaintiffs, to enjoin the defendants from foreclosing trust deed on the land, and to require a reconveyance of the property to the plaintiffs, wherein defendant, Clyde C. Shoemaker, filed a cross-complaint. From a judgment for the plaintiffs, which was conditioned upon the plaintiffs' payment of $2,407.50 to defendant Clyde C. Shoemaker, the latter appeals.

Affirmed.

John Stewart Ross and Winthrop O. Gordon, both of Los Angeles, for appellant.

Best & Best, of Riverside, for respondents.

MARKS, Justice.

This is an appeal from a judgment which, among other things, provides that plaintiffs' title to certain lands in Riverside county be quieted; that defendants be enjoined from foreclosing a trust deed on these lands; that defendant Pioneer Title Insurance and Trust Company reconvey that property to plaintiffs. The judgment was conditioned on the payment of $2,407.50 by plaintiffs to Clyde C. Shoemaker.

On April 1, 1932, plaintiffs executed their promissory note in the principal sum of $8,366.18, payable to Helen M. Cox, now Helen M. Cox Bennett, in instalments, together with interest at the rate of seven per cent per annum. This note was secured by a deed of trust subject to a prior encumbrance which has been paid.

Plaintiffs failed to make the payments on their note as they became due and a notice of default was recorded. Under date of September 8, 1935, Helen M. Cox Bennett and her husband entered into a contract with plaintiffs wherein it was agreed that the indebtedness evidenced by the note be reduced to $3,000, payable, $750 forthwith, and the balance of $2,250 in instalments of $1,000 per annum, with interest at the rate of seven per cent per annum. This contract contained the following: "It is further understood that said George Wagner and wife shall make application for a Government loan upon said above described premises, and in case said loan is obtained then in that instance the total unpaid balance upon said note shall be paid in full at the time said loan is obtained."

The following summary of part of the findings of fact detail the factual situation to be considered in determining the questions necessary for decision here: That prior to September 8, 1935, only $50 had been paid on the principal of the promissory note; that on that date the contract of compromise was executed and $750 paid to Helen M. Cox Bennett; that plaintiffs made an application for a government loan on the property, which was granted on June 25, 1936, in an amount sufficient to pay "the said balance on said note and trust deed"; that plaintiffs performed all the conditions of the contract of September 8, 1935, on their part to be performed; that on March 16, 1936, Shoemaker, with knowledge of the terms of the contract of September 8, 1935, purchased the note and deed of trust; that on August 14, 1936, plaintiffs tendered

Shoemaker $2,407.50 in lawful money, being $2,250 principal, with interest from September 8, 1935, to date of the tender; that Shoemaker rejected the tender on the sole ground that it was inadequate in amount; that in open court plaintiffs offered to pay Shoemaker $2,407.50.

Counsel states that Shoemaker purchased the note and deed of trust for $1,500. Shoemaker admits that he is not an innocent purchaser for value before maturity and concedes that he took the note and deed of trust subject to all equities. In his cross-complaint to foreclose the deed of trust he demanded the full amount of the unpaid principal and accrued interest of more than $11,000.

[1] Shoemaker maintains and contends that the contract of September 8, 1935, merely reduced the amount to be paid on a past due obligation and extended the time of payment; that it is not supported by any consideration and is void. The same argument was made in the case of Brooks v. Fidelity Savings & Loan Assn., 26 Cal.App. 2d 114, 78 P.2d 1175, hearing denied, which involved a contract to accept $10,000 in payment of a $15,000 obligation upon which there was an unpaid principal balance of $11,118.56. There, as here, the owners agreed to apply for a new loan on the property. In holding this contract was supported by a sufficient consideration, the court said [page 1177]:

"Weighing all of the conditions then existing—a depressed market for real property, the value of ready cash, the scarcity of bidders at foreclosure sales due to financial conditions which then existed in the general business depression—defendants may have preferred an agreement for the payment of $10,000 in cash rather than to take over the real property on foreclosure.

"It is also alleged that plaintiffs expended money and time in procuring the consent of the Reconstruction Finance Corporation to advance the money, something plaintiffs were not called upon to do by the terms of their note.

"We believe that sufficient consideration did exist for the execution of the agreement, and on that issue the complaint stated a cause of action."

[2] Shoemaker further urges that as the tender was not made good by deposit in a bank it cannot be relied upon now as a valid offer of performance. As he rejected the tender on the sole ground that it was inadequate in amount, he waived all other grounds of objection. Sec. 1501, Civ. Code.

The argument that the tender must be followed by deposit in a bank, under the facts here disclosed, is answered in the case of Bogue v. Roeth, 98 Cal.App. 257, 276 P. 1071, where it is said [page 1073]: "The affirmative allegation contained in the answer that a sum was due the defendants which was greatly in excess of the amount tendered and found by the jury to have been due, together with the fact that the case was tried on the part of the defendants upon the theory that they were entitled to this larger sum of money, furnishes sufficient basis upon which to assume that plaintiff's tender of $8,250 was futile, and it was therefore unnecessary for him to pay that amount into court to keep the tender good. Ordinarily a tender need not be kept good when it appears that it will not be accepted. 26 R.C.L. 624, § 3, p. 643, § 24. Moreover, a mere objection to the amount of a claim tendered will be deemed to be a waiver of all other alleged defects of the tender, such as inability to pay or the character of money offered or the invalidity of a check. 26 R.C.L. 628, § 7."

[3] As plaintiffs tendered the full amount necessary to pay the principal and interest of their debt the property was discharged from the lien of the deed of trust. In Sondel v. Arnold, 2 Cal.2d 87, 39 P.2d 793, a case involving the lien of a deed of trust, the Supreme Court said: "Neither the principal nor the interest mentioned in the letter was ever paid by appellant, or the makers of the note, whereupon respondent proceeded to and did procure a trustee's deed to the property following sale for alleged default. This action was then commenced by appellant to have the trustee's sale and resultant deed declared void on the ground that she had on the maturity date of the note made a valid tender of the amount due, causing, under the provisions of section 1504 of the Civil Code, so she asserts, a cessation of interest and a discharge of the lien against the property. The cited Code section provides that: 'An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof.' It has

been held under this section that a tender, duly made, of the amount of an obligation, works a discharge of a lien given as collateral security therefor. Leet v. Armbruster, 143 Cal. 663, 668–672, 77 P. 653; Walker v. Houston, 215 Cal. 742, 745–747, 12 P.2d 952, 87 A.L.R. 937." See, also, Bogue v. Roeth, supra.

It follows that Shoemaker cannot complain of the judgment which relieved the property from the lien of the deed of trust only upon the payment to him of the amount due and unpaid. This is a more favorable judgment than that to which he is entitled.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



33 Cal.App.2d Supp. 747

PEOPLE v. YOUNG.

C. A. 1547.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 9, 1938.

1. Constitutional law ⇐90, 274

A Los Angeles ordinance prohibiting the distribution of handbills to pedestrians on city sidewalks did not violate constitutional guaranty of free speech or due process, irrespective of the absence of provision for permit. Const.Cal. art. 1, § 9; art. 11, § 11; U.S.C.A.Const. Amend. 14.

2. Municipal corporations ⇐641

Whether a person is actually "distributing" cards within prohibition of municipal ordinance or merely passing out card or two as an isolated casual or occasional act, may be a close question of fact.

3. Municipal corporations ⇐631(1)

One who had in his possession over 300 cards, some of which he had already given to pedestrians on city sidewalk, and according to stipulation was "proceeding to distribute" the rest to other persons, was "distributing" cards within prohibition of municipal ordinance.

[Ed. Note.—For other definitions of "Distribute," see Words & Phrases.]

4. Constitutional law ⇐274

Though the Fourteenth Amendment does not in terms protect the right freely to speak, write and publish, the due process clause fully guards such right. U.S.C.A. Const. Amend. 14.

5. Constitutional law ⇐90, 274

The right to speak and to publish freely is not absolute, but may be subjected to reasonable restrictions upon the time, place and content of its exercise, and abuse of such freedom may be punished in the exercise of police power. Const.Cal. art. 1, § 9; art. 11, § 11; U.S.C.A.Const. Amend. 14.

6. Constitutional law ⇐90, 274
Municipal corporations ⇐622

A city council may not prohibit the distribution of handbills on city streets in the absence of public interest to be served thereby, merely because the streets are "city" streets, and may not place restraint upon the constitutional right of free expression not justified by the evils which lack of restraint would bring about. Const.Cal. art. 1, § 9; art. 11, § 11; U.S.C.A.Const. Amend. 14.

7. Municipal corporations ⇐63(2)

In determining reasonableness of city's restraint of free speech by ordinance prohibiting distribution of handbills, the court may not substitute its judgment for the city council's in determining how far, within the extreme limits of reason, the threatened evils require restrictions, and court may invalidate the ordinance only when it can say that clearly the line of reasonable debate has been passed. Const.Cal. art. 1, § 9; art. 11, § 11; U.S.C.A.Const. Amend. 14.

8. Municipal corporations ⇐589

Within their boundaries, California cities exercise the entire police power of the state, subject only to the control of general laws. Const. art. 11, § 11.

9. Constitutional law ⇐255, 278(1)

The constitutional prohibition against deprivation of property without due process is not superior to that against deprivation of liberty without due process, and both may be abridged by reasonable exercise of the police power for the public benefit. U.S.C.A.Const. Amend. 14.

Appeal from Municipal Court of City of Los Angeles; A. E. Paonessa, Judge.

Kim Young was convicted of violating § 28.01 of the Los Angeles Municipal Code, prohibiting the distribution of handbills, and he appeals.

Affirmed.

A. L. Wirin, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

BISHOP, Judge.

[1] The provisions of the Municipal Code of the City of Los Angeles, which prohibit the distribution of handbills to pedestrians on the sidewalks of the city, do not, under the authorities, so infringe any constitutional right that they may be held inoperative. The judgment that the defendant-appellant pay a fine of $25 for violating the ordinance is, therefore, to be affirmed.

The provisions of the Municipal Code which are involved appear in sections 28.00 and 28.01. There we find that "No person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to or upon any automobile or other vehicle" and by way of definition it is declared that "Hand-Bill shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

[2, 3] It may at times be a close question of fact, whether a person is actually "distributing" cards, which the Municipal Code prohibits, or whether he is passing out a card or two as an isolated casual or occasional act, which, under a proper interpretation of its provisions, the code does not prohibit. In re Anderson, Anderson v. State, 1903, 69 Neb. 686, 689, 96 N.W. 149, 150, 5 Ann.Cas. 421; Coughlin v. Sullivan, 1924, 100 N.J.L. 42, 126 A. 177; Milwaukee v. Kassen, 1931, 203 Wis. 383, 234 N.W. 352, 354. In this case, however, it plainly appears that the defendant was engaged in the distribution of cards. He had in his possession over three hundred colored cards, three and a half by five and a half inches in size; some of these he had already given to pedestrians on the sidewalk adjacent to the Shrine Auditorium, and, it was stipulated, he was "proceeding to distribute" the rest to other persons on the sidewalk. Obviously, the defendant violated the provisions of the Municipal Code, as he was charged with doing, and the judgment imposing sentence upon him must be affirmed unless in some way the state or federal constitution is offended by those provisions.

[4] The Municipal Code's endeavor to create a public offense is futile, it is claimed, because contrary to the right to speak and publish freely, safeguarded by Art. 1, section 9, of our state constitution, and by the Fourteenth Amendment to the federal constitution, U.S.C.A.Const. Amend. 14. The language of the former is: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The Fourteenth Amendment does not in terms protect against an invasion of the right freely to speak and to publish, but in its fending against the deprivation of liberty without due process, the right is held to be fully guarded. Lovell v. Griffin, 1938, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, and cases cited.

[5] The right to speak and to publish freely is not an absolute one, free from all legislative control. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 1919, 249 U.S. 47, 39 S.Ct. 247, 249, 63 L.Ed. 470, 473. "That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." Gitlow v. New York, 1925, 268 U.S. 652, 45 S.Ct. 625, 630, 69 L.Ed. 1138, 1146. Reasonable restrictions may be placed upon the time and place of the exercise of the right of free expression, as well as upon its content. In spite of the uncompromising language of our constitution, it was held in Re Thomas, 1909, 10 Cal.App. 375, 102 P. 19, that the city of Los Angeles could validly prohibit the making of a

public speech in any public park or on any street, within a defined district. A similar ordinance of the city of Boston, prohibiting all public addresses, without a permit, in any of the public grounds of the city, was upheld by the Supreme Judicial Court of Massachusetts in Commonwealth v. Davis, 1895, 162 Mass. 510, 39 N.E. 113, 26 L.R.A. 712, 44 Am.St.Rep. 389, the opinion being written by Mr. Justice Holmes, and it was thereafter held valid by the Supreme Court of the United States, in Davis v. Commonwealth of Massachusetts, 1897, 167 U.S. 43, 17 S.Ct. 731, 42 L.Ed. 71. The New York Court of Appeals held such a prohibitory ordinance to be constitutional in People v. Atwell, 1921, 232 N.Y. 96, 133 N.E. 364, 25 A.L.R. 107 (Mr. Justice Cardozo concurring specially), and again in People v. Smith, 1934, 263 N.Y. 255, 188 N.E. 745. Still other cases, in accord, are reviewed in Coughlin v. Chicago Park Dist., 1936, 364 Ill. 90, 4 N.E.2d 1, itself reaching the same conclusion. While it may be said, as it was in the case of People v. Smith, supra, that an ordinance such as we have just been considering "is not aimed at free speech," it is plain that it nevertheless hits it. An ordinance which declares that one may not speak within a defined district, to that extent abridges the right to speak freely. Although there is an abridgement, the ordinance may still be valid, if the abridgement is not the end sought by the ordinance, but is merely incidental to the operation of the means reasonably adopted to attain a lawful end. Such is the witness of the cases.

[6, 7] We do not subscribe to the doctrine that the city council could prohibit the distribution of handbills on the city streets in the absence of any public interest to be served by the prohibition, just because the streets are "city" streets, under the council's charge; we hold that no restraint may validly be placed by public authority upon the constitutional right of free expression, whether it be to speak, pen, or print, even upon the public streets, which is not justified by the evils which lack of restraint would bring about. We may not, however, substitute our judgment for the city council's in determining how far, within the extreme limits of reason, the threatened evils require restrictions on the exercise of a constitutional right. It is only when we can say that clearly the line of reasonable debate has been passed that we have the right to declare invalid the deliberate act of the legislative body of the city.

Looking at the code before us, we cannot say that the city council had no reasonable cause for prohibiting the distribution of handbills on the sidewalks of the city, or that the city council acted arbitrarily in determining that some measure other than, or short of, such prohibition would not meet the needs reasonably well. Experience teaches that the immediate result of the indiscriminate distribution of handbills on public streets is the littering of those streets. Curiosity and courtesy would induce most persons to take one of the cards offered by appellant; a glance, and lack of further interest, would release it from the hand. Those who are charged by law with determining the public policy which shall govern may well have seen the problem as it was stated in Re Anderson, Anderson v. State, supra, 69 Neb. 686, 96 N.W. 149, 150, 5 Ann.Cas. 421, as quoted in City of Milwaukee v. Kassen, 1931, 203 Wis. 383, 234 N.W. 352, 353: "The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keeps the streets in an unclean and filthy condition." The evil against which the code appears to have been directed is to be measured not merely by appellant's three hundred cards, but by the flood which might reasonably be expected if the code ceased to operate as a dike.

It has been argued that the remedy for littered streets is not to prohibt the distribution of handbills, but to enforce the laws against letting them fall on the street or sidewalk. But in order effectually to prevent the accomplishment of something regarded as an evil, it is often found best, by those who determine the public policy, to prohibit an act, innocent in itself, but which is in the chain of events leading to the evil. Of laws founded on this principle our federal Supreme Court stated in Purity Extract & T. Co. v. Lynch, 1912, 226 U.S. 192, 33 S.Ct. 44, 46, 57 L.Ed. 184, 185: "It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of government. [Cases cited.] With the wisdom of the ex-

ercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended."

[8] Our conclusion that the individual's exercise of his constitutional right of free expression may be curbed by forbidding the distribution of handbills on public streets, finds support in the authorities. See In re Anderson, Anderson v. State, supra, 1903, 69 Neb. 686, 96 N.W. 149, 5 Ann. Cas. 421; City of Milwaukee v. Kassen, supra, 203 Wis. 383, 234 N.W. 352; Almassi v. City of Newark, 1930, 150 A. 217, 8 N.J. Misc. 420; Commonwealth v. Kimball, Mass., 1938, 13 N.E.2d 18, 114 A.L.R. 1440. In support of principles on which, in part, our conclusion is based, we find People v. St. John, 1930, 108 Cal.App., Supp., 779, 288 P. 53; Sieroty v. City of Huntington Park, 1931, 111 Cal.App. 377, 295 P. 564; and San Francisco Shopping News Co. v. City of South San Francisco, 9 Cir., 1934, 69 F.2d 879, certiorari denied 293 U.S. 606, 55 S.Ct. 122, 79 L.Ed. 697. There are authorities not in harmony with our conclusion, as may be discovered in the notes in 22 A.L.R. 1484 and 114 A.L.R. 1446. In connection with some of these cases, those that are based in part on a strict construction of legislative grants of power to municipalities, this should be noted respecting the police power of California cities: within their boundaries they exercise "the entire police power of the state, subject only to the control of general laws." In re Maas, 1933, 219 Cal. 422, 425, 27 P.2d 373, 374; Sec. 11, Art. 11, State Constitution.

Appellant earnestly urges that Lovell v. Griffin, supra, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, is an authority requiring us to reverse this judgment. But we find nothing in the decision in that case to cause us to doubt the correctness of our conclusion. The ordinance under consideration there differs from ours in a vital particular appearing in the Supreme Court's characterization of it [page 669]: "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager."

The distinction to which we refer is not, that under the Griffin city ordinance distribution of pamphlets would be possible were a permit obtained, while no permit is provided for under our ordinance. In effect the two ordinances are identical in this regard, for the Supreme Court looked upon the permit feature as a nullity; the ordinance with it was measured as though it were without it. The circumstance that some of the ordinances prohibiting speaking in public parks and streets, permitted the speaking if a permit was obtained, was not made the basis of approving the ordinance in any of the cases we noted. The absence, in our ordinance, of any provision for a permit, neither strengthens it nor does it invalidate it.

The distinction between the Griffin city ordinance and the Los Angeles code which is both vital and obvious is that the former prohibited the distribution of handbills and cards anywhere in the city, while the latter prohibits their distribution only in a very limited number of places, which cannot be said to be wholly unconnected with public welfare. The Supreme Court did not indulge in obiter dictum; that is, it did not say that an ordinance such as ours would be valid or invalid. It did point out, however, that the ordinance which it determined denied due process, was distinguishable from an ordinance such as ours in the particular we have emphasized, and thus did not extend its disapproval to an ordinance guarding against the littering of streets, which our ordinance (code) does.

Up to this point we have considered the validity of the provisions of the Municipal Code in question solely from the standpoint of the attack made upon them that they are destructive of the right freely to express one's views. It may be, however, that the real constitutional right involved is that rescued from an ordinance such as ours by In re Thornburg, 1936, 55 Ohio App. 229, 9 N.E.2d 516, where it was held that as the right to engage in business is a property right, to prevent one from advertising his business, by passing out cards on the sidewalk, is to deprive one of his property without due process. The

cards which appellant was distributing bore this message:

"Back from . . .
War-Torn Spain
Captain
Hans Amlie
Commander Lincoln Battalion
Brother of Congressman Amlie
Jay Allen
War correspondent Expelled from
Rebel Spain
Pepi Juneda
Famous Spanish Dancer
Pilar Arcos
Spanish Actress and Singer
Chairman, Lillian Hellman
Screen writer and playwright
Trinity Auditorium
847 So. Grand Ave.
March 21, —:— 8:00 P.M.
Admission . . . 25c and 50c
Auspices: Friends Lincoln Brigade
333 W. 2nd st. —:— Mi. 7926
Mercury Printing Co.
855 No. Western Ave."

Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views.

[9] But if this be so, our conclusion is not thereby changed. We do not find the constitutional prohibition against deprivation of property without due process to be superior to that which protects one from being deprived of his liberty without due process; the latter is not, any more than the former, an absolute right; each may be abridged by a reasonable exercise of the police power for the public benefit. Indeed, if we had to choose, we should follow Coughlin v. Sullivan, supra, 100 N. J.L. 42, 126 A. 177, in finding it easier to uphold an ordinance forbidding the distribution of commercial handbills than one prohibiting the distribution of handbills intended to express one's views on questions of public concern.

For the foregoing reasons, we are of the opinion that the judgment of conviction should be, and it is, affirmed.

SHAW, P. J., and SCHAUER, J., concur.

PORTER et ux. v. HOFMAN.

Sac. 5244.

Supreme Court of California.

Dec. 20, 1938.

Rehearing Denied Jan. 19, 1939.

1. Automobiles ⇐181(1)

"Willful misconduct" within meaning of automobile guest statute involves deliberate, intentional or wanton conduct in doing or omitting to perform acts with knowledge or appreciation of likelihood of resulting danger and means something more than negligence however gross. St.1931, p. 1693, § 141¾, now St.1935, p. 154, § 403.

"Willfulness" necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences, and "misconduct" is defined as wrong or improper conduct; bad behavior; unlawful behavior or conduct; malfeasance.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles ⇐181(1)

A motorist must have actual knowledge, or its equivalent, both of peril to be apprehended from his failure to act and that injury to a guest will be a probable result, coupled with conscious failure to act to end of averting injury to be guilty of "willful misconduct," within meaning of automobile guest statute. St.1931, p. 1693, § 141¾, now St.1935, p. 154, § 403.

3. Automobiles ⇐181(1, 7)

A motorist who, while driving at 45 miles per hour down 6 per cent. grade on wet pavement, turned her head and portion of her body around without relinquishing her hold on steering wheel to look at occupants of rear seat, resulting in automobile leaving paved portion of highway, and turning end over end on striking obstruction while motorist was attempting to bring automobile back on the pavement, was not guilty of "willful misconduct" so as to authorize a recovery by guest under automobile guest statute. St.1931, p. 1693, § 141¾, now St.1935, p. 154, § 403.

SEAWELL, J., dissenting.

In Bank.

Appeal from Superior Court, Mendocino County; Benjamin C. Jones, Judge.

Action by Ed Porter and wife against Nanette Hofman for injuries sustained by the wife while riding as a guest in an automobile driven by defendant. From a judgment for plaintiffs, defendant appeals.

Reversed.

Rehearing denied; SEAWELL, J., dissenting.

Prior opinion, 78 P.2d 1023.

H. L. Preston and Lilburn Gibson, both of Ukiah, for appellant.

Charles Kasch, of Ukiah, for respondents.

SHENK, Justice.

The plaintiffs obtained a judgment in damages for personal injuries to the plaintiff Mrs. Porter, sustained when the automobile in which she was riding as a guest of the defendant overturned after skidding on wet pavement. The judgment was entered pursuant to the finding of the trial court that the defendant was guilty of wilful misconduct. The defendant appealed from the judgment.

The only question for determination is whether the evidence supports the finding of wilful misconduct.

Mrs. Hofman and Mrs. Porter were close friends. Mrs. Hofman conducted a business in Ukiah and had occasion to drive her car on frequent trips to San Francisco, on many of which she invited Mrs. Porter to accompany her. On April 19, 1936, Mrs. Hofman invited Mrs. Porter to make such a trip with her. Mrs. Hofman also took along her seven-year-old son. The three arrived safely in San Francisco and Mrs. Hofman completed her business. Early on the afternoon of April 21st they commenced the return trip to Ukiah. Somewhere between San Francisco and Healdsburg they picked up Eugene Walker, a resident of Ukiah. Mrs. Porter sat in the front seat with Mrs. Hofman, and young Walker and the Hofman boy sat in the rear seat. At Healdsburg they encountered rain, which continued intermittently during the course of the next 30 miles. The car skidded slightly twice on the wet pavement but apparently not dangerously, and Mrs. Porter admitted that she was not frightened. However, she suggested to Mrs. Hofman that she drive nearer the center of the road and reduce her speed. There is no evidence that at any time the speed of the car exceeded 45 miles an hour, and that rate was not maintained going around curves or through towns. Numerous curves on the portion of the highway between Healdsburg

and Ukiah were taken with safety and without any indication of danger. At some moment preceding the accident—it does not appear precisely when—Mrs. Hofman asked what the boys were doing. Mrs. Porter said they were playing with a toy airplane. Mrs. Hofman turned her head and portion of her body round for a look without relinquishing her hold on the steering wheel. At this point in their travels they were about 6 miles south of Ukiah. They had just passed around a slight curve following a descent on a six per cent grade, and over a straight stretch preceding another ascent. Mrs. Hofman there lost control of the car, which skidded off the pavement and on to the parallel dirt portion between the paved highway and a fence. For a distance of about 130 feet she attempted to hold the car and bring it back to the pavement, but at the entrance to a lane it turned over, spun on its top and landed upright on its four wheels. It was in evidence that similar accidents on that part of the road were not unusual, eight having occurred in the six weeks preceding the accident here involved, and a number prior to that period.

[1, 2] The facts are not in dispute. But they fall far short of evidencing that condition which must obtain before a defendant in such an action may be said to be guilty of wilful misconduct. What is wilful misconduct as used in section 141¾ of the California Vehicle Act (Stats.1923, p. 517, St.1931, p. 1693, now section 403 Vehicle Code, Stats.1935, pp. 93, 154), has been reiterated many times. See cases cited in Parsons v. Fuller, 8 Cal.2d 463, 66 P.2d 430; Jones v. Hathway, 22 Cal.App.2d 316, 70 P.2d 681; and Ceikin v. Goldman, 5 Cal.App.2d 162, 42 P.2d 719; also Wright v. Sellers, 25 Cal.App.2d 603, 78 P.2d 209. In Parsons v. Fuller, supra, at page 468, 66 P. 2d page 432, this court approved the following definitions of wilful misconduct:

"'Willful misconduct' is defined in the case of Norton v. Puter (138 Cal.App. 253), 32 P.2d 172, * * * as follows:

"'Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510, 512; Olson v. Gay, 135 Cal. App. 726, 27 P.2d 922; Walker v. Bacon, 132 Cal.App. 625, 23 P.2d 520; Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279. Webster's New International Dictionary, p. 1379, defines misconduct as "wrong or improper conduct; bad behavior; unlawful behavior or conduct; malfeasance." 40 C.J. p. 1221. Willfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences. In Helme v. Great Western Milling Co., supra, it is said: "'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' In re Burns, 218 Mass. 8, 105 N.E. 601, Ann.Cas.1916A, 787. The mere failure to perform a statutory duty is not alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central etc. Ry. Co., 165 Ala. 407, 51 So. 792.'"' To this must be added the element included in the definition approved in Meek v. Fowler, 3 Cal.2d 420, 425, 45 P. 2d 194, and cases following it, of actual knowledge or its equivalent that an injury to a guest will be a probable result.

[3] We need not again enter upon a review of the considerations surrounding the enactment of the legislation and which bear upon the adoption of the quoted definition as appropriate thereunder. All of these considerations are discussed at length in the cases cited herein. It is unnecessary in this case to do more than point to the language of the above quoted definitions to emphasize the fact that the present record is devoid of any evidence that Mrs. Hofman, if guilty of anything, was guilty of anything more than negligence, for which no recovery may be had by the plaintiffs under the provisions of the California Vehicle Act. Before liability arises there must be shown actual knowledge, or its equivalent, on the part of the defendant of peril to be appre-

hended coupled with a conscious failure to act to the end of averting injury. Meek v. Fowler, supra, p. 425, 45 P.2d 194. Even if it be assumed that the skidding commenced while Mrs. Hofman's head was turned, there is no circumstance in the record disclosing either express or implied knowledge on her part that probable injury to any guest in the car would follow from any conduct on her part. On the contrary it appears that Mrs. Hofman was more concerned with the safety of her son and close friend than otherwise. There is here no conscious reckless disregard of their safety as was involved in cases such as those relied upon by the plaintiffs (see Wright v. Sellers, supra; Jones v. Hathway, 22 Cal. App.2d 316, 70 P.2d 681; Jackie Coogan Prod. Inc. v. Ind. Acc. Comn., 21 Cal.App. 2d 225, 68 P.2d 750; Frank v. Myers, 16 Cal.App.2d 16, 60 P.2d 144; Candini v. Hiatt, 9 Cal.App.2d 679, 50 P.2d 843; Parsons v. Fuller, 8 Cal.2d 463, 66 P.2d 430; Edwards v. Bodenhamer, 7 Cal.App.2d 305, 46 P.2d 202; Gieselman v. Uhlman, 7 Cal.App.2d 409, 45 P.2d 819; Sanford v. Grady, 1 Cal.App.2d 365, 36 P.2d 652, 37 P.2d 475; Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172; Olson v. Gay, 135 Cal. App. 726, 27 P.2d 922; Walker v. Bacon, 132 Cal.App. 625, 630, 23 P.2d 520), and which led to the conclusion therein that the evidence warranted a finding that wilful misconduct had occurred. In another case the driver's act of turning to adjust the head of his sleeping companion, resulting in the truck colliding with a car coming from the opposite direction, was held not to amount to wilful misconduct, and a judgment for the plaintiff was reversed. Bartlett v. Jackson, 13 Cal.App.2d 435, 56 P.2d 1298. Similarly in other cases, some of which are cited below, the facts failed to reveal misconduct on the part of defendants within the meaning of the approved definition and the courts unhesitatingly reversed judgments or orders favorable to the plaintiffs therein. Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194; Weir v. Lukes, 13 Cal. App.2d 312, 56 P.2d 987; McLeod v. Dutton, 13 Cal.App.2d 545, 57 P.2d 189; Halter v. Malone, 11 Cal.App.2d 79, 53 P.2d 374; Newman v. Solt, 8 Cal.App.2d 50, 47 P.2d 289; Ceikin v. Goldman, 5 Cal.App.2d 162, 42 P.2d 719; Lennon v. Woodbury, 3 Cal. App.2d 595, 40 P.2d 292; Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.2d 988; Howard v. Howard, 132 Cal.App. 124, 130, 22 P.2d 279; see, also, Hall v. Mazzei, 14 Cal.App.2d 48, 57 P.2d 948.

The record in this case calls for similar action.

The judgment is reversed.

We concur: LANGDON, J.; WASTE, C. J.; CURTIS, J.; EDMONDS, J.; HOUSER, J.

SEAWELL, Justice.

I dissent. The only question presented on this appeal is whether the driver of an automobile is liable in damages to a guest for injuries which were the proximate result of the acts of the driver losing control of the car by reason of turning almost completely in her seat to engage in conversation with guests occupying the rear seat while the car was descending a six per cent oiled road bed, 20 feet wide with graveled shoulders, wet from rain on a cloudy day, and traveling at the rate of approximately 45 miles per hour, as found by the trial judge, with the warning that the car had skidded but a relatively short time before the accident happened. The trial court with all the facts before it held that the driver was guilty of wilful misconduct. There is substantial evidence in the record sustaining the findings of the trial court and the judgment, in my opinion, should not be disturbed.



SPARRER et al. v. KERSGARD et al.

S. F. 16081.

Supreme Court of California.

Dec. 20, 1938.

Rehearing Granted Jan. 19, 1939.

1. Automobiles ⇐242(1)

A motorist driving with a friend would be presumed not to have been taking a chance of seriously injuring the friend or himself, as respects whether motorist was guilty of willful misconduct so as to be liable under guest statute for injuries sustained by friend in accident. St.1935, p. 154, § 403.

2. Automobiles ⇐244(20)

Evidence that motorist approached curve at night at a speed in excess of that prescribed by statute upon wrong side of road, was insufficient to establish that mo-

torist was guilty of such "willful misconduct" as would make him liable under guest statute for injuries sustained by guest when automobile overturned, regardless of whether motorist knew or should have known of approaching curve, where nothing in facts indicated that motorist was conscious, or should have known, that injury to his guest would be a probable result of motorist's conduct. St.1935, p. 154, § 403.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

HOUSER, SEAWELL, and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; Raymond McIntosh, Judge.

Action by Louise A. Sparrer, a minor, by her guardian ad litem, Max X. Sparrer, and another, against Alfred O. Kersgard and another, for personal injuries sustained in an automobile accident. From a judgment for the plaintiff, the named defendant appeals.

Reversed.

Prior opinion, 79 P.2d 161.

Frank V. Campbell and Walter E. Rankin, both of San Jose (Robert E. Hayes, of San Jose, of counsel), for appellant.

Jensen & Holstein and Robert E. Cassin, all of San Jose, for respondents.

SHENK, Justice.

A petition for hearing in this court after decision of the District Court of Appeal, First Appellate District, Division 2, was granted about the same time that a similar petition was granted in the case of Porter v. Hofman, Cal.Sup., 85 P.2d 447, for the purpose of giving further consideration to the contentions of the parties in both cases concerning the question whether the respective records show that the defendants were guilty of wilful misconduct. It now appears that the opinion of the District Court of Appeal herein, 79 P.2d 161, prepared by Mr. Justice Sturtevant, is a proper disposition of the question on this appeal. We therefore adopt as the opinion, in part, of this court, the following portions of that opinion:

"This is an action for damages for personal injuries incurred by the plaintiff Louise A. Sparrer, a guest in the defendant's automobile at the time of the accident complained of. The plaintiff was a minor and her parents joined as parties plaintiff. Alfred O. Kersgard, the owner and driver of the automobile, was a minor and prior to the date of the trial his father was appointed his guardian ad litem. For the purposes of this opinion Louise A. Sparrer, the passenger, will be referred to as the plaintiff, and Alfred O. Kersgard, the driver, will be referred to as the defendant. The action was tried before the lower court sitting with a jury. A verdict was returned in favor of the plaintiff and from the judgment entered thereon the defendant appealed. In his brief he presents many points, the principal one of which is that the evidence did not warrant the jury in bringing in the verdict finding the defendant had been guilty of wilful misconduct, such as to make the defendant answerable to the plaintiff in damages under section 403 of the Vehicle Code, St. 1935, p. 154.

"On November 11, 1936, the plaintiff, a girl of eighteen years of age, was residing with her family at Willow Glen near San Jose. At that time she was in her senior year in high school. * * * Some three or four months prior to the date above mentioned the plaintiff had met the defendant. * * * During that entire period and down to the date of the accident they were 'good friends.'

"On November 11, 1936, no schools were held. However, the next day was school day and both parties were intending to attend their classes. The defendant had not prepared his lessons and at the time of the accident, about 8:45 p. m., was returning for the purpose of doing his home work. He owned a model 'A' Ford coupe. Shortly after noon he called at the residence of the plaintiff and the two went to attend a football game in the stadium at San Jose. A short time before the game was finished the plaintiff and the defendant entered the automobile and started for a drive toward the Big Trees in Santa Cruz. On the outward road they paused at Holy City and there they entered a soft drink parlor and had a drink of coca cola. Having had that refreshment they turned back to return to their homes. Between Holy City and Los Gatos, the exact place not specified in the record, the plaintiff complained to the defendant that he drove too fast. He testified that she made no other complaint on that subject during the day. The plaintiff testified she made

the complaint above mentioned. She also testified that, 'Any number of times I had cautioned him about his driving but never really told him to slow down.' * * * The plaintiff testified that the defendant drove 50 miles an hour; sometimes that he drove at that speed around curves; and sometimes that he did not travel that fast. She testified that at times he drove on the left-hand side of the road. She did not specify any time or place except as will hereinafter be noted. She also testified that she did not drive a car, that she did not see the speedometer, that the dash light was not burning, and that during a portion of the time it was dark.

"In presenting the case in the trial court the defendant used a diagram, defendant's exhibit 'C'. On that diagram a section of the road leading from San Jose to Los Gatos is drawn. Another road known as Dry Creek road branches off of the former and leads to Willow Glen. The record discloses that the defendant traveled the latter road when attending the high school a year and a half previously. How frequently he traveled the road the record does not disclose. * * * Traveling northerly on the San Jose-Los Gatos road on their return, the defendant turned into the Dry Creek road which leads easterly in the direction of the plaintiff's home. Dry Creek road is located in the bottom of a cut that was formerly a creek. The former banks of the creek arise on either side. The road leads down hill on a grade of about one-half of one per cent. The road contains different curves, some to the right, and some to the left. Some of the curves are sharp. The curve where the accident happened is 85 degrees—nearly a right angle, and is a curve to the right.

"The plaintiff testified that as they proceeded along Dry Creek road the defendant drove 50 miles an hour, that the car swayed, and that she was holding onto the seat. Continuing, she testified as follows: "The accident happened on a turn. As we approached that turn Mr. Kersgard took the turn as it came. I know that the car turned over. I was more or less stunned. I was not knocked unconscious. We were thrown out of the car. After the accident the car was facing the opposite direction. Before the accident the car, I imagine, was just about the middle of the road. We had been traveling about the middle. I mean we had been traveling in the center of the road. There was no white line on that road. As we approached the curve where the car left the roadway that is a sharp turn. Where the Dry Creek road leaves the San Jose-Los Gatos road there is a service station. As Mr. Kersgard came down from the service station he continued his same course of speed.' The plaintiff did not claim she knew of the approach to the sharp turn, nor did she claim the defendant had any information on the subject.

"The defendant testified that as he approached the turn he was driving at about 45 miles per hour, although, as he stated, he did not have a dash light and did not look at the speedometer—'I know it was between 35 and 45 somewheres—between 35 and 40 miles when I went around this particular curve. Coming down from Santa Cruz from Holy City when there was straight-away I went 45 miles an hour and slowed down a little bit on the corners. I would not know exactly how much I slowed down because as I say there was no light on the dash and I couldn't see the speedometer. * * * As we left the intersection of the two roads I slowed down gradually and then as I got down to this straightaway I picked up speed. The car had lights and they were lit and in good order. It had brakes but after the accident I found that one of the front brakes was not very good. As I drove down the Dry Creek road I couldn't say definitely the speed I attained.'

"One of the photographs introduced in evidence shows a telephone pole. As the road turns away from it, looking forward, the pole appears to stand in the middle of the road. Continuing, the defendant testified: 'As we approached this curve we were talking and didn't expect anything like that, and I drove right up to it, and the lights flashed on this telephone pole and it came so unexpected and I didn't apply the brakes any. I just went around the end of the road and had my foot off the gas as I started around the corner, and didn't expect such a sharp corner. I didn't know it was going to be such a sharp curve, I didn't know where it was going to come out of; and the wheels came off the pavement after we finished the curve, and the front wheels took hold and my body went forward and I put on the brakes and it just swerved the car around. * * * As I approached this curve here which I have just described I didn't know how sharp that turn was. * * *

"Besides the plaintiff and the defendant there was no other eye witness. Immediately after the accident and before the car was moved the traffic officers arrived. They found the car on the bank at the side of the road on the defendant's right-hand side but facing in the direction from which it had come. It had turned completely over and end for end. It stood at a point about 100 feet forward from the apex of the curve. The last 120 feet of the path of the car in the road was marked by burned rubber skid marks on the defendant's left-hand side of the road.

[1,2] "After all of the evidence had been taken the defendant made a motion that the jury be directed to bring in a verdict in his favor. The trial court denied the motion and the defendant claims the trial court erred. We think that claim is well founded. It must be conceded at once that there was evidence that the defendant violated the statute prescribing the speed of motor vehicles and that he was driving on the wrong side of the road. But such facts, standing alone, do not constitute wilful misconduct. McLeod v. Dutton, 13 Cal.App.2d 545, 549, 57 P.2d 189. * * *

"It is clear that the evidence does not disclose that the defendant, prior to entering the curve where the accident occurred, knew, or should have known, of the dangers in traversing it and therefore that the defendant is not liable. Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510.

"In the case entitled Meek v. Fowler, 3 Cal.2d 420, at page 426, 45 P.2d 194, at page 198, the court said: 'His conduct under the circumstances constituted, at most, gross negligence. Upon the record now before us, it cannot be said that he proceeded in utter disregard of, or that he was utterly indifferent to, the rights of his guests. While his judgment, under the circumstances confronting him, may have been poor, it does not appear that he was wantonly reckless in exposing his guests to danger, nor did his conduct partake of the nature of a willful, intentional wrong.' That language is peculiarly applicable to the facts in the instant case."

Even if it be assumed that the defendant knew or should have known of the curves on the road then being travelled, there is nothing in the facts to indicate that he was conscious or should have known that injury to his guest was a probable result so as to constitute his actions wilful misconduct, as defined in the cases cited herein and in Porter v. Hofman, Cal.Sup., 85 P.2d 447, this day decided, wherein cases such as relied upon by the plaintiffs are distinguished.

The judgment is reversed.

We concur: WASTE, C. J., LANGDON, J.; EDMONDS, J.

I dissent: HOUSER, J.

SEAWELL, Justice.

I dissent from the judgment of reversal. The defendant wilfully refused to exercise reasonable care or consideration for the safety of his invited guests and others while conducting an automobile. The many safety provisions of the Motor Vehicle Act are intended to bring under regulation an increasingly menacing situation. The decisions which practically hold that the driver of a car is not liable to the person whom he invites to ride with him and injures by wilful disregard of the plain and obvious hazards in the manner and circumstances shown herein do not in my judgment reflect the legislative intent. A driver should not be immuned from the consequences of his misconduct when it appears beyond question that he wilfully and intentionally did what no reasonable person should have done or would be expected to do. The defendant persisted in misconduct despite the fact that the young lady whom he took into his care called to his attention the dangers which resulted in her injury. The distinction which some courts have attempted to draw between gross negligence and wilful misconduct shades into faint lines. It seems absurd to say that a person who wills to assume an obvious hazard is not guilty of wilful misconduct. Certainly laymen are not able to see the fine distinctions which courts are able to find by the aid of the judicial microscope. To prevent the jury following what would seem to be a natural interpretation of the statute in the mind of the average man it becomes necessary in this case, and it will be necessary in others, to direct a verdict for the defendant or reverse the finding of the jury in practically every case in which wilful misconduct is an issue. It is not easy to believe that the statute intended to require that the defendant must, in effect, declare that he intended to injure the person he invited to ride with him in order that she may recover compensation for her loss. Cases

involving wilful misconduct present questions of fact and should not be taken from the jury's consideration nor reversed after a jury has rendered its verdict unless there is greater reason for so doing than appears from the facts in the instant case.

The instant case on important facts is very much like the cases of Jackie Coogan Productions, Inc. v. Industrial Accident Commission, 21 Cal.App.2d 225, 68 P.2d 750 (hearing denied by this court) and Parsons v. Fuller, 8 Cal.2d 463, 66 P. 2d 430, wherein the question of wilful misconduct as applied to drivers of automobiles over mountainous and tortuous roads was carefully considered. The judgments in both cases were affirmed. I am therefore of the opinion that the judgment in the instant case should likewise be affirmed.

I concur: CURTIS, J.



12 Cal.2d 434

In re SIDEBOTHAM.

Cr. 4169.

Supreme Court of California.

Dec. 13, 1938.

Rehearing Denied Jan. 12, 1939.

1. Constitutional law ⇐81
Fraud ⇐68

The provision of the Real Estate Act requiring owner of subdivided lands to notify real estate commissioner in writing of intention to sell or lease prior to time lands are offered for sale or lease is not an invalid exercise of police power merely because it benefits only the purchasers and lessees of subdivided realty and not the whole public. Gen.Laws 1937, Act 112, § 20 et seq.

2. Constitutional law ⇐212

The police power may be exercised for the purpose of protecting particular classes of the public in need of such protection.

3. Fraud ⇐68

The object of the provision of the Real Estate Act requiring owner of subdivided lands which are offered for sale or lease to notify real estate commissioner in writing of intention to sell or lease before lands are offered for sale or lease, was intended to prevent fraud in a type of real estate transaction peculiarly open to such abuses. Gen.Laws 1937, Act 112, § 20 et seq.

4. Constitutional law ⇐81

The Real Estate Act requiring the owner of subdivided lands, prior to time they are offered for sale or lease, to notify real estate commissioner in writing of intention to sell or lease is a reasonable exercise of police power. Gen.Laws 1937, Act 112, § 20 et seq.

5. Statutes ⇐47

The Real Estate Act requiring subdivider of lands offered for sale or lease to notify real estate commissioner in writing of intention to sell or lease is not invalid for failure to define "misrepresentation" or "fraud" or in defining "subdivision" as land divided into five or more parcels. Gen.Laws 1937, Act 112, § 20 et seq.

EDMONDS and HOUSER, JJ., dissenting.

In Bank.

Proceeding in the matter of the application of Robert R. Sidebotham for a writ of habeas corpus.

Writ denied.

Rehearing denied; HOUSER, J., dissenting.

Prior opinion, 77 P.2d 893.

J. B. Freeman, of Stockton, for petitioner.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and P. B. Lynch, Dist. Atty., Solano County, and K. I. Jones, Deputy Dist. Atty., both of Fairfield, for respondent.

Breed, Burpee & Robinson, of Oakland, amici curiae for California Real Estate Ass'n.

LANGDON, Justice.

Petitioner, after conviction and sentence for violation of certain provisions of the Real Estate Act, secured a writ of habeas corpus from the District Court of Appeal, and after a favorable decision in said court, was ordered discharged. Respondent sheriff then sought a hearing in this court. The sole issue before us is the constitutionality of the regulation of subdivisions under the terms of said act. Deering's Gen.Laws 1937, Act 112, sec. 20 et seq.

Section 20a of the act provides that prior to the time when subdivided lands are offered for sale or lease, the owner, his agent or subdivider shall notify the real estate commissioner in writing of his intention to sell, and in such notice shall give the name and address of the owner and the subdivider; description and area of the land; true statement of the condition of the title, particularly including all encumbrances; the terms or conditions on which it is intended to dispose of the land; and copies of contracts intended to be used. The commissioner may require "such additional information concerning the project as he may deem necessary", and may prepare a questionnaire to be answered. Section 20b authorizes the commissioner at the expense of the owner, his agent or subdivider, to investigate any subdivision offered for sale or lease and make public his findings. Section 20e provides that the commissioner may issue an order prohibiting the sale or lease of the property if his examination shows that the sale or lease "would constitute misrepresentation to or deceit or fraud of the purchasers of lots or parcels in such subdivision". This examination is followed by a public report (sec. 20e), and before any prohibitory order, a hearing must be held (sec. 20f). After the project has been submitted to the real estate divisions, no material changes may be made without first notifying the division (sec. 20g). If the land is subject to a lien or encumbrance, provision must be made enabling the vendor to deliver title to each parcel sold free of such lien or encumbrance, upon completion of performance by the purchaser. Sec. 20h. For the purpose of the act, "subdivision" is defined as "land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into five or more lots or parcels". Sec. 20j. Violation of these sections is made punishable by imprisonment in the county jail for not exceeding two years, or a fine not exceeding $2,000, and by suspension or revocation of a real estate broker's license. Sec. 20*l*.

Petitioner pleaded guilty to a charge of subdividing and offering for lease and sale certain land in Solano county without first notifying the commissioner, in violation of the terms of section 20a, supra. Sentence of imprisonment in the county jail for one year was pronounced, and habeas corpus was then sought on the ground that the law is invalid. It is contended that these sections are unconstitutional in that they place unreasonable burdens on the exercise of property rights, and that they are vague and uncertain. In our opinion these contentions are not sound.

[1-4] The assertion that this is not valid police power legislation because it benefits only a special class, the purchasers and lessees of subdivided real estate, and not the whole public, is without substance. The police power may be, and usually is, exercised for the purpose of protecting particular classes of the public in need of such protection, and it is rare indeed that a single law includes everyone in the scope of its regulations. The object of the present law, prevention of fraud and sharp practices in a type of real estate transaction peculiarly open to such abuses, is obviously legitimate; and the method, involving investigation and disclosure of certain essential facts, and a protection for the innocent purchaser against loss of his land by foreclosure of the underlying mortgage, is perfectly reasonable. A safeguard against arbitrary action is provided in the requirement of a public report of the commissioner's investigation and a public hearing on any contemplated prohibitory order. The decisions sustaining regulatory legislation to prevent fraud are numerous, and they fully support the law herein attacked. Particularly in point are People v. Craven, 219 Cal. 522, 27 P.2d 906, upholding the provisions of the Corporate Securities Act requiring an individual to secure a permit for the issuance of "certificates of interest" [page 907]; and Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., Cal.Sup., 82 P.2d 3, 118 A.L.R. 486, upholding the California Unfair Practices Act. See, also, Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643, on corporate securities acts; Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418, upholding the California Real Estate Brokers' License Act; Gregory v. Hecke, 73 Cal.App. 268, 238 P. 787, sustaining the statute preventing adulteration, false labeling or fraud in sale of germicides used for plant pests; Pacific States Box & Basket Co. v. White, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853, upholding law regulating size and shape of berry containers; and many other authorities reviewed in the above decisions.

Petitioner relies on People v. Pace, 73 Cal.App. 548, 238 P. 1089, wherein it was held that a provision of the Corporate Securities Act regulating the sale by an individual of securities personally owned, and not issued or underwritten by him, was an unconstitutional restriction on his right to dispose of property. We need not here consider the extent to which the Pace Case has been limited by the opinion in People v. Craven, supra (see 22 Cal.L.Rev. 341), except to point out that the present legislation falls within the principles laid down in the Craven Case. There the subject-matter was securities, individually owned, but issued by the defendant, and this latter fact furnished the basis for valid regulation. Here, the owner or subdivider, initiating the project, is in somewhat the same position. But a more conclusive answer to the Pace Case is that the present statute requires no permit for the sale, but merely the giving of certain information to prevent fraud and oppression against lot purchasers, and this requirement, as we have already stated, is a reasonable one.

[5] Petitioner contends that section 20j, defining "subdivision", is arbitrary and indefinite, and also attacks the act for failure to define "misrepresentation" or "fraud". We find no uncertainty in these terms. The legislature must necessarily choose some point at which the sale of parcels from a large tract gives rise to the possible evils which require regulation, and we cannot say that the determination of five lots is improper. And the terms "fraud" and "misrepresentation" are commonly understood and fully defined judicially.

It is also suggested that unfair or discriminatory action is permitted by the delegation of powers to the commissioner, but since nothing of the sort was alleged to have been done in the instant case, there is no such issue before us now.

The writ is denied, and petitioner is remanded to custody.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

EDMONDS, Justice (dissenting).

I am unable to agree that the legislature may constitutionally require the owner of real estate who desires to sell it in five or more parcels to notify the real estate commissioner of his intention so to do and to pay $50 or more for "an examination of the project". The Constitution of this state provides that all persons have certain inalienable rights, among which are those of "acquiring, possessing, and protecting property". Art. 1, sec. 1, Const. This provision guarantees an owner of property the right to dispose of it "in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter". Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L.R.A.,N.S., 183, 117 Am.St.Rep. 115, 9 Ann.Cas. 747.

Although under the police power the state may properly limit the enjoyment and disposition of property, ordinarily such regulations will be upheld only where they are reasonably related to the health, morals or safety of the public. Even a purpose to protect people from their own folly will not overcome constitutional rights. Both the federal and state Constitutions guarantee the individual's freedom of conduct, and although there are certain limitations which may be placed upon that freedom, in my opinion the act here before the court is not a regulation which it is within the legislative power to impose.

In the leading case of People v. Pace, 73 Cal.App. 548, 559, 238 P. 1089, the defendant was prosecuted for a violation of the Corporate Securities Act. The court held that the police power of the state may not be invoked, under the guise of general welfare, "to interfere with the sale by an individual of his own property when the acquiring and possession of such property is not contrary to law". [page 1094.] This case was followed by the District Court of Appeal in Clover v. Jackson, 81 Cal.App. 55, 253 P. 187, and in Pollak v. Staunton, 210 Cal. 656, 659, 293 P. 26, 27, it was cited for authority for the statement that "a natural person owning securities of which he is not the issuer or underwriter may sell such securities for his own account without procuring a permit from the commissioner of corporations". Later, one Lesser appealed from a judgment of conviction for violating the Corporate Securities Act and it was held that "in so far as the regulation [provided by it] takes away the right of the owner to sell his own property, it is void. * * * Under the guise of 'regulation' a long-established constitutional right, such as is here involved, may not be abridged." People v. Lesser, 123 Cal.App. 489, 11 P.2d 668. The case of People v. Pace, supra, said the

court, states a principle of constitutional rights which has broad application.

Nothing which was said in People v. Craven, 219 Cal. 522, 27 P.2d 906, is authority for upholding the statute challenged in the present case. In the Craven Case this court held that the state may properly prohibit an individual from selling a security of his own issue. But the sale of a security created by an individual stands in a different category from the sale of tangible property and the regulation of the sale of securities rests upon the principle that it is within the power of government to prevent deception concerning them because their value consists in what they represent. The intangibility of securities, said the Supreme Court of the United States, require and allow regulations concerning their sale different than those which may be applied to other property. Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643.

In my opinion the statute which the petitioner was charged with violating imposes onerous and unreasonable restrictions upon owners of real property precluding them from enjoying the constitutional guaranty of ownership and control of it; hence the writ should be granted and the petitioner discharged.

I concur: HOUSER, J.



29 Cal.App.2d 697

PEOPLE v. SALISBURY.

Cr. 3146.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1938.

1. Criminal law ⇐1144(13)

On appeal by accused, evidence was viewed most favorable to the people.

2. Criminal law ⇐304(11)

The courts of California take judicial notice of the laws of a sister state. Code Civ.Proc. § 1875, subd. 3.

3. Criminal law ⇐1202(3)

Under Ohio statute providing that any offense punishable by imprisonment in the penitentiary is a felony and statute providing imprisonment in the penitentiary as penalty for conviction of stealing an automobile, where accused charged with petty theft had pleaded guilty in Ohio to stealing an automobile, finding that accused had been previously convicted of a felony was authorized. Code Civ.Proc. § 1875, subd. 3; Gen. Code Ohio, §§ 12372, 12448.

4. Criminal law ⇐1202(3)

Certificate of the superintendent of the Ohio state reformatory stating that accused had served a term in such institution, designated as a penal institution of the state of Ohio, sustained finding that accused charged with petty theft had served a term in a penal institution.

Appeal from Superior Court, Los Angeles County; Clement D. Nye and George M. Smith, Judges.

Walter Warren Wilshire Salisbury was convicted of petty theft with a finding of a prior conviction of a felony, and he appeals.

Affirmed.

Henry C. Huntington, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant entered a plea of guilty to the charge of petty theft with a prior conviction but denied having previously been convicted of a felony. The court found, after trying the defendant without a jury, that he had been previously convicted of a felony. From this finding and from an order denying his motion for a new trial defendant appeals.

[1] Viewing the evidence most favorable to the People (respondent) the material facts are:

After pleading guilty in the court of common pleas of the state of Ohio to the offense of stealing an automobile and operating a motor vehicle without the consent of the owner, defendant served a term in the Ohio state reformatory at Mansfield, Ohio.

[2-4] Defendant relies for reversal of the judgment upon this proposition:

There is no substantial evidence to sustain the trial court's finding that (a) he was

previously convicted of a felony or (b) he served a term in a penal institution.

This proposition is untenable. We have examined the record and find there was substantial evidence considered in connection with such inferences as the trial judge may have reasonably drawn therefrom to sustain the finding of facts set forth above. For example:

(a) Section 12372 of Patterson's Wilson's Criminal Code (1918) of the state of Ohio provides that any offense punishable by imprisonment in the penitentiary is a felony and section 12448 of the same code provides imprisonment in the penitentiary as the penalty for conviction of the crime of stealing an automobile. The courts of California take judicial notice of the laws of a sister state. Sec. 1875, subd. 3, Code Civ. Proc.; People v. Howard, 16 Cal.App. 2d 349, 352, 60 P.2d 336. It is therefore clear that defendant plead guilty in the state of Ohio to a felony.

(b) There was introduced in evidence a certificate of the superintendent of the Ohio state reformatory, in which it was stated that defendant had served a term in such institution designated as "a penal institution of the State of Ohio". This is evidence that defendant served a term in a penal institution.

For the foregoing reasons the judgment and order appealed from are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



30 Cal.App.2d 20

HALLAM COOLEY AGENCY, INC., et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 12066.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1938.

1. Appeal and error ⇐487

Where an appeal has been taken to the District Court of Appeal from an order of the superior court discharging a writ of attachment levied upon funds in a bank, and the plaintiff appeals from the order, filing an undertaking as provided by statute to continue the attachment in force pending determination of the appeal, the superior court prior to the determination of the appeal has jurisdiction to make an order releasing a portion of the funds from attachment upon the ground that they are exempt. Code Civ.Proc. §§ 690.11, 946.

2. Appeal and error ⇐487

Notwithstanding the perfection of an appeal and stay of all proceedings in attachment upon the order appealed from and matters embraced therein, the superior court may proceed upon any matter embraced within the action and not affected by the order appealed from. Code Civ.Proc. §§ 690.11, 946.

3. Appeal and error ⇐487

An order releasing a portion of funds held under attachment upon the ground that they are exempt is not embraced within the subject matter of an order dissolving the entire attachment, as respects right of former order pending appeal from latter, since part of funds might be exempt from attachment notwithstanding that the attachment is valid in every respect. Code Civ.Proc. §§ 690.11, 946.

Original application for a writ of prohibition by Hallam Cooley Agency, Inc., and another against the Superior Court of the State of California, in and for the County of Los Angeles, and others to restrain the making of an order releasing a portion of funds held by the sheriff pursuant to writ of attachment.

Writ denied.

Charles J. Katz and Alfred Gitelson, both of Los Angeles, for petitioners.

J. H. O'Connor, Co. Counsel, Wolfson & Swetow and Burnett Wolfson, all of Los Angeles, for respondents.

McCOMB, Justice.

This is an original application for a writ of prohibition to restrain respondent court from making an order releasing a portion of funds held by the sheriff pursuant to a writ of attachment on the ground that said funds are exempt from attachment.

The material facts are:

October 5, 1938, petitioner filed an action in respondent court against Robert Gleck-

ler and obtained a writ of attachment which the sheriff served upon the Bank of America National Trust & Savings Association, which made a return to the sheriff that it was holding $2,814.21 belonging to Mr. Gleckler. October 24, 1938, respondent court made an order discharging the writ of attachment above mentioned upon the ground that it was not a proper case for the issuance of a writ of attachment. October 29, 1938, petitioner appealed to this court from such order, filing an undertaking to preserve the attachment pending determination of the appeal. November 2, 1938, Mr. Gleckler made a motion before respondent court for an order releasing $700 of the fund which was being held pursuant to the attachment, upon the ground that said $700 was money which was exempt from attachment. Respondent court announced that it would make such order unless restrained by this court, whereupon an alternative writ of prohibition was issued.

This is the sole question to be determined:

When an appeal has been taken to the District Court of Appeal from an order of the Superior Court discharging a writ of attachment levied upon funds in a bank, and the plaintiff appeals from said order, filing an undertaking as provided by section 946 of the Code of Civil Procedure to continue the attachment in force pending determination of the appeal, does the Superior Court have jurisdiction prior to the determination of the appeal to make an order releasing a portion of said funds from attachment upon the ground that they are exempt therefrom under the provisions of section 690.11 of the Code of Civil Procedure?

[1, 2] This question must be answered in the affirmative. The law is established in California that, notwithstanding the perfection of an appeal and stay of all proceedings upon the order appealed from and matters embraced therein, the superior court may proceed upon any other matter embraced within the action and not affected by the order appealed from. Code Civ. Proc., sec. 946; City of Vallejo v. Superior Court, 199 Cal. 408, 419, 249 P. 1084, 48 A.L.R. 610; 2 Cal.Jur. (1921) 418, sec. 180; 1 Cal.Jur.Ten Yr.Supp. (1936) 350. It therefore becomes pertinent to determine whether or not an order releasing a portion of funds held under attachment upon the ground that they are exempt therefrom is embraced within the subject-matter of an order dissolving the entire attachment. We believe that it is not.

[3] The entire attachment might be dissolved upon any one of a number of grounds or the motion to dissolve the attachment might be denied, the attachment being in every respect valid, and still a portion or all of the funds might be exempt from attachment under the provisions of section 690.11 of the Code of Civil Procedure. It is therefore evident that an order granting a motion to release an attachment or denying the same deals with an entirely separate and distinct situation from an order holding that a portion of funds held pursuant to a writ of attachment falls within the class of property which the Code of Civil Procedure designates as exempt from attachment.

No case has been called to our attention which passes squarely upon the situation here presented. However, in Sherwood v. Porter, 58 Idaho 523, 76 P.2d 928, 115 A.L.R. 593, a case analogous in its facts, the supreme court of Idaho has passed upon a rule of law identical with that here presented. In the Idaho case a writ of attachment had been issued and upon motion of the defendant was dissolved. Plaintiff filed a notice of appeal and also a supersedeas bond to continue the attachment in force pending determination of the appeal. Thereafter defendant, pursuant to an Idaho statute, made a motion to permit him to file a bond in lieu of the property which was being held under attachment and upon the filing of such bond to have the attachment dissolved. The trial court threatened to make the requested order, and upon application for a writ of prohibition, the supreme court held that the order which the trial judge was proposing to make was not embraced within his previous order dissolving the attachment from which an appeal had been taken; and that therefore he had jurisdiction to make the order, and the writ of prohibition was denied. In reaching its conclusion the supreme court of Idaho relied upon a provision in the Idaho statute identical in wording with section 946 of our Code of Civil Procedure, to-wit: "* * * but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from."

For the foregoing reasons the alternative writ of prohibition heretofore issued is discharged and a writ of prohibition is denied.

We concur: CRAIL, P. J.; WOOD, J.

Ex parte MEANS.*

Cr. 1652.

District Court of Appeal, Third District, California.

Dec. 2, 1938.

Rehearing Granted Dec. 17, 1938.

1. Municipal corporations ⇐592(1)

A city ordinance requiring plumbers to obtain registration certificates from city health officer *held* not unconstitutional as in conflict with general Civil Service Act or rules and regulations of state personnel board. St.1937, p. 2085; Const. art. 11, § 11.

2. Municipal corporations ⇐8

A city charter being legislative act, provisions thereof as to regulation of plumbing prevail over any conflicting rules or regulations of appointive state civil service personnel board, which is mere state agency created to perform certain governmental functions for state in very restricted field. St. 1937, p. 2085; Sacramento Charter, § 9.

3. Municipal corporations ⇐592(1)

The state civil service personnel board's setting up of system of plumbers' qualifying examinations would not abrogate city ordinance respecting same matter. St.1937, p. 2085; Const. art. 24.

4. Municipal corporations ⇐592(1)

Nothing less than positive general law on same subject as city ordinance creates conflict within section of Constitution authorizing city to make local police, sanitary, or other regulations not in conflict with general law. Const. art. 11, § 11.

5. Municipal corporations ⇐592(1)

The supplying of water and removal of water borne waste are municipal affairs.

Appeal from Superior Court, Sacramento County.

Proceeding by E. H. Means for a writ of habeas corpus to procure his release from imprisonment under a judgment on conviction of engaging in the work of a plumber without having a registration certificate as required by a city ordinance.

Writ discharged, and petitioner remanded.

John J. Hamlyn, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., amici curiae.

Hugh B. Bradford and B. F. Van Dyke, both of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner was charged with a violation of ordinance No. 496, 4th series, section 3, and was convicted and imprisoned therefor.

This ordinance is entitled "An ordinance regulating plumbing in the City of Sacramento; providing for the examination of and issuance of certificates of registration to qualified plumbers; * * *".

It defines "plumbing work" as including "all water and sewer pipes, drainage and water pipes and vent pipes in or pertaining to any building or lot upon which same is situated, * * *; also all material and work used in new construction or reconstruction * * *; also all pipes in connection with the vapor or waste of any kind which may be discharged into the sewers or drains or vent pipes". It makes it unlawful for any person to engage in the plumbing business without first procuring from the health officer a certificate of registration authorizing such acts; and then declares it unlawful for any person to perform such labor without first obtaining such certificate and prescribing a penalty therefor.

In the instant case petitioner was a civil service state employee, assigned to and engaged in the work of a plumber by the state of California at the state fair grounds in Sacramento. The fair grounds lie within the corporate limits of the city of Sacramento. He earned his status by virtue of having passed the necessary examinations required by the provisions of article 24 of the state Constitution, the Civil Service Act (Stats.1937, chap. 753, p. 2085) and the rules and regulations of the state personnel board. He did not have a registration certificate as required by the foregoing ordinances of Sacramento, hence his arrest and imprisonment.

Sacramento is a charter city, and is given the power therein "to regulate the construction of and the materials used in all buildings * * *; to regulate the manner of construction and location of drains and sewers * * *; the materials and methods used for piping buildings for water; * * * to regulate and prescribe all methods and materials used for the

*For subsequent opinion see 87 P.2d 894.

plumbing of all buildings, * * * and to provide for the examination and licensing of all persons * * * who shall engage in or work at the business of plumbing * * *". Sacramento charter, sec. 9.

In addition to this express charter provision, Sacramento is given the power by section 11 of article 11 of the state Constitution, to "make and enforce within its limits all such local police, sanitary, or other regulations as are not in conflict with general laws". Acting, therefore, under its general police power and under its specifically given charter powers Sacramento adopted the ordinance in question. Having in mind the nature of the work and its possible effect upon the health and well being of its citizens, it would appear that such requirements, both as to material and workmanship, were a necessity and the failure to so protect its citizens would be a dereliction of duty upon the part of any city.

[1, 2] It is the contention of petitioner that the ordinance in question is in conflict with the general Civil Service Act, and to that extent is unconstitutional. We are unable to find such conflict. Ordinance No. 496 deals exclusively with the regulation of plumbing within the city of Sacramento, how it shall be done, and those who may do it. Neither in the Constitution nor in the Civil Service Act is this question mentioned, and obviously those provisions were not intended to occupy that field. Nor do we find in the rules and regulations of the personnel board any provisions pertaining to the regulation of plumbing, but even if such conflict did exist, the provisions of the charter, being a legislative act, must be held to prevail over a rule or regulation of an appointive board, which is no more than a state agency created to perform certain governmental functions for the state in a very restricted field.

[3, 4] In Pasadena School District v. City of Pasadena, 166 Cal. 7, 134 P. 985, 47 L.R.A.,N.S., 892, Ann.Cas.1915B, 1039, the school district, embracing all of the territory within the limits of the city, was proceeding to erect a school building without having first complied with an ordinance of the city providing for the issuance of a building permit and the payment of certain fees, and the submission of the proposed plans to the city. The city threatened to arrest the school trustees and the contractor, and the controversy was submitted to the court under section 1138 of the Code of Civil Procedure. The question, as found by the court, was, "Has the city * * * the power to subject the school district * * * to its regulating building ordinances and building code in the exercise of its police power?" In brief, the court held that unless there was some positive and general law upon the same subject which could be said to create a conflict, the charter provisions must govern, and that while the state had the power to provide for a complete and exclusive system of regulation in respect to the erection of school buildings, if it had not exercised that power the city was within its right in exacting conformity with its building laws. So, here, while the state could, if it desired, provide regulations for the installation of plumbing, it has not done so. The fact the Constitution provides for civil service and gave authority to a board to set up a system of rules and regulations in furtherance of that purpose, does not constitute a general law regulating plumbing. Even if the board did set up a system of qualifying examinations for plumbers, it would not abrogate the city's ordinance in respect to the same matter. As said in the Pasadena School District Case, supra, quoting from Ex parte Campbell, 74 Cal. 20, 15 P. 318, 321, 5 Am.St.Rep. 418, "nothing less than a positive and general law upon the same subject can be said to create a conflict within the meaning of that section".

Whether or not a general law would in the present situation affect the outcome of this case we are not here called upon to decide. The charter grants the city the right and power to make and enforce laws and regulations in respect to municipal affairs.

In Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 166 P. 351, and quoted with approval in Bank v. Bell, 62 Cal.App. 320, 217 P. 538, it is said [page 541]: "* * * The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles. If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law can confer it. * * *"

In the Matter of Nowak, 184 Cal. 701, 195 P. 402, the court said [page 403]:

"The net result of this situation is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and, the imposition of the tax for revenue purposes being strictly a municipal affair, the city has the power to impose that tax unless the power was taken from it by the charter itself."

[5] That the supplying of water, and the removal of water borne waste is a municipal affair is clearly established in Metropolitan Water District v. Superior Court, 2 Cal.2d 4, 37 P.2d 1041; Smith v. City of Glendale, 1 Cal.App.2d 463, 36 P.2d 1083; City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745; Wehrle v. Board of Water and Power Commissioners, 211 Cal. 70, 293 P. 67.

In City of Pasadena v. Charleville, supra, the court held that the city was not bound by state law or regulation in respect to municipal affairs. In that case a contract had been let by the city for the erection of a wire fence around its municipal reservoir. A general state law required that any contract for the doing of any public work should contain certain provisions as to the payment of the prevailing per diem wage. The city manager refused to sign a contract for the erection of the fence which did not contain such provisions; the city taking the position that the maintenance and operation of a water distribution system was a municipal affair and not bound by general state law opposed the position taken by its manager, which contention the court upheld, declaring that the city was not controlled by any legislative enactment regarding its municipal affairs, and that the construction of the fence around the reservoir, which was a part of the city's municipal water system, was a municipal affair.

Regardless, however, of that point we believe that neither the constitutional provision providing for civil service nor the Civil Service Act applied to the situation here presented, and that the city was acting within its authority in making it a misdemeanor for any one to do plumbing work within its limits without obtaining a license so to do. That being true, the writ sought should be discharged, and the petitioner remanded. It is so ordered.

I concur: THOMPSON, J.

29 Cal.App.2d 486

PEOPLE v. RIO NIDO CO., Inc., et al.

Civ. 5851.

District Court of Appeal, Third District, California.

Nov. 30, 1938.

1. Judgment ⇐226

It is essential that a judgment, particularly one affecting real property, be specific and certain in its identity of the lands affected so that a stranger may be able to clearly identify the particular tract.

2. Judgment ⇐226

A judgment declaring that "all parks in the valleys" of designated divisions of a subdivision as shown by maps had been dedicated to public use and were public property did not fix character of lands as parks, where judgment, after recitation that parks were public property, attempted to identify maps by reference to specified pages of "volume 19" and maps in office of county recorder, which were regarded as those referred to, failed to indicate parks, valleys, or dedicated lands, showing merely an elliptical course of lots.

3. Judgment ⇐226

A judgment purporting to adjudicate the title to realty must be as clear and explicit as a deed which purports to convey real property.

4. Judgment ⇐226

A judgment declaring that "all parks in the valleys" of designated divisions of a subdivision had been dedicated to public use and were public property was insufficient to fix character of lands as public park for failure to declare that any land was actually dedicated to public use as a park.

5. Judgment ⇐526

A judgment declaring that "all parks in the valleys" of designated divisions of a subdivision had been dedicated to public use and were public property was not made sufficiently certain to fix character of land by resort to pleadings, if required, where allegations of complaint failed to identify any land as being in valleys or to describe "parks and valleys," and no parks were marked on map referred to in complaint.

6. Judgment ⇐526

A person whom it is sought to bind by a judgment is not required to seek beyond the judgment roll, nor to indulge in surmise.

7. Dedication ⇐1

"Dedication" is one means of bestowing property on the government.

[Ed. Note.—For other definitions of "Dedication," see Words & Phrases.]

8. Dedication ⇐1, 44

A "dedication" being a voluntary transfer partakes both of the nature of the grant and a gift, and is governed by the fundamental principles which control such transactions, consisting of an offer and acceptance which must be shown by proof of intention of owner to dedicate to public use clearly indicated by his words or acts, and unequivocal proof of acceptance by public user or formal resolution.

9. Eminent domain ⇐69

The government cannot deprive a person of his private property without just compensation unless the owner is willing, and such willingness must be manifest by clear and unmistakable acts, and cannot be founded on doubtful implications.

10. Dedication ⇐1

Dedication may be either a statutory or common-law dedication.

11. Dedication ⇐23, 35(1)

Parks in a subdivision were not dedicated to public use under statute requiring filing of map showing lands reserved for public purposes and providing for dedication of streets, roads, alleys, and highways after indorsement of acceptance by governing body, where map filed in office of county recorder failed to show supervisors' acceptance of land in tract for park or any other public purpose, or to show any land set aside for park purposes, and supervisors merely accepted map which did not constitute acceptance of dedicated lands, since none was shown on face of map. St.1901, p. 288.

12. Dedication ⇐1, 15, 31

A "common law dedication" is the setting apart of land for the public use, to which are necessary an intention by the owner clearly indicated by his words or acts to dedicate land to public use, and an acceptance by the public of the dedication.

[Ed. Note.—For other definitions of "Common-Law Dedication," see Words & Phrases.]

13. Dedication ⇐29

Before a common-law dedication has been accepted, owner of land is not precluded from revoking at any time the offer to dedicate.

14. Dedication ⇐37

Parks in subdivision were not dedicated to public use under common law, where the only public use relied on to indicate intention to accept dedication was use of property by neighboring property owners and others for picnics, camping, and playgrounds, and where such uses were intermittent, site remained in same condition as when tract was originally surveyed, except for accumulation of rubbish, no signs or enclosures had been erected, and there was no supervision nor attempt to eradicate poison oak or underbrush or to develop any special attractions on property.

15. Dedication ⇐37

Something more than a mere casual user must be shown before any valid dedication will be implied.

16. Estoppel ⇐62(3)

A county by acceptance of judgment determining that only such lands in divisions of subdivision as might be marked as parks on map had been dedicated to public use was precluded from claiming prior dedication of lands for park purposes by common-law offer and acceptance.

17. Judgment ⇐226

In action in name of state against owners of lots in subdivision to establish ownership of lands in subdivision as public park, owners of lots had right to have property described in judgment with certainty and particularity.

18. Judgment ⇐226

A judgment establishing public ownership of park lands in designated county shown and platted on recorded map as open space not divided into lots, without description of property by metes and bounds, or monuments or natural boundaries, was defective for failure to describe lands affected with certainty, where map to which reference was made merely showed elliptical chain of lots which, if sufficient to determine eastern, northern, and western boundaries, failed to fix southern boundary or provide anything by which it could be fixed.

19. Appeal and error ⇐1152

Where judgment establishing public ownership of park lands in subdivision was fatally defective for failure to describe lands affected with certainty, reviewing court

ould not revise findings and decree under statute, where there was no evidence in record which made park sites definite. Code Civ.Proc. § 956a.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by the People of the State of California against Rio Nido Company, Inc., and others, to establish ownership of lots in a subdivision. Judgment for plaintiff, and defendants appeal.

Reversed.

Landels, Weigel & Crocker and Edward B. Landels, all of San Francisco, for appellants.

Toland C. McGettigan, Dist. Atty., and F. L. Manker, Asst. Dist. Atty., both of Santa Rosa, and Wright & Wright & Larson, of San Francisco, for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought in the name of the People of the State of California against eighty-six defendants, claiming the ownership of certain lots in a subdivision upon the Russian river in Sonoma county, known as Rio Nido, formerly Eaglenest.

Plaintiff contends the lands involved were dedicated as a public park in 1906, and that such dedication was judicially determined by a judgment of the superior court of Sonoma county in 1912. In reply the defendants contend that no such dedication ever occurred and that the judgment of 1912 was not determinative of the issues here presented, and is not binding upon these defendants.

Some time prior to 1906 the Russian River Land Company acquired a tract of land near Rio Nido. In 1906 the land company caused this tract to be surveyed and divided into seven divisions, which were delineated upon two maps, referred to during this trial as "Map 1 of Eaglenest" and "Map 2 of Eaglenest". We are here concerned with map 2 only, which shows divisions 1, 2 and 3, and the land here in dispute lies in divisions 2 and 3.

Before offering the lots for sale to the public the Russian River Land Company complied with the law providing for the acceptance of the map by the supervisors of Sonoma county. The certificate on the map shows the acceptance but makes no reference to any park.

The lots in divisions 2 and 3 are arranged in an ellipse built up along the hillside and fronting upon an open wooded section, and it is the contention of plaintiff that it was this open wooded section that was dedicated as a park site.

In 1912, one Mark W. Levy started to erect a house in an area expressly delineated as a park area upon the map of subdivision 6. An action was filed in August, 1912, in the name of the People of the State of California against Levy and the Russian River Land Company, and notice of lis pendens recorded. Thereafter a judgment was entered declaring certain areas to be public parks; with respect to divisions 2 and 3, with which we are here concerned, the judgment stated: "Third. That all parks in the valleys of division 2 and 3 of Rionido, formerly 'Eaglenest' were on the 8th day of the said October, 1906, dedicated to the public use and has all the time since and are now public property; that said park in said Division 2 is filed in Map 2 of Eaglenest volume 19 at page 19; that Park No. 3, in valley division No. 3 is recorded in Map 2 of Eaglenest volume 19 at page 19."

By virtue of this paragraph the trial court in the present case now holds the land in question to be a public park.

We here have two questions to determine:

First, does the evidence support the findings and judgment; and

Secondly, is the former judgment binding upon these defendants?

Considering the second of these questions first, we are constrained to hold that such judgment did not fix the character of the lands for several reasons.

[1-3] The most obvious defect in the judgment as expressed in paragraph "Third",—which admittedly is the only portion of the judgment that refers to divisions 2 and 3—is its uncertainty. It is essential that a judgment, particularly one affecting real property, be specific and certain in its identity of the lands affected. It must be so certain that a stranger may be able to clearly identify the particular tract. This elementary requirement is, we think, undisputed. Freeman on Judgments, 5th Ed., vol. 2, p. 1540; vol. 1, p. 165, and Cor.Jur. pp. 1209, 1210.

Paragraph "Third" does not attempt to mark out the portions of the valleys set aside or dedicated to public use, but only

says "that all parks in the valleys * * * were * * * dedicated to the public use and has all the time since and are now public property". The judgment then attempted to identify the map, continuing "that said park in said Division 2 is filed in Map 2 of Eaglenest, Volume 19 at page 19; that Park 2 in Valley Division No. 3 is recorded in Map 2 of Eaglenest, Volume 19, at page 19". While the reference is to some volume 19 it is quite indefinite although accepted at the trial as referring to volume 19 of maps in the office of the county recorder of Sonoma county. An examination of this map, however, discloses nothing that can aid in locating or identifying any "park in the valleys". There is nothing upon the face of the map to indicate parks or valleys or any dedicated lands. The map merely shows an elliptical course of lots, but nothing to indicate any contour, any valleys or any parks. Undoubtedly a judgment purporting to adjudicate the title to real property must be as clear and explicit as a deed which purports to convey real property. Certainly a deed that attempted to convey a lot in a valley and referred to a map which showed neither a lot nor a valley would have to be held too uncertain to effect any transfer.

[4] A further defect in the third paragraph is that it fails to declare that any land was actually dedicated to public use as a park. It indirectly says that if there are any parks in the valleys of divisions 2 and 3 they are public parks. An examination of the decree with respect to other divisions wherein certain lands are found to be public parks, reveals the decree was specific in that it described with sufficient particularity the lands so dedicated.

[5] If one interested in the construction and scope of the decree is required to examine the pleadings of the case upon which it was based to understand it, such examination is of no assistance here. The complaint in paragraph II describes the tract belonging to the Russian River Land Company. Paragraph III recites that the land company, for the purpose of founding a village or resort upon a portion of said tract caused the same to be surveyed into lots, streets, alleys and parks, that a part of the lands were surveyed into seven divisions so that each division should slope down into a natural valley 100 to 200 feet wide and a half a mile to a mile long, and that a plat was made delineating the seven separate divisions and the first tier of lots fronting upon an open space.

Paragraph IV alleges that the land company thereafter sold a large number of lots with reference to the map with the representation that the parks, marked upon the map as "Parks", would remain open perpetually to public use and were dedicated to the public. Paragraph VIII alleges the parks were mapped, platted and recorded with the intention of the land company that they should be open parks dedicated to the public as public parks and that said dedication was never revoked.

From the foregoing brief summary it appears from paragraph III that "each of said divisions should slope down into a natural valley * * *". This does not identify any particular land as being in the "valleys" nor does it describe any "parks in the valleys". It also is alleged in paragraph III that the first section or tier of lots fronted upon an open piece of ground, but it is not alleged that this particular piece of ground is the same as the natural valley referred to in the preceding paragraph. In paragraph IV it is directly stated that the lots were sold to a great many persons with the representation that "said Parks thereupon marked 'Parks' would become a part of this purchase and remain open perpetually to public use. That said parks so marked upon said plat or map was intended by said Russian River Land Company as public parks * * *". The allegation in paragraph IV that the parks were not subdivided into lots is not helpful in identifying the parks as a large part of the land shown upon the several maps is not subdivided into lots, and no place upon map 2 do we find any area marked "Parks" as alleged in paragraph IV.

[6] One whom it is sought to bind by a judgment is not required to seek beyond the judgment roll, nor to indulge in surmise. One test is expressed in Hedrick v. Lee, 39 Idaho 42, 227 P. 27, as follows: "The general rule is that a judgment involving the right to possession of real property must sufficiently describe it to enable an officer charged with the duties of executing a writ of possession to go upon the ground, and, without exercising judicial functions, ascertain the locality of the lines as fixed by the judgment."

In Hill v. Barner, 8 Cal.App. 58, 96 P. 111, a suit to quiet title, the question was whether certain lots were within a railroad right of way. In reversing a judgment

for plaintiff this court held the findings were insufficient in that they did not precisely fix the boundary lines of the lots, saying [page 115]: "* * * In order to give stability to the judgment it and the corresponding findings should describe the land with such definiteness as to enable the parties to know from such description the precise limits or the location of the boundary lines thereof. Porter v. Counts, [6 Cal.App. 550, 92 P. 655], supra; Shaw v. Hill, 79 Mich. 86, 44 N.W. 422; Wickersham Banking Co. v. Rice, 137 Cal. 506, 70 Pac. 546. Measured by these tests, the findings and judgments in the cases at bar cannot for a moment be upheld."

In Buckley v. Gadsby, 51 Cal.App. 289, 196 P. 908, an attempt to introduce a judgment roll of a prior action on the theory of res judicata, was refused for the reason the description of the property in the judgment was too uncertain to delineate the boundaries and therefore the judgment could not serve as res judicata.

[7, 8] One of the means of bestowing property upon the government is by dedication, and as said in Diamond Match Company v. Savercool, 218 Cal. 665, 24 P. 2d 783, 784: "To constitute a valid and complete dedication, there must be an intention by the owner, clearly indicated by his words or acts, to dedicate the lands to public use (City of Venice v. Short Line Beach L. Co., 180 Cal. 447, 450, 181 P. 658), and an acceptance either by public user or formal resolution (Brown v. Bachelder, 214 Cal. 753, 7 P.2d 1027)."

A dedication, being a voluntary transfer, as pointed out in County of Inyo v. Given, 183 Cal. 415, 191 P. 688, partakes both of the nature of a grant and also a gift, and is governed by the fundamental principles which control such transactions. It consists of an offer and acceptance and both of those elements must be clearly and definitely established. There must be the intention of the owner to dedicate to public use clearly indicated by his words or acts, and unequivocal proof of the acceptance.

[9] One of the strongest prohibitions against the government is that it cannot deprive one of his private property without just compensation.

"Property cannot be taken for public use without compensation unless the owner is willing; and this willingness should be manifested by clear and unmistakable acts. Parties are not to be done out of their property by doubtful implications, no matter how greatly the public may be inconvenienced." (Cerf v. Pfleging, 94 Cal. 131, 29 P. 417, 419.)

[10, 11] Dedication may be either a statutory or a common-law dedication. At the time of the alleged dedication of the land here in question, by the Russian River Land Company, a legislative act (Stats. 1901, p. 288) required the filing of a map with the county recorder, which map was required to accurately set forth the land involved, showing all land reserved for public purposes, and all lots intended for sale. It also required that the map be presented to the governing body having control of the streets and highways in the territory shown on the map, and that there be endorsed upon the map which streets, roads, alleys and highways were accepted on behalf of the public, and when so accepted they become dedicated to public use. When so accepted the map was required to be recorded in the office of the county recorder.

An examination of map 2 of Eaglenest fails to show any acceptance by the supervisors of Sonoma county of any lands in the tract for park or any public purpose, nor does the map show any lands set aside for park purposes. All the map shows is certain numbered lots, some 49 in division 2 and 75 in division 3. The remaining area is unmarked. The acceptance by the supervisors was merely that by resolution the board accepted the map, which was not an acceptance of any dedicated lands, none being shown upon the face of the map. We cannot hold, therefore, there was any statutory dedication.

[12, 13] "A common-law dedication," as said in People v. Dreher, 101 Cal. 271, 35 P. 867, 868, "is the setting apart of land for the public use, and, to constitute a valid and complete dedication, two things are necessary, to wit, an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication. * * * And, before it has been accepted, the owner of the land is not precluded from revoking at any time the offer to dedicate."

It is the theory of respondent that the land company offered the land in question when it presented to the board of supervisors and recorded map No. 2 of Eagle-

nest. It is also alleged that by way of confirming said dedication it subsequently sold lots and stated to purchasers that certain areas had been dedicated to public uses for public parks, and that since said dedication, the lands have ever since been used as public parks.

[14-16] Even if it is held that there was an offer to dedicate, which we cannot find, there was no acceptance of such offer by or upon behalf of the public. There was no formal acceptance by resolution of any governing body and for that reason no statutory dedication. Nor was there such use by the public as to indicate an intention to accept.

To establish a public use respondent introduced evidence to the effect the area had been used by the neighboring property owners and by others for picnics, camping and for a playground. But such uses were intermittent; the site was, after a period of twenty years, in the same condition as when the tract was originally surveyed, except for the accumulation of rubbish. There were no signs, no enclosures, no supervision, no attempt to eradicate poison oak or underbrush, or to develop thereon any special attractions. In fact, the use made of the tract was the same use as would be made of any unenclosed wooded tract near any inhabited area. In City of San Diego v. Hall, 180 Cal. 165, 179 P. 889, it was said [page 890], "something more than a mere casual user must be shown before any valid dedication will be implied". F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 P. 62 was an action involving title to certain beach property; the plaintiff claimed the land in private ownership, and sought to quiet title. The city of Santa Cruz raised various issues in defense, one of which was dedication accomplished by public user. A judgment in favor of the city was reversed by this court, although the evidence showed that for many years the land had been used by the public generally for walking, bathing, and other recreation. The court said [page 67]: "For many years the public has been in the habit of going upon and across this land in the same manner in which the adjoining tideland was used; * * *. Plaintiff and its predecessors never interposed any objection to such use. * * * In order to constitute a valid dedication, there must be an intention on the part of the owner to devote his property to the public use. * * * It is true that this intent may be inferred from long acquiescence in a use by the public. * * But, where land is unenclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate. * * * This is more particularly true where the user by the public is not over a definite and specified line, but extends over the entire surface of the tract. * * * It will not be presumed, from mere failure to object, that the owner of such land so used intends to create in the public a right which would practically destroy his own right to use any part of the property."

The recent case of City of Manhattan Beach v. Cortelyou et al., 10 Cal.2d 653, 76 P.2d 483, disposes of several of the questions here presented. There the Manhattan Beach Company was the owner of a large tract of land fronting the Pacific ocean. A map of the land was filed by which it was claimed certain portions were dedicated for public use. In determining that issue the court fully considered the intention of the parties, payment of taxes, and declarations by the grantor, and held generally as appellant here contends.

The county did nothing to evidence the fact that any park existed on the site in question. It assessed the land to individuals for tax purposes and collected the taxes so levied; and by accepting the judgment rendered in 1912 (People v. Levy et al.) wherein it was decided that only such lands in divisions 2 and 3 as might be marked as "Parks" on map 2 of Eaglenest, was dedicated to public use, is now precluded from claiming a prior dedication.

[17, 18] It would appear also the present judgment is fatally defective by reason of the failure to describe with certainty the lands affected. The park lands, as found by the court, are described in the judgment under review as "All those lands in said County of Sonoma lying in the valleys of Divisions Numbered 2 and 3 of Rionido, formerly 'Eaglenest', as said subdivisions are shown on that certain map 2 of Eaglenest recorded in Volume 19 at page 19 in the office of the County Recorder of said Sonoma County, which lands are shown and platted on said map as open space or piece of ground not divided into lots, and which platted open space was and is on said map abutting on a surround-

ing and numbered tier of lots as platted and numbered on said map."

Being an attempt to identify specific real property appellants have a right to have the property described with certainty and particularity. The property is not described by metes and bounds, nor by monuments nor by natural boundaries. It purports to identify the property by reference to the map hereinbefore considered. Even if the reference to the elliptical chain of lots is sufficiently definite to determine the eastern, northern and western boundaries, there is no southern boundary, nor anything by which it can be fixed.

The findings assume the sufficiency of the description, the fact of offer and acceptance, the sufficiency of the 1912 judgment, and other points necessary to a complete determination of these issues. If what we have held is correct, then the findings are not supported by the evidence.

[19] It has been suggested that should this court believe the description of the park areas too uncertain in the judgment, we might, under the power granted by section 956a of the Code of Civil Procedure, revise the findings and decree. We do not believe this court can do that in that there is no evidence in the record which make definite and park sites in divisions 2 or 5.

We are of the opinion that for the reasons herein given the judgment must be reversed. It is so ordered.

I concur: THOMPSON, J.



29 Cal.App.2d 737

McHUGH v. MARKET ST. RY. CO. et al.

Civ. 10524.

District Court of Appeal, First District, California.

Dec. 19, 1938.

1. Street railroads ⇐114(14)

Plaintiff's testimony, in action for injuries sustained in collision between automobile driven by her and defendant's street car, that she knew street car was only 20 feet away and approaching at speed of 30 miles an hour when automobile, which could have been easily stopped within two or three feet, was seven or eight feet from track, but turned her head, looked the other way, and blindly attempted to cross track in front of street car, was sufficient to justify trial court's holding that she was contributorily negligent as matter of law.

2. Street railroads ⇐99(7)

An automobile driver, blindly attempting to cross street in front of street car after becoming aware of its approach within such distance and at such apparent rate of speed as to cause reasonable apprehension of danger, is guilty of negligence as matter of law.

3. Street railroads ⇐85(3)

While street car company has only equal right with traveling public to use street whereon its tracks are laid, it has paramount right, to which others must yield whenever necessary to avoid collision with street car, to space in which such car runs on its rails.

4. Street railroads ⇐99(7)

Where danger of crossing street in front of approaching street car is imminent, automobile driver is not justified in assuming that speed of street car will not be increased.

5. Street railroads ⇐99(7)

Where danger of crossing street in front of approaching street car is imminent, automobile driver negligently attempting to do so is not excused by fact that he looked once in direction of anticipated danger and then looked away.

6. Street railroads ⇐103(3)

The last clear chance doctrine was not available to plaintiff in action for injuries sustained in collision between automobile driven by her and defendant's street car, where she admitted that she looked away from, and blindly attempted to cross tracks in front of, street car, though she knew it was only 28 feet away and approaching at 30 miles an hour when automobile, which could have been stopped within two or three feet, was seven or eight feet from tracks.

7. Negligence ⇐83

The last clear chance doctrine is inapplicable where injured person could have avoided accident up to very moment thereof by exercising ordinary care.

8. Street railroads ⇐103(3)

The last clear chance doctrine was inapplicable, where plaintiff in action for injuries to automobile driver in collision with defendant's street car was in no apparent peril until very moment of collision.

9. Negligence ⇐83

One able to escape danger by exercising ordinary care after becoming aware thereof, but neglecting to do so, cannot invoke last clear chance doctrine to place burden of resulting loss on defendant in former's action for damages.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mary McHugh against the Market Street Railway Company and another for injuries sustained in a collision between an automobile driven by plaintiff and named defendant's street car. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

William M. Malone, of San Francisco (Raymond L. Sullivan, of San Francisco, of counsel), for appellant.

Wm. M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondents.

PER CURIAM.

An electric car operated by the defendant company and a Ford roadster driven by plaintiff collided at the intersection of Eighteenth avenue and Balboa street in San Francisco, about 5 o'clock in the afternoon. Riding with plaintiff were David Whang, the owner of the roadster, and plaintiff's cousin, Virginia O'Donnell, fourteen years of age. As the result of the collision plaintiff and her cousin were injured, and the roadster was more or less wrecked. Thereafter plaintiff brought this action against the street car company and its motorman to recover damages for the personal injuries she sustained. The trial proceeded before a jury, and ended in a judgment of nonsuit, from which plaintiff has taken this appeal.

[1-5] At the time of the accident the roadster was being driven northerly along Eighteenth avenue, which is forty feet wide between curbs, and intersects Balboa street at right angles. Balboa street is fifty feet wide between curbs, and along the center thereof are laid the double tracks of the defendant company. The approach of Balboa street to said intersection from the west is on an up-grade of 8 1/3 per cent, and the street car entered the intersection from that side, that is, it was eastbound. There were no stop or arterial signs on any of the corners of the intersection, and in accordance with a rule of the defendant company its eastbound cars did not stop at that intersection to receive or discharge passengers. The roadster entered the intersection just a second or two before the street car, and the operator of each vehicle saw the approach of the other. As each vehicle entered the intersection, it slowed down to a speed of twelve or thirteen miles an hour, but neither was brought to a stop before the impact, which took place just as the front wheels of the roadster reached the farther or northerly rail of the eastbound track, the street car striking the roadster broadside and shoving it along the track for a considerable distance.

The motorman was called as a witness by plaintiff subject to the provisions of section 2055 of the Code of Civil Procedure, and as to the movements of the street car he testified that it continued to slow down after it entered the intersection, so that at the time of the impact it was traveling at a speed of only seven or eight miles an hour. But in contradiction thereof plaintiff and another witness testified that after the street car entered the intersection, its speed was accelerated to twenty or twenty-five miles an hour, and that it was traveling at that rate of speed at the time of the impact, which, if true, was in violation of the fifteen mile an hour limit fixed by law for traversing intersections within the city. Defendants concede, therefore, that in that state of the evidence it would have been sufficient to support a finding that the street car was being negligently operated; but they contend that the facts disclosed by plaintiff's own testimony as to the manner in which she attempted to cross in front of the street car establish that she was guilty of contributory negligence as a matter of law, and that therefore the nonsuit was properly granted. We are of the opinion that defendants' contention must be sustained.

In this regard she testified that she was familiar with the intersection, having frequently visited the home of her aunt (Virginia O'Donnell's mother) who lived within a block thereof, and that she knew from experience that because of the prevailing

"non-stop" street car rule the eastbound cars did not stop at that intersection; that after driving into the intersection, she was fully aware of the approach of the oncoming street car and observed that it was proceeding across the intersection without stopping; that she saw it first when it was twenty-five feet west of the west property line, and again as it crossed said property line; that on this second observation she watched its progress until after it had crossed the west curb line of Eighteenth avenue and started across the intersection. Continuing, she testified that at that time the street car was only tweny-eight feet away, traveling toward her at a speed of thirteen miles an hour, and that the roadster was still seven or eight feet distant from the first rail of the east bound track; and she admits that at that time she could have easily stopped the roadster within two or three feet and let the street car pass in front of her. However, she made no attempt at any time to stop or even slow down. On the contrary, at that particular moment, so she testified, she turned her head, looked the other way, and continued to drive forward at the same rate of speed of ten or twelve miles an hour, thereby placing the roadster and its occupants squarely on the eastbound track in the pathway of the oncoming street car. After the roadster was astride of the track she again looked toward the street car, but it was then only a few feet away, traveling toward her at a speed which she estimated to be twenty miles an hour, and the crash was inevitable.

The foregoing testimony was amply sufficient, in our opinion, to justify the trial court in holding that plaintiff failed to exercise ordinary care for her own safety. As held in substance in the cases hereinafter cited, where a pedestrian or the driver of a motor vehicle, after being aware of the approach of an oncoming electric car which is within such a distance and going at such an apparent rate of speed as to cause a reasonable apprehension of danger, closes his eyes to the dangers necessarily involved and blindly attempts to cross in front of it, thus placing himself in the pathway of the oncoming car, he is guilty of negligence as a matter of law. New York Lubricating Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72; Arnold v. San Francisco-Oakland T. Rys., 175 Cal. 1, 164 P. 798; Urbano v. Market Street Ry. Co., 8 Cal.App.2d 22, 46 P.2d 817; Gore v. Market St. Ry. Co., 4 Cal.2d 154, 48 P.2d 2.

And clearly this was such a case, because as shown by plaintiff's own testimony, despite the fact that she knew that the street car was only twenty-eight feet away and approaching at a speed of thirteen miles an hour, and that the roadster was still seven or eight feet distant from the track and could have been easily stopped within two or three feet, she turned her head, looked the other way, and blindly attempted to cross the track in front of the oncoming car. Obviously, in that situation, the street car was within such a distance and going at such a rate of speed as to cause a reasonable apprehension of danger. In other words, it was reasonably apparent from the location of the vehicles and the speed at which they were traveling at the time she turned her head and looked the other way, that they would reach the crossing point about the same time, or at best that the roadster would be able to clear the farther rail of the eastbound track by only a split second ahead of the street car; and under such circumstances, due care and prudence on plaintiff's part required her to continue to be watchful of its approach until the danger therefrom was obviated, and to stop the roadster, if necessary to avoid a collision, and give the street car the right of way. Manifestly, if she had exercised ordinary care in taking either of those precautions, there would have been no collision. As frequently said by the courts, while a street car has only an equal right with the traveling public to the use of the street whereon its tracks are built, still, since it cannot go upon the street except upon its rails it has a paramount right to that space to which others must yield whenever it is necessary to avoid a collision (Scott v. San Bernardino Valley Traction Co., 152 Cal. 604, 93 P. 677; Clark v. Bennett, 123 Cal. 275, 55 P. 908; Bailey v. Market Street C. Ry. Co., 110 Cal. 320, 42 P. 914; Arnold v. San Francisco-Oakland T. Rys., supra); and that where, as in the present case, the danger of crossing in front of an approaching street car is imminent, the driver of a motor vehicle is not justified in assuming that the speed of the street car will not be increased (New York Lubricating Oil Co. v. United Railroads, supra); nor under such circumstances is he to be excused by the fact that he looked once in the direction of the anticipated danger and then looked away (Flores v. Los Angeles Ry. Corp., 15 Cal.App.2d 576, 59 P.2d 856, citing numerous authorities, including Moss

v. H. R. Boynton Co., 44 Cal.App. 474, 186 P. 631, and Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493).

In arriving at the conclusion that the trial court's ruling should be sustained, we have borne in mind the well-settled rule that where the evidence is such that reasonable minds might well differ upon the question of contributory negligence, that issue should be submitted to the determination of the jury; and we have also examined the cases relied on by plaintiff in support of the contention she makes in that behalf. But we find no room for the application of that rule here, nor do we deem any of the cases cited by plaintiff here controlling because of the material difference in the factual situation thereof relating to the question of whether the oncoming car was close enough, and going at such an apparent rate of speed, as to cause a reasonable apprehension that it would be dangerous to cross in front of it.

[6-9] Plaintiff further contends, however, that even though the evidence establishes that she was guilty of contributory negligence as a matter of law, the cause nevertheless should have been submitted to the jury on the issue of last clear chance. This contention is based mainly upon the testimony showing that the speed of the street car was increased after it entered the intersection, and a statement made by the motorman in giving his testimony to the effect that the roadster was within his view at all times after the street car entered the intersection, and he did not apply the brakes of the car until instantly before the vehicles collided. It is quite certain, however, that under the admitted facts of the present case the doctrine of the last clear chance is not available to plaintiff, for the reason that it has been specifically held that the doctrine has no application where by the exercise of ordinary care the plaintiff up to the very moment of the accident could have avoided it (Palmer v. Tschudy, 191 Cal. 696, 218 P. 36; Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259; 19 Cal. Jur., p. 658, and 8 Cal.Jur.Supp., p. 368, and cases cited therein); nor where the driver of an automobile is in no apparent peril until the very moment of the collision with the street car (Read v. Pacific Electric Ry. Co., 185 Cal. 520, 197 P. 791). In other words, if after a plaintiff is aware of the danger, and being able to escape it by the exercise of ordinary care, he neglects so to do, he cannot invoke the last clear chance to place the burden of the resulting loss upon the other party, because obviously, if both parties to an accident could by the exercise of ordinary care have avoided it, neither can be said to have had the last clear chance. Palmer v. Tschudy, supra; Arnold v. San Francisco-Oakland T. Rys., supra. In this regard the facts of the present case are no different from those of the Arnold Case, supra, and in holding there that the doctrine of the last clear chance was not available the court said, 164 P. 800: "It was the duty of Arnold, upon approaching the crossing, to give way to a car of the defendant which was about to pass at the same time, if necessary to avoid a collision, since he could give way while it could not. The defendant's motorman was not required to presume that Arnold would not perform this duty. He had the right to presume that Arnold would stop or turn aside, until the conduct of Arnold was such as should reasonably have led him to apprehend the contrary. So long as it appeared that Arnold, with reasonable care, could stop his automobile, or turn it to one side or the other, so as to avoid a collision, and there were no obvious indications that he might not do so, the motorman had the right to assume that he would do so and upon that assumption to proceed along the track." Citing Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709.

Nor are we able to agree with plaintiff's argument that the legal principles deducible from the cases of New York Lubricating Oil Co. v. United Railroads, supra, and Arnold v. San Francisco-Oakland T. Rys., supra, which have been invoked are inapplicable merely because those cases involve collisions with suburban electric cars; for while the "stop, look and listen" rule governs in that class of cases and is not necessarily controlling in such a case as we have here, namely, a collision with a street car at an intersection within the municipal boundaries, it will be found that in both of the cases above mentioned the "stop, look and listen" rule was not the determining factor. In each of them, as here, the plaintiff saw the approaching street car but nevertheless attempted to cross in front of it. It follows, therefore, that the rules laid down in those cases relating to a situation of that kind apply with equal force to the present case.

The judgment is affirmed.

30 Cal.App.2d 35

ALBANY PEANUT CO. v. EUCLID CANDY CO. OF CALIFORNIA, Inc., et al.

Civ. 10626.

District Court of Appeal, First District, Division 1, California.

Dec. 20, 1938.

Rehearing Denied Jan. 19, 1939.

Hearing Denied by Supreme Court Feb. 16, 1939.

1. Frauds, statute of ⇐144

To establish an estoppel precluding reliance upon statute of frauds as defense to action for breach of oral contract, essential terms of contract must be shown with reasonable certainty and it must be shown that representations were made that invalidity of contract would not be asserted, together with fact that party urging estoppel had thereby changed his position to his detriment, and that intention to make change was known at time by one making representations.

2. Frauds, statute of ⇐144

To establish estoppel precluding reliance upon statute of frauds as defense to action upon oral contract, circumstances must clearly indicate that it would be a fraud for party offering inducements to assert invalidity of contract, and unless conduct of that party amounted to an inducement to other to waive written contract in reliance upon representation that statute of frauds would not be relied upon, there is an absence of fraud requisite to an estoppel.

3. Frauds, statute of ⇐144

A mere promise to execute a written contract, followed by refusal to do so, is insufficient to estop person so refusing from setting up statute of frauds as defense to action upon oral contract, notwithstanding that reliance has been placed on promise and damage occasioned by refusal.

4. Frauds, statute of ⇐144

A mere promise to execute a written contract, followed by a refusal to do so, will not estop the promisor from relying upon statute of frauds as defense to action upon oral contract, unless his acts and conduct so thoroughly indicated that he did not intend to avail himself of the statute that to permit him to do so would be to work fraud upon other party.

5. Frauds, statute of ⇐144

Where defendant had made no representation in regard to purchase of peanuts other than that it would take them upon condition that certain freight rate would be guaranteed, and no showing was made that such condition had been met, defendant's refusal to sign contract for purchase of peanuts did not estop it from relying upon statute of frauds as defense to action for breach of an alleged oral contract to buy the peanuts.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the Albany Peanut Company against the Euclid Candy Company of California, Inc., and others to recover the reasonable value of goods sold and delivered and to recover for the breach of an alleged oral contract to buy the goods. Judgment for plaintiff, and the named defendant appeals.

Judgment reversed, with directions.

Philip S. Ehrlich and Albert A. Axelrod, both of San Francisco, (Julien R. Bauer, of San Francisco, of counsel), for appellant.

Smith, Southwell & Smith and J. D. Lear, all of San Francisco, for respondent.

JONES, Justice pro tem.

This action went to trial on June 19, 1935, upon the second amended complaint of the plaintiff which contained six separate causes of action. The first two of these various causes of action were directed to the appellant here, and the remaining counts to other defendants. Upon the conclusion of plaintiff's case a nonsuit was granted as to all the causes of action except the first, and as to this cause of action the motion for a nonsuit was denied. The respondent at that time made a motion to amend its complaint to conform to the proof, which said motion was granted.

The first cause of action is for the reasonable value of goods sold and delivered. The amendment to its complaint filed by the plaintiff sets up what is denominated a seventh and separate cause of action, and alleges an oral contract to buy, a breach thereof, a resulting damage in the sum of $3,000, and an estoppel to rely on the defense that the contract was not in writing. The answer to this amended pleading denies all the material allegations thereof, and sets up the statute of frauds as a special defense. The action came up again for hearing on November 27, 1936, at which time stipulations were made that certain-

persons would testify to particular facts if called as witnesses, after which the plaintiff again rested its case and another motion for a nonsuit was made. This motion was likewise denied.

The findings made by the trial court follow generally the allegations of the complaint as amended and judgment was entered for the plaintiff in the sum of $3,000, together with interest and costs. From this judgment the appeal has been taken.

The respondent is a Virginia corporation engaged in the business of cleaning and shelling peanuts at Albany, Georgia. On June 3, 1931, it communicated with Latimer & Carmichael Co., brokers at Atlanta, Georgia, and requested them to offer to the trade four carloads of No. 1 Spanish shelled peanuts at a price of 5½ cents per pound f.o.b. Albany, Georgia, two cars to be delivered during the last half of October, and two cars the last half of November. Latimer & Carmichael Co. in turn telegraphed Parrott & Co., brokers in San Francisco, to make a similar offer, subject to confirmation, of the same amount of peanuts at the same price for the same delivery. C. J. Nouges, a representative of Parrott & Co., called on J. W. McKey, the general manager of the appellant, and made him acquainted with the offer. McKey stated at that time that he would take the four carloads of peanuts provided that a thirty cent freight rate on them would be guaranteed. Latimer & Carmichael Co. refused to guarantee the freight rate and it does not appear that such a rate was ever guaranteed to the appellant by anyone. On June 15th, Parrott & Co. mailed to the appellant a proposed contract in writing which had been forwarded to them by Latimer & Carmichael Co. and which was signed by the Albany Peanut Company. The appellant was requested by Parrott & Co. to sign this contract and return it. On September 19th the appellant did return the proposed contract to Parrott & Co., but without its signature and with the statement that it was not satisfactory. At various times between June 15th and the 19th of September, Nouges, representing Parrott & Co., called on McKey, manager of the Euclid Candy Co., to get his signature to the contract, but was never able to do so. The following testimony of the witness Nouges details the negotiations between Parrott & Co. and the appellant from the time the proposed agreement was mailed to appellant until it was returned unsigned on the 19th of September:

"Mr. Lear: Q. You state in that letter, Mr. Nouges, that Mr. McKey promised you he would sign the contract. Did he make such a promise to you? A. Mr. McKey always said that he would sign the contracts, —'Leave them here on my desk and I will sign them later,' or 'Come in again and I will sign them.' He always said he would sign them.

"Q. Approximately how many times did he tell you that? A. Well, that is difficult for me to state. I will say this: That we were always very anxious to get the buyers' and sellers' names on the dotted line, and we would follow those things up very closely. It was unfortunate that Mr. McKey was away so often when I contacted him for the contract, but whenever I saw him he always said he would sign them.

"Q. Up to this time did he ever state that he would not sign them—would not sign the contract? A. No."

There is no other evidence pertaining to any promise on the part of the appellant to sign the written contract proposed by the respondent. Nothing was ever paid by the appellant on account of the alleged purchase price and it was stipulated upon the trial of the case that none of the peanuts were ever delivered by the respondent.

The contract here involved is one which is required by the statute of frauds to be in writing, and the respondent is not entitled to recover unless the appellant is estopped to plead the statute as a defense to the action.

The position taken by the respondent is that the appellant promised to put in writing a contract to purchase the four carloads of peanuts and that in reliance upon this promise it held the peanuts for the appellants until the communication of September 19th to Parrott & Co., returning the proposed contract unsigned, and that by so doing it suffered substantial damages. In this connection it is urged that since the appellant promised to put the contract in writing it is estopped to rely on the statute of frauds as a defense.

[1, 2] Before such an estoppel can arise the essential terms of the contract must be shown with reasonable certainty, and that representations were made by the opposite party that the invalidity of the contract under the statute would not be asserted, to-

gether with the fact that the party urging the estoppel has, pursuant to the terms of the contract, and induced by the representations and in reliance thereupon, changed his position to his detriment, the intention to make such change being known at the time to the one making the representations. The circumstances must clearly indicate that it would be a fraud for the party offering the inducements to assert the invalidity of the contract under the statute, and, unless the words and conduct of the party sought to be held amount to an inducement to the other to waive a written contract in reliance upon the representation that the person promising will not avail himself of the statute of frauds, there is an absence of fraud which is requisite to an estoppel. Little v. Union Oil Co., 73 Cal.App. 612, 238 P. 1066; Long v. Long, 162 Cal. 427, 122 P. 1077; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Standing v. Morosco, 43 Cal.App. 244, 184 P. 954.

[3-5] A mere promise to execute a written contract, followed by refusal to do so, is not sufficient to create an estoppel, even though reliance is placed on such promise and damage is occasioned by such refusal. The acts and conduct of the promisor must so clearly indicate that he does not intend to avail himself of the statute that to permit him to do so would be to work a fraud upon the other party. Little v. Union Oil Co., supra. The appellant here took no positive action and held out no inducement to the respondent. It made no representation whatever other than that it would take the offered peanuts upon the condition that a thirty cent freight rate would be guaranteed, which, so far as the record shows, was never met. The testimony of Nouges shows that during the entire period of negotiations pressure was being exerted upon the appellant to execute the written contract. At no time was it asked to return the writing, nor was there a limit to the time within which it might execute the same. The respondent instituted the negotiations for the sale of its wares and in the hope that the sale would be consummated upon its terms, held them, and met a falling market to its loss. Any intentions which it may have had with reference to the purchase of peanuts to supply a prospective contract entered into with the appellant, or the holding of any peanuts which it had in stock for such a purpose, was never communicated to the appellant, and in so far as its knowledge goes the respondent may have intended to purchase the peanuts in the open market when and if appellant's signature was appended to the proposed contract. We are unable to perceive, and the respondent has failed to point out, wherein the taint of fraud is cast upon the appellant at any stage of the negotiations. Under such circumstances the appellant is not estopped to rely upon the statute of frauds as a defense.

Practically all of the grounds urged by the appellant for a reversal go to the point that it is entitled to rely upon the statute of frauds as a defense, and it being so held by this decision no extended discussion of these additional points is necessary.

The judgment is reversed with directions to the trial court to enter judgment for appellants.

We concur: KNIGHT, Acting P. J.: CASHIN, J.



30 Cal.App.2d 70

SMITH v. SMITH et al.

Civ. 10857.

District Court of Appeal, First District, Division 2, California.

Dec. 21, 1938.

1. Appeal and error ⇐965

In passing on a nonresident defendant's motion for change of place of trial on ground that the resident defendant has been made a defendant solely for the purpose of having the action tried at place of resident defendant's residence, the decision is with the trial court. Code Civ.Proc. § 395.

2. Venue ⇐22(3)

In action to recover money allegedly owing to plaintiff from nonresident defendant under a contract, trial court did not err in granting the nonresident's motion for change of place of trial, where evidence supported finding that resident defendant, which was merely the stakeholder of corporate stock deposited by nonresident as security for payments called for by the contract, was not an interested or necessary party and was joined solely for the purpose of having the action tried at place of resident defendant's residence. Code Civ.Proc. § 395.

3. Venue ⇐22(3)

The purpose of the statute relating to joinder of a defendant solely for the purpose of having the action tried where he resides is to give the real party in interest the right to have the trial held in the county of his residence when an unnecessary party is joined for the sole purpose of taking that right from him. Code Civ.Proc. § 395.

Appeal from Superior Court, City and County of San Francisco; Elmer P. Robinson, Judge.

Suit by Grace Helen Smith against James Franklin Smith and another to recover money alleged to be owing from the named defendant on a written contract, wherein the named defendant moved for a change of the place of trial. From an order granting the named defendant's motion, the plaintiff appeals.

Order affirmed.

Joseph F. O'Malley, John F. O'Sullivan, and James A. Himmel, all of San Francisco, for appellant.

John Elliott Cook, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover money alleged to be owing from defendant Smith on a written contract. The defendant title company was sued as stakeholder of corporate stocks deposited by defendant Smith as security for payments as called for by the contract. The suit was filed in the city and county of San Francisco, which is the residence of the title company. The defendant Smith, a resident of Santa Clara county, moved for a change of the place of trial, and his motion was granted. The appeal is from that order.

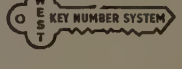
The motion was heard on the affidavit of respondent Smith alone. No counter showing was made. The title company filed a disclaimer and consent to abide by any order the court should make. The ground upon which the motion was made and granted was that the title company was not an interested or necessary party and was joined solely for the purpose of having the action tried in the city and county of San Francisco. There is ample evidence to support this finding.

[1, 2] The case presents a single question of statutory procedure. Section 395 of the Code of Civil Procedure provides that "If any person is improperly joined as a defendant, or has been made a defendant solely for the purpose of having the action tried in the county, city and county, township, city or town where he resides, his residence must not be considered in determining the proper place for the trial of the action." If a party is joined under these circumstances the section provides that his residence must not be considered. The decision is with the trial court in passing on the motion for change of the place of trial. The appellant has not shown any error in the ruling complained of. We find the ruling in full harmony with Sayward v. Houghton, 82 Cal. 628, 629, 23 P. 120; Sourbis v. Rhoads, 50 Cal.App. 98, 101, 194 P. 521; Hellman v. Logan, 148 Cal. 58, 61, 82 P. 848. We find nothing in Freeman v. Dowling, 219 Cal. 213, 25 P.2d 980, to the contrary. The point here is not that the appellant failed to plead a cause of action against the resident defendant. It is that, after a full and fair hearing, the trial court found that the title company was not a necessary party to the litigation and that it had been joined solely for the purpose of having the action tried in the county of its residence.

[3] The terms of the statute are plain and require no interpretation. They are designed to give the real party in interest the right to have the trial held in the county of his residence when an unnecessary party is joined for the sole purpose of taking that right from him.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



30 Cal.App.2d 64

PEOPLE v. SLEPNOL.

Cr. 2042.

District Court of Appeal, First District, Division 2, California.

Dec. 21, 1938.

1. Infants ⇐20

Evidence *held* sufficient to sustain conviction for contributing to the delinquency of a minor. St.1937, pp. 1030, 1033, §§ 700, 702.

2. Statutes ⇐225¾

Where, after decision that Juvenile Court Act regarding delinquency of minor

applied to all persons under age of 21 years regardless of whether married, act had been amended in certain respects without making material change in the language, contention that act did not apply to a married female under 21 was without merit. St.1937, pp. 1019–1078, §§ 500–1630; pp. 1030, 1033, §§ 700, 702.

3. Infants ⇐20

A married female under 21 years who was not a ward of the juvenile court was within provisions of Welfare and Institutions Code so as to permit her to charge a person with the crime of contributing to her delinquency. St.1937, pp. 1019–1078, §§ 500–1630; pp. 1030, 1033, §§ 700, 702.

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Albert Slepnol was convicted of contributing to the delinquency of a minor, and he appeals.

Affirmed.

Allen Spivock, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

The defendant Albert Slepnol was charged in an information with two counts, arising from the same facts, against one Patricia Wardell, aged seventeen years, who was married and living with her husband at said time and was not a ward of the juvenile court. The first count charged defendant with the crime of rape, alleging intercourse with a female under the age of eighteen years. The second count charged defendant with violation of the Juvenile Court Law for allegedly contributing to the delinquency of said married complainant by remaining alone with her in her room and kissing and embracing her and removing her clothing, all of which is alleged to be a violation of section 702 of the Welfare and Institutions Code (St. 1937, p. 1033), in that such conduct did "manifestly tend to and did encourage, cause and contribute to the said Patricia Wardell becoming such a person as is described in section 700 of said Welfare and Institutions Code (St.1937, p. 1030) towit: A person under the age of twenty-one years who is leading or from any cause is in danger of leading an idle, dissolute and immoral life." The case was tried without a jury and upon the testimony of said Patricia Wardell, who was the only witness for the prosecution, the court found defendant not guilty of the alleged rape but found him guilty of contributing to the delinquency of a minor on said second count and sentenced him to one year in the county jail. The defendant appeals from said judgment of conviction.

Two questions are involved. (1) Does a married female under twenty-one who is not a ward of the juvenile court come within the provisions of sections 700 and 702 of said Welfare and Institutions Code so as to permit her to charge a person with the crime of contributing to her delinquency? (2) Assuming that there is such a criminal offense under our state laws, was the evidence sufficient to justify conviction?

[1] The second question may be answered first. If the charge of rape was still to be considered the objections of the defendant would require more extended attention. But as noted above that charge was found in the defendant's favor. As to the other count pleaded in the information the complaining witness took the stand and testified quite fully. By no means may we say the evidence is insufficient.

[2, 3] The defendant contends the first question should be answered in the negative. He cites and relies on the decision entitled In re Lewis, 3 Cal.App. 738, 86 P. 996. We think that decision is not helpful in this case. It was based in part on two different statutes enacted in 1905, chapters 84 and 610. Both statutes were confined to provisions for the protection of "children" and "minors". It was not until several years later that the Juvenile Court Act was enacted. (Stats.1909, chap. 133.) That act was amended in 1915 (Stats. chap. 631). Section 1 is as follows: "This act shall be known as the 'juvenile court law' and shall apply to any person under the age of twenty-one years: * * * 11. Who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life; * * *." In no place does the statute recite that the jurisdiction of the juvenile court therein provided would be affected in any respect by the marriage of the complaining witness. However, in the case of Ex parte Willis,

30 Cal.App. 188, 157 P. 819, it was contended that the marriage of a prosecuting witness ousted the juvenile court of jurisdiction. The District Court of Appeal of the second district held that the law was otherwise. In 1921 other amendments were made to the statute. (Stats. chap. 504). The contention which this defendant makes was presented by the defendant in the case entitled People v. Cohen, 62 Cal. App. 521, 217 P. 78. In presenting his appeal Cohen contended that the information was insufficient because it did not allege that the complaining witness was not the wife of the defendant. He also contended the evidence did not show that the complaining witness was one of the persons described in subdivisions 1 to 13 of section 1 of the Juvenile Court Act (St.1915, p. 1225). Commencing on page 525, 217 P. page 79 the court said: "Under the former acts it was necessary to allege and prove that the complaining witness was either a dependent or a delinquent person before the defendant could be found guilty of improper conduct toward such person, but under the present law it is only necessary to show that the complaining witness is under the age of 21 years. The former act was designed to protect only delinquent and dependent children. The purpose of the present law is manifestly to protect all persons under the age of 21 years. The evidence showed, without any conflict, that the complaining witness was only 16 years of age at the time the offense was alleged to have been committed, and in our opinion this is all that is required under the present statute." Since the decision last mentioned was rendered the Juvenile Court Act has been amended in certain respects not material to anything pertinent to the instant case. Furthermore it has been codified (Welfare and Institutions Code, Div. 2, §§ 500–1630, St.1937, pp. 1019–1078), but no material change in the language has been made. We think it is clear therefore that the contentions made by the defendant are not well founded. The reasoning adopted by the California cases is supported by the great weight of authority. Re Hook, 95 Vt. 497, 115 A. 730, 19 A.L.R. 610, note 616; State ex rel. Foot v. District Ct., 77 Mont. 290, 250 P. 973, 49 A. L.R. 398, note 402.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

29 Cal.App.2d 717

JANSEN v. SUGIYAMA et al.

Civ. 6024.

District Court of Appeal, Third District, California.

Dec. 16, 1938.

1. Automobiles ⇐207

A motorist who, on a clear night after stopping and observing in rear view mirror second automobile approaching three or four hundred feet distant, turned automobile about on highway was not contributorily negligent when his automobile was struck, after completing turn, by second automobile which crossed center line of highway.

2. Automobiles ⇐244(10)

In motorist's action for injuries sustained in collision with approaching automobile which struck plaintiff's automobile after plaintiff had turned around on highway, evidence warranted recovery on ground that driver of approaching automobile, who first saw plaintiff's automobile from distance of 700 feet, and who crossed center line of highway, was negligent.

3. Automobiles ⇐167(3)

It is only when an automobile is approaching so near as to constitute an immediate hazard that one may not emerge from a private way onto a highway. St.1935, p. 187, § 553.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by H. P. Jansen against M. Sugiyama and others for injuries sustained in a collision between an automobile driven by plaintiff and an automobile driven by the named defendant. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Robert H. Schwab, Walter T. Tsukamoto, and Gerald M. Desmond, all of Sacramento, for appellants.

Lowell L. Sparks, of Auburn, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

From a judgment by the court in favor of plaintiff awarding to him damages for personal injuries sustained in an automobile collision, defendants appeal.

Masayasu Sugiyama is a 20-year-old minor son of T. Sugiyama and M. Sugiyama. At the time of the accident he was driving the automobile belonging to his parents, with their consent. He also had an operator's license issued by the department of motor vehicles upon an application verified by the parents as provided by section 350 of the Motor Vehicle Code (St.1935, p. 144). The liability, therefore, of defendants Mr. and Mrs. Sugiyama was such as is imposed by the Vehicle Code. Sec. 352 (St.1935, p. 145). Hereinafter when the word defendant is used it is understood we are referring to Masayasu Sugiyama.

The record discloses that shortly after midnight of January 3, 1937, Masayasu Sugiyama was driving a Ford sedan easterly along highway 40. Riding with the operator in the front seat were two other boys, and in the rear seat were three girls, one a sister of defendant. These young people were returning from Penryn where they had attended a theater to their homes in Bowman. The night was clear, the highway dry, and for a considerable distance on either side from the point of collision the highway was straight and level with a white traffic line down the center. Within two hundred feet after defendant had emerged from the east portal of the Newcastle tunnel he saw the car of plaintiff some ten or fifteen feet off the highway on the south side, and almost directly in front of the Foothill Dairy plant. This building is approximately 926 feet east of the east portal of the tunnel. Defendant therefore was about 700 feet from plaintiff when he first saw his car.

Plaintiff, on this night, had left Auburn and was proceeding to his home in Lincoln. To reach Lincoln he traveled west on highway 40 to a point near the Newcastle tunnel, where the Lincoln road turns southwesterly from highway 40 about 680 feet east from the tunnel portal, and about 250 feet west of the Foothill Dairy. Plaintiff had turned his car to the left and crossed highway 40 to enter the Lincoln road, but in the darkness had missed the junction of the two highways and had retraced his course easterly a short distance until he had come in front of the Foothill Dairy. He then recognized where he was, and had stopped and lighted a cigar, and was preparing to turn his car across the highway and return to the point of divergence of the Lincoln road. He glanced in his rear view mirror and saw approaching the car of defendant, which was then some 300 or 400 feet distant. He then made a quick turn across the highway and had entered the west line of traffic, and had proceeded slowly about ten feet westerly along the highway when defendant suddenly swerved from the south lane, crossed the white line and struck the car of plaintiff, causing the injuries here complained of.

[1, 2] It is the contention of defendant that plaintiff was guilty of contributory negligence, and that the evidence was insufficient to support the finding of negligence against appellant. We believe that in this contention appellant is in error, and that the summary made by the trial court is entirely correct, where it is said: "That the collision occurred between the two cars on the date and at the place alleged and that plaintiff was severely injured is not questioned; but defendants contend that no negligence on the part of defendants has been shown and contend that the collision resulted from plaintiff's having driven the car from a point on the south side of the road across the highway and in front of defendants' car and while plaintiff's car was proceeding and facing the north, and that defendants' car was traveling in an easterly direction and on its proper side of the highway. Plaintiff contends, however, and the evidence clearly shows that at the time of the collision his car had crossed from the south side of the highway to the north side of the highway into his proper right side lane and that his car was entirely on the north side of the white center line facing the west, and that he was traveling westerly in low gear waiting for defendants' car, which was traveling east and on the south side of the white line, reached a point almost opposite plaintiff's car, without any warning, necessity, or apparent reason, defendant swerved his car to the left, resulting in the front of his car striking the left front end of plaintiff's car, all on plaintiff's side of the center line. The minor defendant operator of the car, admits that he saw plaintiff's car continuously from the time that he was at a point 200 feet east of the tunnel until he reached and collided with the plaintiff's car, a distance of over 700 feet, and that the weather was clear, the highway dry, and there was nothing to obstruct his view. Without here undertaking to set forth all the evidence, suffice it to say, although the testimony was more or less conflicting, the contention of plaintiff is clearly supported by a preponderance of the evidence, both

the oral testimony and the physical evidence. It is quite clear that plaintiff is entitled to recover."

Appellants seem to confuse somewhat the condition of the highway in front of the dairy plant by referring to a private lane or way. The record indicates that at this point the dairy buildings are set back some 40 feet from the paved portion of the highway, and that the area between the pavement and the dairy plant is smooth and is in fact a wide portion of the road or an extended shoulder, if it might be so termed. The car of plaintiff standing some 12 or 14 feet from the pavement was at all times clearly in view of the oncoming car of defendant. It is also to be recognized that the collision did not occur as plaintiff was turning, but occurred after plaintiff had transversed across the path of the east bound traffic, and was struck only after it had crossed the white center line and into the channel of westerly traffic, and when he was proceeding slowly in a westerly direction.

Appellants in effect contend it was the duty of plaintiff to yield the right of way to appellant irrespective of the distance.

[3] In Wakefield v. Horn, 109 Cal.App. 325, 293 P. 97, section 131 of the California Vehicle Act of 1927 was under consideration, which was substantially the same as the present law as expressed in section 553 of the Vehicle Code (St.1935, p. 187). The court there held that the action was intended to prevent automobile drivers on private roads from entering a public highway when a car was approaching upon such highway so near as to constitute an immediate hazard. If the rule were otherwise one could not drive from a private road onto a public highway irrespective of the distance of an approaching car. It is only when such car is approaching so near as to constitute an immediate hazard that one may not emerge from a private way onto the highway.

To the same effect is Harkey v. Luckehe, 19 Cal.App.2d 130, 65 P.2d 77.

The trial court has determined the facts upon conflicting evidence. We are satisfied no error has been committed.

The judgment is affirmed.

I concur: THOMPSON, J.

30 Cal.App.2d 40

PEOPLE v. MORRISON.

Cr. 3127.

District Court of Appeal, Second District, Division 1, California.

Dec. 20, 1938.

1. Criminal law ⇐1159(2)

Where sufficiency and weight of evidence are for jury, the verdict and judgment will not be disturbed on appeal in the absence of error.

2. Automobiles ⇐355(10)
Kidnapping ⇐5
Larceny ⇐55
Robbery ⇐24(3)

Evidence relating to identification of defendant by hold-up victim *held* sufficient to support conviction for robbery, kidnapping, and the theft and unlawful driving or taking of an automobile. St.1935, p. 174, § 503.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Harry H. Morrison was convicted for robbery, kidnapping, and the theft and unlawful driving or taking of an automobile, and he appeals.

Affirmed.

Edwin F. Franke and George W. Rochester, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant, who was charged in an information with the crimes of robbery, kidnapping and violation of section 503 of the Vehicle Code (St.1935, p. 174) commonly known as the joy-riding statute, was found guilty thereof by a jury. The appeal herein is from the judgment and from the order denying defendant's motion for a new trial.

The evidence reveals that the alleged offense was committed on January 20, 1938, at about 7:30 o'clock in the evening, in a service station located at Pico and Sepulveda boulevard, in Los Angeles Some $8 were obtained from the operato of the station, one J. B. Abernathy, who was then forced by veiled threats to get into a car left in front of the station by a

customer for servicing. The perpetrator of the offense got into the rear seat of the car and ordered the victim to drive him to a spot a few miles away in the hills near Playa Del Rey, which, it was learned later, was about 2½ miles from where the defendant was afterward found to be living. Here Abernathy was ordered to get out of the car, and the robber drove away.

The matter was immediately reported to the police, who later found the abandoned car in the Del Rey hills, about a mile and a half south of the point where Abernathy was ordered to leave, and about a mile from where the defendant was then living. The robber was described by Abernathy as having on a "long brown overcoat and a scarf wrapped up around his neck, and dark glasses. His black hair was combed slick back; his hands were in his pockets, slit pockets."

Some four days later, at about 10:30 o'clock at night, two police officers who were driving around in a car in the vicinity of the Del Rey hills noticed the defendant who was walking south on Ocean View lane. The defendant "flagged" the car for a ride and one of the police officers asked defendant where he was going; defendant answered "To Hyperion Pier", which was about 2½ miles south of that point, and which was where defendant said he lived, in a little shack down along side of the pier. The police officer searched the defendant and found a revolver and a pair of dark glasses inside of his coat pocket. Within the next day or two Abernathy was called to the police station to identify the defendant. He was unable to make a positive identification at that time. Two detectives, with Abernathy, then went to a rooming house in Venice in which defendant had lived for one week immediately prior to the robbery; defendant's room was searched and a brown overcoat, with pockets fastened into the coat at an angle and which the witness Abernathy referred to as "slit pockets", was found rolled up and piled on top of a small box in the closet. The overcoat was taken to the police station and defendant was requested to wear it and to put on a pair of dark glasses. His hair, which had been frowsy upon Abernathy's first visit to the police station, was now wet and slicked back. Thus attired, the defendant came into the waiting room of the station, where Abernathy was waiting for him. Abernathy asked the defendant to repeat some words used by the robber in the hold-up. Defendant complied, and at that time Abernathy positively identified the defendant as the man who held him up.

Quoting from appellant's brief, it is contended that "the evidence is insufficient to justify or sustain the verdicts of guilty on all or any of the charges; that the testimony of the prosecution was insufficient to convict the defendant; the verdict of the jury was unwarranted and unreasonable; and the probability of the innocence of the defendant was the only reasonable inference to be drawn from the evidence".

In substance and effect, the only issue presented on appeal is whether the evidence supports the verdict of the jury and sustains the judgment.

[1, 2] It is urged in support of the above mentioned contentions that appellant is the victim of mistaken identity, in connection with which it is argued that the identification of defendant by the only witness, namely, Abernathy, is uncertain and unsatisfactory. The inability of the victim at first to identify the defendant naturally inspires such an argument, and it is reasonable to assume that the same argument was addressed, in vain, to the jury. However, the sufficiency and weight of the evidence was for the jury's consideration and determination, under which circumstances it is well settled that, in the absence of error, the verdict and judgment will not be disturbed on appeal. People v. Franklin, 46 Cal.App. 1, 188 P. 607; People v. Wilson, 76 Cal.App. 688, 245 P. 781. Moreover, the failure of Abernathy to identify defendant in the first instance may have been regarded by the jury as an act of caution and deliberation rather than an indication of uncertainty. As a matter of law the evidence supports the judgment.

The judgment and the order denying a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.

29 Cal.App.2d 658

PEOPLE v. VILLEGAS.

Cr. 3139.

District Court of Appeal, Second District, Division 1, California.

Dec. 15, 1938.

1. Criminal law ⇐38

In order for duress produced by threats to be a valid excuse, under the Penal Code, for the performance of a criminal act, the act must have been done under such threats as show that the life of the person threatened was in danger, or that there was reasonable cause to believe and actual belief that there was such danger, and the danger must be of present and immediate violence at the time of the commission of the forbidden act instead of a danger of future violence. Pen.Code, § 26, subd. 8.

2. Criminal law ⇐569

In prosecution for robbery, evidence sustained conviction as against claim that defendant had acted under coercion from armed companion. Pen.Code, § 26, subd. 8.

3. Criminal law ⇐469

In prosecution for robbery with defense of coercion, from armed companion, testimony of a defense witness, that by reason of the study of psychology the witness was able to state that defendant's will power was weak and his physical condition bad, was incompetent, since witness was entitled to testify only concerning the general reputation of defendant in the community in which he lived for the traits involved.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Rudolph P. Villegas was convicted of robbery, and he appeals.

Appeal dismissed.

David C. Marcus, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WHITE, Justice.

Appellant Villegas, and Charles A. Guerra were by information charged with two counts of robbery whereby they did by means of force and fear, etc., take from Gordon Gammans and Mrs. Ruth Bohanna certain described personal property. In each count it was further alleged that both at the time of the commission of each offense and at the time of their arrest the defendants were armed with a deadly weapon in the form of a 38-caliber revolver. Following trial before the court sitting without a jury, the defendants were convicted on both counts and the court further found that at the time of the commission of the offenses charged defendants were armed with a deadly weapon.

From the judgments pronounced against him and from the sentences imposed, as well as from the order denying his motion for a new trial, defendant Villegas alone prosecutes this appeal.

Evidence introduced at the trial showed that on the evening of March 20, 1938, the victim named in count I was in charge of a service station, when about 7:30 o'clock defendant Guerra walked into the premises and inquired concerning the name of a street. As the victim was examining a map to obtain the requested information, defendant Guerra addressed him, saying, "Open the cash register"; whereupon the victim looked around and saw Guerra with the gun, which he was holding at his side. The station attendant thereupon opened the cash register and defendant Guerra abstracted therefrom certain personal property, including money in the amount of approximately sixteen dollars. Following this, defendant Guerra ran over to an automobile parked nearby and drove away. The station attendant was uncertain as to whether there was any other person in the automobile; neither did he make any identification of appellant, Villegas.

The victim named in count II testified that she was waiting for a bus at a street intersection when an automobile came up and defendant Guerra, alighting therefrom, went around toward the rear of the automobile, then suddenly came back, pointed a gun at her and demanded her purse. This witness testified that she remonstrated with Guerra, asking him not to take her purse, as she worked for a living, needed her money and had no funds other than what were in her purse to enable her to get home; whereupon defendant Guerra snatched the purse out of her hand, got into the automobile and started away. This witness also testified that there was another young man driving the automobile, but she could not identify appellant Villegas, as being that person.

Charles R. White, a police officer, testified that about 11:15 p. m. on the night of

the robberies here in question he and another officer were sitting in a police automobile when another machine drove by. Becoming suspicious of the occupants of the latter car, the officers pursued it, and upon overtaking the same discovered the occupants thereof to be appellant and his codefendant, Guerra, the latter of whom was holding a loaded 38-caliber revolver in his hand, while appellant was driving. Certain personal property belonging to the victims of the robberies was also found in the automobile. In a conversation with the officers immediately following his apprehension, appellant Villegas said, "I will tell you what happened * * * yes, we held up two people, a service station in Hollywood and a woman some place in Hollywood". while defendant Guerra in the presence of appellant upon the same occasion said, "Yes, we got a guy in North Hollywood, a service station, and some woman ran away from us and screamed, and we got another woman in Hollywood". On the following day police officer Clendenning held a conversation with both defendants, when appellant was asked what part he took in the holdups, to which he replied that beyond driving the automobile he did not actively participate. At this conversation appellant stated, however, that he received eleven dollars of the money so obtained from the victims of the crimes herein referred to.

Appellant first contends that the evidence was insufficient to support the decision of the court finding him guilty, this for the reason that he committed under coercion the acts upon which the robbery charges were based. In support of this defense appellant testified at the trial that his codefendant, Guerra, menaced him with the gun, threatened him, and that at all times he was in fear of great bodily harm being inflicted upon him by his codefendant.

[1] The degree of evidence necessary to excuse one under the provisions of subdivision 8 of section 26 of the Penal Code from punishment for his criminal acts is thus defined in People v. Sanders, 82 Cal. App. 778, at page 785, 256 P. 251, at page 254, where the court says: "In order for duress or fear produced by threats or menace to be a valid, legal excuse for doing anything, which otherwise would be criminal, the act must have been done under such threats or menaces as show that the life of the person threatened or menaced was in danger, or that there was reasonable cause to believe and actual belief that there was such danger. The danger must not be one of future violence, but of present and immediate violence at the time of the commission of the forbidden act. The danger of death at some future time in the absence of danger of death at the time of the commission of the offense will not excuse. A person who aids and assists in the commission of the crime, or who commits a crime, is not relieved from criminality on account of fears excited by threats or menaces unless the danger be to life, nor unless that danger be present and immediate."

[2] We think there was enough testimony of appellant's guilt furnished by himself to give rise to a conflict in the evidence. There was nothing in the conduct of Guerra as exhibited toward appellant which gave the latter reasonable cause to believe that his life was in danger because of the belligerent attitude of his codefendant. The only threats which the record discloses are found in the following testimony of appellant himself with reference to the acts of his codefendant. "Then he tells me that he stole some money from the fellow in the gasoline. I got mad and I tell him, 'Why, that is a funny trick you are playing on me. It is going to be too bad for us'. Then he says to come, too. 'Come away,' he says, 'you are in it just about as much as I am, and we are going to do some more. You hear me?' And he pointed that gun at me."

Before going into the gasoline station to perpetrate the first robbery, appellant Villegas testified that Guerra had said, "Don't you dare go and leave me." After the perpetration of the first robbery, they went to a beer parlor, where they drank, and at which place, appellant testified, his codefendant "bought some wine there and offered me some wine. I refused the wine and I took Seven-Up. And, of course, he started drinking a lot there. And I thought maybe he will get crazy or something and would shoot me up, or something. So I asked him, 'Let us go on; let us go home.'"

The incident at the beer parlor occurred a considerable time before the second robbery was committed. After they left the beer parlor they drove back toward San Fernando, in connection with which trip appellant testified as follows:

"Q. Where did he have this gun? A. He had it right in his hand.

"Q. Were you afraid of him? A. Yes."

But there is other evidence, and inferences, inconsistent with the testimony of appellant that he was in fear of his codefendant as above indicated. For instance, when, according to appellant, his codefendant before going into the service station to perpetrate the first robbery, said "Don't you dare go and leave me," appellant could have driven away, but instead he waited until Guerra returned, and drove the latter from the scene of the robbery. Again, following the first robbery, they drove to the beer parlor, where they consumed some drinks. Appellant was there afforded an opportunity to withdraw and leave his codefendant, but instead we find him remaining and driving Guerra away from there; and finally, when Guerra left the automobile to accost the victim in the second robbery, appellant again could have driven away; but on the contrary, we find him waiting at the wheel of the automobile with the motor running until Guerra accomplished his evil purpose, and then driving Guerra from the scene of the crime. Such conduct is not consistent with innocence or apprehension that great bodily injury might be inflicted; but on the contrary, strongly fortifies the logic of a conclusion that appellant was a willing aider and abetter of his codefendant. That such was the case is amply established by the appellant's admissions both at the time of his arrest and on the following day.

[3] Finally, appellant contends that the court erred in excluding the testimony of Mrs. Prudence Harding, called as a defense witness at the trial. During the examination of this witness, appellant attempted to qualify her as a psychologist and offered to prove by her that she had known appellant for some fourteen years, and that by reason of her study of psychology she was in a position to testify that appellant's will power was weak, that his physical condition was bad, and that he therefore was without sufficient force to "resist the impulse of this other boy to take him out on these robberies". The action of the trial court in sustaining an objection to this line of testimony was correct. It was both incompetent and immaterial, and she was entitled only to testify, as she was permitted under the court's ruling to do, concerning the general reputation of appellant in the community in which he lived for the traits involved in the offenses charged.

The appeal from the sentences is dismissed.

The judgments and the order by which the motion for a new trial was denied are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.



29 Cal.App.2d 733

MASHBIR v. MASHBIR.

Civ. 11890.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1938.

1. Trial ⇐43

A party is entitled to have received in evidence and considered by the court before findings of fact are made all competent, material, and relevant evidence which tends to prove or disprove any material issue raised by the pleadings.

2. Husband and wife ⇐281

In action to recover an amount allegedly due under a separation agreement, correspondence, telegrams, and testimony tending to prove affirmative defense that separation agreement had been superseded by a subsequent agreement was competent, and should have been given due consideration by the court before findings of fact were made.

3. Appeal and error ⇐1170(7)

In action to recover an amount allegedly due under a separation agreement, trial court's failure to consider evidence tending to prove affirmative defense that separation agreement had been superseded by a subsequent agreement before making its findings of fact was prejudicial error. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Blanche B. Mashbir against Sidney Forrester Mashbir to recover amount allegedly due under a separation agreement. Judgment for plaintiff, and defendant appeals.

Reversed.

Dockweiler & Dockweiler, of Los Angeles, for appellant.

Overton, Lyman & Plumb and P. B. Plumb, Jr., all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover a sum of money allegedly due under a separation agreement defendant appeals.

The material facts are:

Plaintiff's complaint alleged in substance that defendant owed her as arrearage under a separation agreement dated October 3, 1926, $10,466. Defendant by his answer denied generally the alleged indebtedness and as an affirmative defense asserted: "* * * that the agreement referred to in plaintiff's complaint, to-wit, the agreement of October 3, 1926, is no longer in force and effect, that on or about March 16, 1937, plaintiff and defendant made and entered into an agreement replacing said agreement of October 3, 1926, by said agreement of March, 1937, that under said agreement of March, 1937, said plaintiff, * * * waived and relinquished any and all rights accrued or accruing to her, the said plaintiff, with respect to any and all sums of money to which she was or thereafter would be entitled under said agreement of October, 1926, and fully released defendant of and from any and all obligations under said agreement of October, 1926."

At the trial defendant offered evidence in support of his affirmative defense as pleaded above. All of the evidence thus offered by defendant was upon motion of plaintiff stricken from the record when defendant had rested his case.

Defendant relies for reversal of the judgment on this proposition:

It was prejudicially erroneous for the trial court to strike from the evidence all of the testimony and exhibits which defendant had offered in support of his affirmative defense that the parties by an agreement of March 16, 1937, had released defendant from any obligation or obligations created by their agreement of October 3, 1926.

[1] This proposition is tenable. The law is established that a party is entitled to have received in evidence and considered by the court, before findings of fact are made, all competent, material, and relevant evidence which tends to prove or disprove any material issue raised by the pleadings. In the instant case together with other testimony stricken by the court defendant offered the following evidence.

[2] A letter dated January 14, 1937, from plaintiff to defendant reading in part as follows: "Nearly three years have elapsed since we came to some sort of a temporary financial understanding, which was for the time being and apart from the terms of our permanent contract * * * The understanding was that you would send me $85.00 a month for a period of six months or so * * * You informed Mr. Dixon at the time he was in Washington that you expected to be in very much better financial condition in a couple of years or so and would increase the amount as you were able * * * I cannot help but feel you have arrived at the point where you can allow more than $85.00 a month * * * Hoping that you will * * * try to comply with my reasonable request * * * (signed) Blanche."

Telegraphic reply dated January 18, 1937, wherein defendant asked plaintiff that if he paid her $125 per month would she cancel past accumulations.

A telegram from plaintiff to defendant dated January 19, 1937, wherein she stated that she would require further time to consider his proposal, and containing this statement: "Suggest you commence payment at increased rate mentioned your wire to be credited on account until modification if any agreed to between us."

A telegram of January 21, 1937, from defendant to plaintiff, in which he stated that he was mailing the regular remittance of $85 and was awaiting the modified contract mentioned in her telegram of January 19, 1937.

A letter dated February 26, 1937, from plaintiff's attorneys to defendant, demanding full payment of the alleged arrearage under the property separation agreement dated October 3, 1926. This letter, however, offered on behalf of plaintiff to accept in lieu of any balance due her under the agreement of October 3, 1926, the performance of certain conditions by defendant and the letter fully outlined these conditions.

A telegram dated March 15, 1937, from plaintiff to defendant's attorneys reading thus: "Your wire twelfth identical with your preceding proposal and still as unac-

ceptable Stop Have heretofore informed you one twenty five entirely inadequate Stop After careful consideration Mrs Mashbir authorizes us to make following concessions She will waive accumulations provided you pay her punctually one fifty per month maintain life policies per our letter twenty sixth ultimo and bear reasonable and necessary expense boys college education regardless locality college Stop This her final determination and unless we have your acceptance of terms as herein outlined without any modification whatever by March eighteenth will proceed according to concluding paragraph our last letter."

A telegram dated March 16, 1937, from defendant to plaintiff's attorneys reading thus: "I accept terms as outlined in your telegram March fifteenth Stop Air mail necessary papers without delay."

Testimony that defendant left Washington on a business trip en route to the Orient and stopped in Los Angeles, where he met with plaintiff and her attorney and signed in duplicate an agreement embodying the terms set forth in the letter of February 26, 1937, from plaintiff's attorneys to defendant; that both copies of the agreement, at the suggestion of plaintiff's attorneys, were left with him pending the examination of a life insurance policy which defendant had obtained pursuant to the terms of the parties' modified agreement with the understanding that, if the insurance policy was satisfactory to plaintiff, defendant would receive a signed copy of the agreement upon his return from the Orient; that thereafter the insurance policy was examined by plaintiff and her attorneys and returned to defendant's office in Washington without complaint or objection; that upon defendant's return from the Orient he was served with a notice of rescission of the contract which the parties had entered into predicated upon the alleged fraud of defendant in misrepresenting his financial condition.

All of the foregoing evidence was competent, relevant, and material. It had a tendency to prove the affirmative defense alleged by defendant that the separation agreement between the parties dated October 3, 1926, had been superseded by another agreement of March 16, 1937. This evidence therefore should have been received by the court and given due consideration before findings of fact were made.

[3] There is no merit in the contention that the error is not prejudicial within the purview of article 6, section 4½ of the Constitution of the state of California. As the record is presented to this court the trial court did not consider the evidence as set forth above before making its findings of fact, and we cannot say that, had the trial court received the excluded evidence and given it due consideration, a different result would not have ensued.

For the foregoing reasons the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.



30 Cal.App.2d 28

SOUTHERN CALIFORNIA EDISON CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 11946.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1938.

Workmen's compensation ⇐989

The Industrial Accident Commission is without jurisdiction to assess against employer and direct latter to pay deceased employee's widow amount of deceased's funeral expenses theretofore paid from his estate by executors. St.1937, p. 284, § 4701(a).

Proceeding for a writ of review by the Southern California Edison Company, Limited, to review an award of the Industrial Accident Commission to Anna Hazelbud for funeral expenses of her deceased husband, Ivan Blair Hazelbud, employee.

Award annulled.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for petitioner.

Everett A. Corten, and Eldon B. Spofford, Asst. Atty., both of San Francisco, for respondent.

McCOMB, Justice.

This is a writ of review to consider an award of the Industrial Accident Commission.

Viewing the evidence most favorable to respondent, the essential facts are:

December 26, 1935, respondent commission made an order awarding to Kennedy &

Creger, undertakers, the sum of $150 for funeral expenses of Ivan Blair Hazelbud, who died as the result of an industrial accident. April 25, 1938, respondent entered an order pursuant to section 5803 of the Labor Code (St.1937, p. 301), vacating its previous order above mentioned and directing that the sum of $150 as and for funeral expenses of Ivan Blair Hazelbud be paid to his widow, Anna Hazelbud. It is conceded that the funeral expenses had been paid by the executor of decedent's estate and that Anna Hazelbud had never incurred any liability therefor.

This is the sole question to be determined:

Is respondent commission without authority to order an employer to pay a sum equivalent to the amount of the funeral expenses of a deceased employee to the widow of said employee when she has not incurred liability therefor and when in fact the funeral expenses have been paid from the decedent's estate?

This question must be answered in the affirmative. Where death results from an industrial accident the employer is liable for the reasonable expenses of the employee's burial, not exceeding $150. Sec. 4701(a), Labor Code (St.1937, p. 284). This is the limit of the employer's liability for the burial expenses of an employee, and this section also fixes the extent of respondent commission's jurisdiction to make an award for burial expenses. It is the clear intent of this provision that the employer be liable for a reasonable burial expense of a deceased employee in an amount not to exceed the sum of $150. It does not provide that a dependent of a deceased employee is to receive $150 as and for burial expenses in any event. Therefore, where, as in the instant case, the burial expenses have been paid from the estate of the decedent, respondent is without jurisdiction to arbitrarily assess a sum against an employer equivalent to the amount of the funeral expenses and direct that such sum be paid to decedent's widow.

We expressly refrain from expressing any opinion as to whether or not the executor of decedent's estate is entitled to reimbursement by petitioner for the funeral expenses which have been paid with funds from such estate.

For the foregoing reasons the award is annulled.

We concur: CRAIL, P. J.; WOOD, J.

29 Cal.App.2d 710

CROSLEN v. GRAND LODGE OF THE ANCIENT ORDER OF THE UNITED WORKMEN OF NORTH DAKOTA.

Civ. 11989.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1938.

1. Insurance ⇐750

When member of fraternal benefit society stopped sending in premiums due on life and disability certificate, by-law providing that, if loan value should be sufficient to cover amount due, it should be automatically applied to payment of delinquent premiums, became operative and required society to pay premiums from reserve fund, as against contention that clause in certificate providing that member could terminate disability insurance by ceasing to pay assessments irrespective of continuance in force or termination of certificate was inconsistent with by-law, and that society must be deemed to have waived by-law.

2. Insurance ⇐818(1)

In action on life and disability certificate issued by fraternal benefit society, it was not error to admit in evidence a set of by-laws over plaintiff's objection, where clause on which plaintiff herself relied to continue insurance in effect by payment of dues out of reserve fund was contained in by-laws.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Tinnie J. Croslen against the Grand Lodge of the Ancient Order of the United Workmen of North Dakota to recover life benefits on a life and disability insurance contract. From an adverse judgment, plaintiff appeals.

Affirmed.

Joseph T. Enright and Black, Hammack & McWilliams, all of Los Angeles, for appellant.

Carlos S. Hardy and Rex Hardy, both of Los Angeles (J. J. Mulready, of Fargo, N. D., of counsel), for respondent.

CRAIL, Presiding Justice.

This is an appeal by the plaintiff from a judgment against her in an action upon a life and disability insurance contract to

recover the life benefits. The contention of the plaintiff on appeal is that the trial court misinterpreted the contract of insurance with regard to certain provisions of the contract which the plaintiff contends are inconsistent.

The defendant at all times was a fraternal benefit society incorporated under the laws of North Dakota and authorized to do business in California. As such it has conducted its business solely for the mutual benefit of its members and their beneficiaries and not for profit, and maintains a lodge system with ritualistic form of work and a representative form of government, and makes provision for the payment of benefits in case of death and disability of its members. One of its subordinate lodges is located at Whittier.

In September, 1926, Roy C. Croslen, the husband of plaintiff made application for membership and asked for a policy of life and disability insurance. Croslen's application was forwarded to the home office and was approved by it and the certificate sued upon was issued.

The certificate provided for $5,000 life insurance and $5 per day disability insurance. The premium on the life feature of the contract was $10.25 per month and on the disability, $3.70 per month. Croslen paid the monthly premiums for all accruing months, including December, 1932, and never thereafter made any payments on account of his said membership.

His certificate contained a table of loan values providing that if the certificate had been in force for three years, loans could be made to the member in conformity with the laws of the society for the purpose of enabling him to pay premiums. On January 1, 1933, according to said table his loan value was $300. The by-laws of the society provided that after the certificate had been in force for three years, a loan should automatically be extended to Croslen sufficient to cover the amount due from him for life and disability premiums, and that so long as the loan value on his certificate was sufficient to make delinquent monthly payments, the certificate should be continued in force. In accordance with the provisions of his certificate and the by-laws, the defendant commenced in January, 1933, charging the monthly premiums due from Croslen as they accrued against his reserve accumulations standing to the credit of his contract of insurance, and continued to do this from month to month down to and including the month of June, 1936, at which time the loan value or reserve accumulation was exhausted. On June 29, 1936, the defendant notified Croslen by letter in which it advised him that it had advanced for his account to pay his premiums a total of $562.40, and that his reserve or loan value had been exhausted, and that his insurance would terminate with June, 1936, unless he resumed making payments in the month of July, 1936. No payments were made by Croslen, and he died on September 10, 1936. Croslen never communicated with defendant after he stopped his premium payments in 1932.

[1] It is the primary contention of the plaintiff that a conflict existed between the terms of the disability certificate held by Croslen with reference to termination on ceasing to pay dues and the provision of the by-law with reference to the advancement of premium loans; that in a case where such a conflict exists the society must be deemed to have waived the provisions of the by-laws in so far as they conflict with the provisions of the certificate, and the certificate will control and determine the rights of the parties, and that the "termination clause" of the disability certificate precluded the defendant from advancing $3.70 per month, and had said sums not been advanced, the life insurance certificate would have been in full force and effect at the time of the death of Croslen, and the plaintiff would be entitled to recover.

The contract of insurance between the parties consisted of Croslen's application, the benefit certificate which was issued to him and the by-laws of the society, but it is only necessary to set forth the two clauses which the plaintiff contends were inconsistent.

The clause which appeared in the certificate issued to the member and upon which the plaintiff relies reads as follows: "Termination of this Supplementary Contract. The member may at any time terminate the disability insurance under this Supplementary Contract by ceasing to pay rates and assessments thereunder, irrespective of the continuance in force or termination of the members' beneficiary certificate referred to above; * * *" The clause in the by-laws which the plaintiff claimed is inconsistent with the above reads as follows: "Any member who fails to make monthly payments due from him to the Beneficiary, Disability and General

Funds, to the Treasurer of the Lodge of which he is a member, on or before the last day of the month for which such payments are due, shall forfeit all his rights as such member and stand suspended from all the rights, benefits and privileges of the Order * * * Provided, however, that if the loan value of the members Certificate or Contract of Insurance * * * shall be sufficient to cover the amount due from such member for life, disability and double indemnity insurance and dues, the same shall be automatically advanced to him as a loan and applied to the payment of such delinquent monthly payments * * * While the loan value of each certificate or contract of insurance is sufficient to make delinquent monthly payments as herein provided the same shall be continued in full force. When the total indebtedness against a Certificate or Contract of Insurance, including any accrued interest, shall equal the loan value thereof, such Certificate or Contract shall become null and void, and the indebtedness shall be cancelled."

It will be observed that the plaintiff's point is based upon the contention that there is actually a conflict between the two clauses above set forth. It is our duty as judges to keep in mind the rules of construction that if reasonably practicable the whole of a contract is to be taken together so as to give effect to every part, each clause helping to interpret the other (Civ. Code, § 1641), and that where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. Code Civ.Proc. § 1858. In our view of the contract, after the certificate had been in force three years it had accumulated a reserve which should not be forfeited, and so when a member stopped sending in his premiums, this reserve fund being on hand to his credit, the by-law became operative and required the defendant to pay the premiums from such reserve fund. The reserve fund was money which had been paid by the member, and when it was used to pay his premium under the by-law in question, the member had not ceased to make payments and he was still paying so long as the money was thus used.

[2] Finally, the plaintiff complains because defendant's exhibit "B", a purported set of by-laws, was admitted in evidence over the objection of plaintiff. Exhibit "B" was in pamphlet form. Said exhibit contained the paragraph with regard to paying the dues out of the reserve funds. After all is said, it is the clause upon which the plaintiff herself relies in order to continue her life insurance in effect. The plaintiff does not contend that exhibit "B" is not the by-laws of the society, but she contends that it was admitted upon the testimony of a district manager of the defendant, whereas it should have been admitted on the certificate of the secretary of the defendant. Without going into the merits of this controversy, it is sufficient for us to say that the plaintiff has shown no prejudice to herself by reason of this ruling of the court and there is no reversible error. Const. art. 6, § 4½.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J



30 Cal.App.2d 67

PEOPLE v. STEPHENS.

Cr. 2039.

District Court of Appeal, First District, Division 2, California.

Dec. 21, 1938.

1. Parent and child ⇐17(6)

In prosecution of father for abandonment of minor children, evidence supported jury's finding that father intended to abandon children and to cast their maintenance upon charity of the county. Pen.Code, § 271a.

2. Criminal law ⇐517(4)

Proof of the "corpus delicti" to justify admission of evidence of a confession or admission means proof that a crime has been committed, and proof of accused's part in the crime need not first be made.

[Ed. Note.—For other definitions of "Corpus Delicti," see Words & Phrases.]

3. Criminal law ⇐517(4)

In prosecution of father for abandonment of minor children, admission of a transcript of father's testimony taken at preliminary hearing before magistrate was not error as against contention that corpus delicti had not been proved before testimony was read where there was proof that the

children had been left a charge on the county in a wholly destitute condition. Pen.Code, § 271a.

4. Criminal law ⇐1169(1)

In prosecution of father for abandonment of minor children, admission of a transcript of father's testimony taken at a preliminary hearing before a magistrate was harmless where there was no admission in testimony tending to prove the father's guilt.

5. Parent and child ⇐17(6)

In prosecution of father for abandonment of minor children, check of father's employer and father's union card, both of which showed relation which father maintained with another woman whom he designated as his wife and which showed father's efforts to conceal his identity from his wife and county officials, were competent to show father's intent to abandon children. Pen. Code, § 271a.

6. Parent and child ⇐17(2)

The word "abandon," as used in statute penalizing father for abandonment of minor children, applies to the act of intentionally failing to supply the needs of the child as against contention that it should be given the same meaning as in guardianship proceedings, wherein it is used to describe an act of complete relinquishment of the right of parental control. Pen.Code, § 271a.

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words & Phrases.]

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Clarence M. Stephens was convicted of abandonment of his four minor children, and he appeals.

Affirmed.

David B. Fyfe, Jr., and Guy A. Ciocca, both of San Rafael, for appellant.

U. S. Webb, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant was tried before a jury upon an information charging abandonment of his four minor children contrary to the provisions of section 271a of the Penal Code. A verdict of guilty was followed by a judgment and a motion for a new trial which was denied. The appeal is from the judgment.

In the early part of May, 1936, the defendant left his family then consisting of his wife and three children. The fourth child was born about six weeks later. He made no contributions to their support after July 6th of that year, though knowing that they were all in destitute circumstances. The expenses of the birth of the fourth child, and the cost of maintenance of all four were borne by the county of Marin. In the meantime the defendant was gainfully employed and living in San Francisco under an assumed name and with another woman whom he represented to be his wife. The defendant did not take the witness stand, and made no defense to the charge laid.

[1] His grounds of appeal will be taken in order. He complains that the evidence is insufficient to support the verdict. Substantial evidence was produced to prove the facts heretofore stated and supported the inference which the jury must have drawn that he intended to abandon his children and to cast their maintenance upon the charity of the county. His statements to the arresting officer were alone sufficient to prove his intention to abandon.

[2-4] He complains of the admission in evidence of a transcript of his testimony taken at his preliminary hearing before the committing magistrate. He argues that the corpus delicti had not been proved before the testimony was read, and that there was no admission in the testimony tending to prove guilt. Proof had been made that the children had been left a charge upon the county in a wholly destitute condition. Proof of the corpus delicti to justify evidence of a confession or admission means proof that a crime has been committed. It is not required that proof of defendant's part in it must be first made. People v. Mohr, 24 Cal.App. 2d 580, 75 P.2d 616. As to the second point, if there was no admission of guilt, there was no harm in admitting the testimony. People v. Thourwald, 46 Cal.App. 261, 189 P. 124.

[5] Objections to the admission in evidence of the check of his employer and of his union card are not sound. Both showed the relation which defendant maintained with another woman whom he designated as his wife and to whom he direct-

ed his wages be paid. They also showed his efforts to conceal his identity from his wife and the county officials. This evidence was competent and material to show the defendant's intent to abandon his children.

[6] Some argument is made that the word "abandons" as used in section 271a of the Penal Code should be given the same meaning as in guardianship proceedings. The difference is manifest. Here the word applies to the act of intentionally failing to supply the needs of the child, while in the guardianship cases cited by appellant it is used to describe an act of complete relinquishment of the right of parental control. The case here finds ample support in People v. Lewis, 132 App. Div. 256, 116 N.Y.S. 893, 896, Nunn v. State, 39 Ga.App. 643, 148 S.E. 165, and Curtis v. State, 48 Ga.App. 135, 172 S.E. 99.

The assignments of prejudicial misconduct on the part of the district attorney require no comment other than that they simply relate to the presentation of proof of the state's case, which was as a matter of course prejudicial to the appellant.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



29 Cal.App.2d 679

DE SANTIS et al. v. MILLER PETROLEUM CO. et al.

Civ. 11924.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1938.

Hearing Denied by Supreme Court Feb. 10, 1939.

1. Guaranty ⇐102

In suit for price of goods, brought by guarantor who had paid price on purchaser's failure to pay, against alleged partners of purchaser, evidence *held* to authorize finding that seller and its officers and agents knew at time of sale that neither buyer nor its officers or directors had any authority to bind a particular corporation sued as partner, and that seller did not charge such corporation with the price or look to such corporation for payment. Civ.Code, § 2403.

2. Partnership ⇐216(2)

In suit for price of goods, brought against alleged partners of purchaser, wherein complaint was based upon a common count for goods sold and delivered to purchaser's partner at partner's special instance and request, partner could rely, under a general denial, upon statute restricting partnership liability in the event of known lack of authority in partner who makes contract. Civ.Code, § 2403.

3. Pleading ⇐382(1)

Where complaint is based upon a common count, defendant may urge under a general denial any defense which tends to show that plaintiff does not have a subsisting cause of action.

4. Pleading ⇐93(2)

A corporation sued as another corporation's partner, for purchase price of goods bought by other corporation, could deny the existence of partnership and at the same time claim benefit of statutory restriction on partnership liability in the event of known lack of authority in partner who makes contract. Civ.Code, § 2403.

5. Partnership ⇐155

A corporate partner which gave notice to seller of goods that it would not be responsible for any merchandise furnished to other corporate partner was not estopped from claiming benefit of statutory restriction on partnership liability by the fact that partnership received and used goods furnished to other partner. Civ.Code, § 2403.

6. Partnership ⇐160

A partner is not liable to third parties for contracts entered into with partnership, when the third party has notice that the partner endeavoring to bind the partnership does not have authority. Civ.Code, § 2403.

7. Partnership ⇐157(1), 160

A partner who gives notice to third person that he will not be bound by copartner's acts is not bound by copartner's contract, even though partnership has enjoyed fruits of the contract, unless he finally acquiesces in the contract. Civ.Code, § 2403.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by William A. De Santis and another against the Miller Petroleum Com-

pany and others, to recover purchase price of merchandise. From a judgment for defendant Caminol Company, Limited, plaintiffs appeal.

Affirmed.

George Appell and Harry A. Mock, both of Los Angeles, for appellants.

Paul J. Fritz, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant Caminol Company, Ltd., after trial before the court without a jury in an action to recover a sum of money alleged to be due as the purchase price for certain merchandise plaintiffs appeal.

These are the essential facts:

Ducommun Metals & Supply Company sold to defendant Miller Petroleum Company oil well tubing and casing, upon the purchase price of which there remained unpaid $12,166.93. Plaintiffs guaranteed that the Miller Petroleum Company would pay for the merchandise, and, upon its failure to do so, paid the amount of the indebtedness to the Ducommun Metals & Supply Company. Plaintiffs then filed the present action against defendants, which, after containing appropriate allegations of the existence of a partnership between defendants, was in the form of a common count for goods, wares, and merchandise sold and delivered to defendants at their special instance and request, and prayed for judgment in the amount they had paid to Ducommun Metals and Supply Company. Defendant Caminol Company, Ltd., denied generally and specifically the allegations of plaintiffs' complaint.

At the close of the trial the court caused a minute order to be entered giving judgment in favor of plaintiffs against defendants. Thereafter, upon motion of defendant Caminol Company, Ltd., the trial court permitted the case to be reopened for the taking of additional testimony, the substance of which being that Mr. Covel, district manager of Ducommun Metals & Supply Company, prior to selling or delivering any tubing or casing to the Miller Petroleum Company, called upon the purchasing agent of the Caminol Company, Ltd., and president of the Caminol Company, Ltd., and was informed by them that defendant the Caminol Company, Ltd., would not be in any way responsible for casing or tubing purchased by defendant Miller Petroleum Company; and that thereafter and prior to any sale to the Miller Petroleum Company the credit manager of Ducommun Metals and Supply Company telephoned defendant the Caminol Company, Ltd., and made inquiry relative to the credit to be extended by Ducommun Metals & Supply Company for casing and tubing to be delivered to the Miller Petroleum Company and was informed that defendant Caminol Company, Ltd., would in no way be responsible for the payment of any bill for tubing or casing thus delivered and that neither defendant J. Warren Miller or Miller Petroleum Company had any authority to purchase for the account of defendant Caminol Company, Ltd.

These are the questions presented for determination:

First: Is there substantial evidence to sustain finding of fact No. 8 of the trial court which read as follows:

"That it is true that at and prior to the time that said Ducommun Metals & Supply Company did sell and deliver to Miller Petroleum Company said casing and tubing hereinbefore referred to, said Ducommun Metals & Supply Company and its officers and agents, had knowledge and were notified by officers and agents of defendant The Caminol Company, Ltd., of the fact that neither Miller Petroleum Company, nor any of its officers or directors, had any authority whatsoever to act for, bind, or obligate defendant The Caminol Company, Ltd., in any manner or capacity whatsoever, in connection with the purchase and sale of said casing and tubing; that it is further true that said Ducommun Metals & Supply Company did at no time charge to defendant The Caminol Company, Ltd., the price of the said casing and tubing, and did not look to said defendant The Caminol Company, Ltd., at any time or in any manner or capacity, for payment thereof."?

Second: Where a complaint is based upon a common count for goods, wares, and merchandise sold and delivered to defendant at its special instance and request, may defendant under a general denial of such allegations rely upon section 2403 of the Civil Code to escape partnership liability?

Third: May a defendant, after denying the existence of a partnership relation, claim the benefit of a restrictive liability as provided in section 2403 of the Civil Code?

Fourth: Since the partnership of which the defendant Caminol Company, Ltd., was

a member actually received and used the tubing and casing, was said defendant estopped from claiming the benefit of the restrictive provisions of section 2403 of the Civil Code?

[1] The first question must be answered in the affirmative. We have examined the record and in our opinion there was substantial evidence considered in connection with such inferences as the trial judge may have reasonably drawn therefrom to sustain each and every finding of fact in paragraph 8 of the findings of fact of the trial court set forth supra.

[2, 3] The second question must also be answered in the affirmative. The law is settled in California that where, as in the instant case, the complaint is based upon a common count under a general denial defendant may urge any defense which tends to show that the plaintiff does not have a subsisting cause of action. Heaton-Hobson etc., Offices v. Arper, 145 Cal. 282, 284, 78 P. 721; Wallace v. Crawford, 21 Cal. App.2d 394, 403, 69 P.2d 455.

[4] The third question also must be answered in the affirmative. There is nothing inconsistent in the position of the defendant Caminol Company, Ltd., in denying the existence of a partnership relation with its codefendants and in claiming that if in fact a partnership relation did exist its liability as a copartner was limited by its compliance with the provisions of section 2403 of the Civil Code. If no partnership existed between the defendants then concededly defendant Caminol Company, Ltd., was not liable to plaintiff; and on the other hand, even though a partnership did exist between the defendants if the facts demonstrated that defendant the Caminol Company, Ltd., had brought itself within the restrictive liability provisions of section 2403, plaintiffs failed to prove a cause of action against such defendant.

[5-7] The final question must be answered in the negative. A partner is not liable to third parties for contracts entered into with a partnership when the third party has notice that the partner endeavoring to bind the partnership does not have authority to do so (sec. 2403, subd. 1, Civ. Code; California C. P. Growers v. Bardell & Oregoni, 132 Cal.App. 153, 167, 22 P.2d 764), and when a partner gives notice to a third person that he will not be bound by the acts of his copartner, such partner is then not bound by a contract entered into by his copartner, although the fruits of the contract have been enjoyed by the partnership of which he is a member, unless the objecting partner, after making his objection, finally acquiesces therein. California C. P. Growers v. Bardell & Oregoni, supra; Cowan v. Tremble, 111 Cal.App. 458, 296 P. 91.

In the present case defendant the Caminol Company, Ltd., gave notice to the Ducommun Metals & Supply Company that they would not be responsible for any merchandise furnished to the defendant Miller Petroleum Company. Therefore, the fact that thereafter the partnership received and used merchandise furnished by the Ducommun Company did not bind in any way defendant the Caminol Company, Ltd. In addition, under the terms of the partnership agreement Miller Petroleum Company was to furnish the casing for the well and defendant Caminol Company, Ltd., was not to furnish any of the casing, and there is no showing or finding that defendant Caminol Company, Ltd. altered its original position which it had taken when it gave notice to plaintiffs' assignor that it would not be liable for any purchases made by Miller Petroleum Company or that defendant Caminol Company, Ltd. ratified in any way the purchase of the casing on credit.

For the foregoing reasons the judgment is affirmed.

I concur: CRAIL, P. J.
I concur in the judgment: WOOD, J.



SHEA et al. v. LEONIS et al.*
Civ. 11579.

District Court of Appeal, Second District, Division 1, California.
Dec. 15, 1938.

As Modified on Denial of Rehearing Jan. 13, 1939.

Hearing Granted by Supreme Court Feb. 9, 1939.

1. Corporations ⇐378
Landlord and tenant ⇐208(4)

Where lease gave lessee right to assign lease and thereby relieve itself of obligations thereunder, but lessee's corporate assignee, in order to prevent collection of rents, assigned the lease to an insolvent corporation created for the purpose and wholly owned by

*For subsequent opinion see 92 P.2d 400.

the first assignee's sole stockholders, lessor could recover rents from first assignee and its stockholders.

2. Landlord and tenant ⇐230(1)

In lessor's action for rents due under a lease which was assignable at any time, complaint alleging facts showing the virtual identity of corporate assignee of lease, its stockholders, and another corporation organized by it for the sole purpose of taking assignment of lease in order to defeat collection of rents, was not demurrable despite indefiniteness of allegations to show that recognition of subsequent assignee's separate existence would sanction fraud or promote injustice.

3. Corporations ⇐1

Before a corporation's acts and obligations can be legally recognized as those of a particular person or persons, and vice versa, not only must the corporation be influenced and governed by such persons, but there must be such unity of interest and ownership that the individuality or separateness of such persons and the corporation has ceased, and facts must be such that an adherence to the fiction of corporation's separate existence would sanction fraud or promote injustice.

4. Corporations ⇐1

The separate personality or capacity of a corporation is but a statutory privilege and must not be utilized for fraudulent purposes, as a cloak or disguise for the evasion of obligations.

5. Limitation of actions ⇐24(2)

An action for rentals due under lease, brought by lessor against corporate assignee of lease, its stockholders, and subsequent corporate assignee, dominated by same stockholders, which was organized for sole purpose of taking the assignment in order to defeat collection of rent, was governed by four-year statute of limitations upon actions on written instrument, not by three-year statute of limitations upon actions sounding in fraud. Code Civ.Proc. §§ 337, 338.

6. Appeal and error ⇐1178(8)

On appeal from judgment sustaining general and special demurrers to complaint without leave to amend, where only part of the grounds of special demurrer were well taken, record disclosed a nunc pro tunc order denying plaintiffs' motion for leave to amend, though such order was subsequently vacated, and plaintiffs were not given opportunity to amend but were under impression that motion for leave to amend had been made and denied, judgment would be reversed and remanded to give plaintiffs opportunity to amend.

7. Appeal and error ⇐918(1)

The reviewing court must assume, from trial court's action in vacating order denying plaintiffs leave to amend, that plaintiffs did not request leave to amend.

8. Appeal and error ⇐78(3)

Purported appeals from order sustaining demurrers and denying plaintiffs' application to amend, taken in connection with appeal from judgment for defendants, would be dismissed.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Lusannah C. Shea and others against J. B. Leonis, Sr., and others, to recover rentals due under lease. From a judgment for defendants, plaintiffs appeal.

Reversed and remanded.

Chapman & Chapman, of Los Angeles, and Decoto & St. Sure, of Oakland, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (S. M. Haskins, Ira C. Powers, and Frederic H. Sturdy, all of Los Angeles, of counsel), for respondents J. B. Leonis, Jr., and Adelina F. Leonis, Jr.

Young & Kelly, Edward R. Young, and Frank R. Johnston, all of Los Angeles, for respondents J. B. Leonis, Sr., and J. B. Leonis, Inc.

WHITE, Justice.

Demurrers to the second amended complaint in the present action were sustained without leave to amend as to J. B. Leonis, Sr., J. B. Leonis, Jr., and Adelina F. Leonis, Jr.; the same order was entered as to defendant Boyle Avenue Investment Company, except as to the third cause of action, and as to J. B. Leonis, Inc., except as to the sixth cause of action. Judgment was accordingly entered in favor of defendants, from which plaintiffs appeal.

In the second amended complaint which is under attack it is alleged that in January, 1934, plaintiffs leased certain property in the city of Vernon to O. Nicholas Gabriel for a term of ninety-nine years, at certain specified rentals. Less than a month later the lessee, Gabriel, assigned the lease to J. B. Leonis, Inc., by an assignment in which J. B. Leonis, Inc., expressly assumed

and agreed to perform all the terms, conditions and covenants in the lease; that J. B. Leonis, Sr., and J. B. Leonis, Jr., own all of the capital stock of J. B. Leonis, Inc., and are, respectively, the president and secretary of said corporation, which it is alleged is completely controlled and dominated in its corporate acts by J. B. Leonis, Sr., and J. B. Leonis, Jr. That J. B. Leonis, Inc., was organized for the sole purpose of acting as the agency for J. B. Leonis, Sr., and J. B. Leonis, Jr., in the conduct of their business affairs, has acted as such agent, and as a matter of fact is but J. B. Leonis, Sr., and J. B. Leonis, Jr., acting in a corporate capacity.

Further, it is alleged that in 1931, after holding the lease for seven years, J. B. Leonis, Sr., and J. B. Leonis, Jr., who were acting through their corporate agent, J. B. Leonis, Inc., conceived a fraudulent scheme to terminate their liability under the lease. It is then alleged that this scheme was to organize a wholly-owned subsidiary, to-wit, Boyle Avenue Investment Company, an insolvent concern, and to cause J. B. Leonis, Inc., to assign to the newly organized company the leasehold interest, for the express purpose of terminating their own liability and preventing any recovery by the lessors for breach of the lease contract, thereby hindering, delaying and defrauding creditors, to-wit, plaintiffs herein.

The second amended complaint then proceeds to allege that J. B. Leonis, Sr., and J. B. Leonis, Jr., and J. B. Leonis, Inc., and the latter's officers and directors, carried out the alleged fraudulent scheme, as follows: That they caused Boyle Avenue Investment Company to be organized for the sole purpose of acquiring the lessee's interest in the lease; that J. B. Leonis, Sr., and J. B. Leonis, Jr., acting by and through J. B. Leonis, Inc., assigned the lease to Boyle Avenue Investment Company, which last-named corporation, it is alleged, had no other assets, and is insolvent. By the terms of this assignment, it is alleged, Boyle Avenue Investment Company assumed and agreed to perform all of the terms of the lease. It is then set forth that J. B. Leonis, Jr., and Adelina F. Leonis, Jr., own all of the stock of Boyle Avenue Investment Company in trust for J. B. Leonis, Sr., and J. B. Leonis, Jr., and that no other person other than the two last named ever paid any consideration for the stock of Boyle Avenue Investment Company. It is then charged that J. B. Leonis, Jr., is president of Boyle Avenue Investment Company, and that the corporation and its officers are completely controlled and dominated by J. B. Leonis, Sr., and J. B. Leonis, Jr.; that Boyle Avenue Investment Company was organized for the sole purpose of taking over the lease and acting as the agent of J. B. Leonis, Sr., and J. B. Leonis, Jr., in the conduct of their business affairs, has acted as such agent, and, as a matter of fact, is but J. B. Leonis, Sr., and J. B. Leonis, Jr., acting in a corporate capacity. Default in the lease payments on the part of Boyle Avenue Investment Company is then alleged. It is then charged that Boyle Avenue Investment Company is a fraudulently organized corporation created by J. B. Leonis, Sr. and J. B. Leonis, Jr., to take over the lease and thereby defraud the lessors of their rent by substituting an insolvent lessee for a solvent one. The amended complaint here in question then proceeds to allege that J. B Leonis, Sr., and J. B. Leonis, Jr., through their corporate agent, Boyle Avenue Investment Company, were in default at the time of the commencement of this action in the sum of $16,833.33⅓ for unpaid rentals and $5,435 for unpaid taxes.

The demurrers interposed were both general and special, and the order sustaining the demurrer was not limited either to general or special demurrers or to any one of the several grounds therein contained.

[1, 2] Appellants concede that by its terms the lease here in question gave to the lessee, J. B. Leonis, Inc., the right to assign said lease at any time and thereby become released from liability under the instrument. Appellants admit that if the assignment of the lease was a bona fide transaction they would have no cause of action, but contend that their second amended complaint shows a deliberate attempt upon the part of respondents, by means of a corporate screen, to prevent the collection of rents by appellants from the lessee, while at the same time in fact reserving to respondents any benefits that might accrue from said lease. We find ourselves in accord with appellants' claim in this regard. Notwithstanding the right given to the lessee to assign the lease and thereby relieve itself of its obligations thereunder, nevertheless, if the assignment in question was made to an alter ego of the lessee with the sole object of preventing the lessors from

collecting rents because of the insolvency of the alter ego assignee, while retaining to the lessee any benefits that might accrue under the lease, such allegations would be sufficient to state a cause of action that the new lessee was only the old one under another name, and that the responsibility of the latter was not impaired by such a merely nominal transfer. Higgins v. California Petroleum, etc., Co., 122 Cal. 373, 55 P. 155.

[3] Coming to a consideration of the aforesaid allegations of the second amended complaint, they would seem to be sufficient as against a general demurrer. Before the acts and obligations of a corporation can be legally recognized as those of a particular person or persons and vice versa, two circumstances must be present: First, that the corporation is not only influenced and governed by that person or persons, but that there is such a unity of interest and ownership that the individuality or separateness of said person or persons and the corporation has ceased; and second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would under the particular circumstances sanction a fraud or promote injustice. Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641; Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 P. 986. There is an adequate observance of the first requirement above set forth in the second amended complaint before us, because plaintiffs do not merely aver that Boyle Avenue Investment Company was an instrumentality which was used for the benefit of J. B. Leonis, Inc., and the individual defendants named, but in substance and effect the second amended complaint alleges that the Boyle Avenue Investment Company was but the double or alter ego of J. B. Leonis, Inc., and the individual defendants named. That is to say, facts are alleged showing the virtual identity of both corporations and the individual defendants.

With regard to the second requisite, it may be conceded that the allegations of the second amended complaint are not as definite as might be desired, and the interests of clarity would doubtless be subserved by an amendment in this respect. Nevertheless, the second amended complaint is not fatally defective, the allegations being sufficient to reveal a situation of impending and probable injustice through the deprivation of plaintiffs from collecting their rent while retaining to the lessee through its alter ego any benefits that might flow from the lease. It is not necessary that the complaint allege actual fraud; it is sufficient if the facts set forth disclose that the dealings were in form with Boyle Avenue Investment Company, but in reality with J. B. Leonis, Inc., and the individual defendants constituting such company, and that a refusal to recognize this fact will bring about inequitable results.

[4] If the allegations of the amended complaint are true, then J. B. Leonis, Inc., and the individual defendants owning the capital stock are doubtless liable for the debts of Boyle Avenue Investment Company, for it is well settled that inasmuch as the separate personality or capacity of a corporation is but a statutory privilege, it must not be utilized for fraudulent purposes, such as a cloak or disguise for the evasion of contracts or other obligations.

[5] It is next contended by respondents that this action is barred by the statute of limitations, particularly section 338 of the Code of Civil Procedure, which provides for a three-year limitation upon actions sounding in fraud. This claim cannot be sustained, for it is obvious from the amended complaint that the suit is one upon contract and is not an action ex delicto for fraud. The recovery which is sought by plaintiffs is of a definite sum of money due upon a contract of lease for the payment of rent, and is accordingly governed by the four-year period of limitations upon actions based upon a written instrument. Code Civ.Proc., sec. 337; Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 353, 181 P. 780.

[6, 7] Finally, respondents urge an affirmance of the judgment on the ground that at least some of the grounds of the special demurrers are well taken, and that if a demurrer is well taken on any of the grounds specified therein, the ruling of the trial court must be sustained on appeal. Some of the special grounds of demurrer undoubtedly were well taken so far as uncertainties, ambiguities, and legal conclusions appearing in the pleading are concerned. This being so, respondents argue that the action of the trial court sustaining the demurrer without leave to amend does not constitute reversible error, even if the general demurrers were not well taken, in the absence, as herein, of a request or application by the plaintiffs for permission to amend. Fitzpatrick v. Fidelity & Casualty Co., 7 Cal.2d 230, 60 P.2d 276. However, the instant case is distinguishable from Koster v. Local No. 33, etc., 2 Cal.App.2d

612, 613, 38 P.2d 423, relied upon by respondents, because in the Koster Case it did not appear that plaintiff sought leave to amend his complaint, nor did either side upon appeal present arguments in connection with the special demurrers, and the court refused to reverse the judgment on the ground that leave was not granted, when no such leave was asked; while in the case before us the record discloses a nunc pro tunc order denying plaintiffs' motion for leave to amend. This order, it is true, was subsequently vacated, but in the affidavits filed by plaintiffs' attorney in opposition to the motion to vacate such order it appears that plaintiffs' counsel was under the impression and belief that he had made a motion for leave to amend and that the same was denied. In fairness to respondents, it should be noted that the order sustaining the demurrers without leave to amend was made March 16, 1937, in the presence of appellants' counsel, while the judgment based thereon was not entered until March 23, 1937, a period of some seven days, during which time appellants' counsel had personal notice of the order sustaining the demurrers without leave to amend. The law favors the determination of lawsuits upon their merits rather than upon technicalities, and where, as here, the uncertainties, ambiguities, and legal conclusions appearing in the pleading might be corrected by amendment, the court should allow an opportunity for such amendments to be made. Assuming, as we must from the action of the trial court vacating the order denying plaintiffs leave to amend, that plaintiffs did not request leave to amend, nevertheless, neither did they refuse so to do, nor were they offered or afforded such an opportunity. Viewing the facts of this case as presented by the record before us, we have no hesitancy in saying that the interests of justice dictate that plaintiffs be accorded an opportunity to further amend their complaint if they be so advised.

[8] The purported appeals from the order sustaining the demurrers and denying plaintiffs' application to amend are dismissed.

For the foregoing reasons, the judgment appealed from is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

We concur: YORK, P. J.; DORAN, J.

30 Cal.App.2d 43

POWELL v. LAMPTON et al.

Civ. 6053.

District Court of Appeal, Third District, California.

Dec. 20, 1938.

1. Pleading ⇐34(4)

On demurrer, allegations of complaint must be taken most strongly against the pleader.

2. Quieting title ⇐34(1)

In action to quiet title to a fund in custodia legis, a complaint alleging facts from which it was apparent that title to the identical fund had either been determined adversely to plaintiff or that a previous suit involving the same issue was pending, was subject to demurrer for failure to state a cause of action. Code Civ.Proc. § 430.

3. Pleading ⇐225(2)

The sustaining of a demurrer to a complaint without leave to amend was not an abuse of discretion, where plaintiff did not make application to amend the complaint and it did not otherwise appear that plaintiff could state a valid cause of action under the circumstances appearing in the complaint.

4. Pleading ⇐243

The trial court should be liberal in allowing amended pleadings when it reasonably appears that a good cause of action can be pleaded.

5. Pleading ⇐416

Unless it otherwise appears from the record, a plaintiff waives his charge of abuse of discretion on the part of the trial court in sustaining a demurrer to the complaint without leave to amend the pleading, unless he asks leave to file such amendment.

6. Pleading ⇐416

That trial court sustaining demurrer to complaint affirmatively directed the order sustaining the demurrer to be made without leave to amend did not show that plaintiff's failure to request the privilege to amend the complaint was unnecessary, as respects whether plaintiff's failure to ask leave to file an amendment waived his charge of abuse of discretion in sustaining demurrer to complaint without leave to amend.

7. Appeal and error ⇐959(1)

An order sustaining demurrer to complaint without leave to amend may be such

an abuse of discretion as to require reversal of order, notwithstanding plaintiff's failure to make application to amend the pleadings, if it clearly appears from the face of the complaint that a good cause of action could be stated in an amendment.

8. Appeal and error ⇐948

The plaintiff has the burden of affirmatively showing an abuse of discretion before an order of the trial court sustaining a demurrer to a complaint without leave to amend will be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Robert B. Powell, trustee in bankruptcy of Theodore N. Dyches, against L. E. Lampton, clerk of the Superior Court of the state of California, in and for Los Angeles county, A. Van Matre, Mary MacAllister and others, to quiet title to a fund of $3,348.52 in custodia legis. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

Albert A. Kidder, Jr., of Hollywood, for appellant.

Call & Murphey and Guy T. Graves, all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment of dismissal of an action to quiet title to a fund of $3,348.52, which judgment was rendered after a general and special demurrer to the complaint had been sustained without leave to amend the pleading.

It is contended the court erred in sustaining the demurrer for the reason that the complaint does state a good cause of action to quiet title to personal property, and because the trial judge abused his discretion in failing to grant the plaintiff leave to amend the pleading. No application to amend the complaint was made by the plaintiff.

The complaint purports to state a cause of action by the trustee of a bankrupt estate belonging to Theodore N. Dyches, to quiet title to a fund of $3,348.52 in custodia legis. To identify the fund in controversy, it is specifically alleged that the title to the identical fund was involved "in another action in the above entitled court" numbered 371,067, filed March 16, 1934, in which Theodore N. Dyches, the above named bankrupt, was one of the defendants. The complaint in this case then states that in the former action "certain of said defendants were served with summons and complaint therein; that certain of said defendants defaulted; that certain of said defendants answered"; that findings and judgment were entered therein on July 1, 1935; that the judgment "was not appealed from by certain defendants", but that other defendants did perfect their appeal therefrom and that the former suit was still pending.

To the complaint in this action the defendants filed a general and special demurrer. The special demurrer for uncertainty asserts that it cannot be determined from the allegations of the complaint whether Theodore N. Dyches, the bankrupt whom this plaintiff represents, was served with process and answered in the former suit; whether he defaulted in that action; whether judgment was rendered against him for title to and possession of the fund which is involved in this case, or whether the judgment in the former action became final against him.

That demurrer was sustained without leave to amend the complaint. No application to amend the pleading was made by the plaintiff.

[1, 2] The demurrer was properly sustained. The allegations of the complaint are clearly uncertain. The complaint identifies the fund of $3,348.52 in controversy, as the same money to which title was claimed by the representative of the same individual in behalf of whom it is sought to recover the money in this action. If the judgment in the former suit became final and it determined that this plaintiff, Theodore N. Dyches, had no title to the fund, that case would become res judicata of the issues in this cause. If the judgment in the former case did not become final, but is still pending, as it was alleged in this complaint, then it would become a valid ground of demurrer under section 430 of the Code of Civil Procedure for the reason that there was another action pending for the same cause. On the principle that for the purpose of ruling on the demurrer the allegations of the complaint must be taken most strongly against the pleader, the trial court was authorized in assuming that either a default had been taken against the claimant of that fund in the former action, or that judgment had been rendered against him, and he had appealed therefrom. In either event, the court properly sustained

the demurrer on the ground of uncertainty. In order to determine whether the representative of this plaintiff, Theodore N. Dyches, who claims title to the $3,348.52 fund was a party to a former suit to quiet title to the same fund, either determined or pending, because he had been served with process and had answered the complaint, or whether he had defaulted in that suit or whether a judgment had been rendered against him, and he had appealed therefrom, it became necessary to make the allegations more definite and certain as to whether he was included in the term "certain defendants", which is used in attempting to identify the particular fund in paragraph IV of the complaint in this case. These defendants were entitled to that information, so they might properly demur or answer this complaint on the ground of res judicata, or of another pending case involving the same issues.

Even though a good cause of action to quiet title to the fund in question might have been pleaded without alleging the facts which show on the face of the pleading that another case involving title to the same fund had either been decided or was pending at the time this complaint was filed, having defectively pleaded the facts upon which the plaintiff relied to identify the fund, he is bound by the issue thus tendered, and may be required to more definitely and specifically allege the facts to avoid the apparent uncertainty with relation to the parties bound thereby. Under similar circumstances it was contended in the case of Burki v. Pleasanton School Dist., etc., 18 Cal.App. 493, at page 498, 123 p. 546, at page 548, that the unnecessary matter relating to the giving of a statutory bond, was an issue which "should be pleaded as a defense" to the action. The court said in that regard:

"The plaintiff undertook to plead all of the circumstances of the transaction, apparently in anticipation of any defense which might be available to the defendant. He is bound by the facts pleaded in his complaint; and, as it is apparent upon the face of the complaint that those facts do not and cannot be made to state a cause of action upon a completed and valid contract, the demurrer was correctly sustained, without leave to amend."

In the present case, from the facts alleged it is apparent that title to the identical fund which is here involved, has either been determined adversely to this plaintiff, or that the previous suit involving the same issue is now pending, in either of which cases the plaintiff cannot state a good cause of action, and the court therefore properly sustained the demurrer. 1 Bancroft's Code Pleading, p. 349, sec. 211.

[3, 4] The court did not abuse its discretion in sustaining the demurrer without leave to amend the pleading. No application was made to amend the pleading. It does not appear by any tendered amendment, or otherwise, that the plaintiff can state a valid cause of action under the circumstances appearing in the complaint. It is true that the court should be liberal in allowing amended pleadings when it reasonably appears that a good cause of action can be pleaded. But it does not so appear in this action.

[5] In a long and almost unbroken line of authorities it has been determined in this state that, unless it otherwise appears from the record, a plaintiff waives his charge of abuse of discretion on the part of the court in sustaining a demurrer to the complaint without leave to amend the pleading, unless he asks leave to file such amendment. Buckley v. Howe, 86 Cal. 596, 605, 25 P. 132; Aalwyn v. Cobe, 168 Cal. 165, 172, 142 P. 79; Curry v. Feigenbaum, 218 Cal. 575, 24 P.2d 462; Galusha v. Fraser, 178 Cal. 653, 174 P. 311; Smith v. Carlston, 205 Cal. 541, 553, 271 P. 1091; Bell v. Bank of California, 153 Cal. 234, 245, 94 P. 889; See v. Joughin, 18 Cal.App.2d 414, 419, 64 P.2d 149; 1 Bancroft's Code Pleading, p. 745, sec. 516.

[6-8] It is not an answer to plaintiff's failure to request the privilege to amend his complaint to assert that it is unnecessary and useless to make such a request when the court in sustaining the demurrer affirmatively directs the order to be made "without leave to amend". In most of the cases above cited, and in many others which we have not cited, that very order was made The general rule as above stated has become the law of this state. It may reasonably be said that, in spite of the fact that an application to amend the pleading has not been made, if it clearly appears from the face of the complaint that a good cause of action could be stated in an amendment, under such circumstances, an abuse of discretion of the court might so clearly appear therefrom that the order should be reversed on appeal. But no such situation appears in the present case.

The burden is on the plaintiff to affirmatively show an abuse of discretion before the order of the court may be disturbed on appeal.

The judgment is affirmed.

I concur: PULLEN, P. J.



29 Cal.App.2d 715

PEOPLE v. HASKINS.

Cr. 3157.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1938.

1. Automobiles ⇐355(13)

Evidence indicating that defendant was driving between 50 and 60 miles per hour while intoxicated, and narrowly avoided other collisions immediately before fatal collision, *held* to authorize conviction of manslaughter on ground that defendant was committing an unlawful act and was guilty of criminal negligence. Pen.Code, § 192.

2. Automobiles ⇐354

In manslaughter prosecution arising out of death caused by reckless driving, police officer's testimony concerning vile remarks made by defendant at scene of collision, not containing any confession or admission, were admissible to show basis of officer's conclusion that defendant was intoxicated.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Charles I. Haskins was convicted of manslaughter, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

WOOD, Justice.

The defendant was convicted by a jury of the crime of manslaughter. He prosecutes this appeal from the judgment.

It is contended on behalf of defendant that the evidence is insufficient to sustain the verdict. The conviction is based upon the reckless driving of defendant when his automobile struck the automobile being driven by Walter E. Hulce at the corner of Chestnut and State streets in the city of Long Beach. At about 2 o'clock in the afternoon of June 10, 1938, Mr. Hulce was driving his car in a northerly direction on Chestnut street. He made a boulevard stop at the intersection and proceeded at a speed of approximately 10 miles per hour when his car was struck on the left front side by the car driven by defendant. Mr. Hulce received injuries in the collision which caused his death. The defendant was driving in an easterly direction along State street through a residential district. The street had been legally posted as a 25-mile zone but defendant was driving at a speed of between 50 and 60 miles per hour. At a point two blocks before the intersection where the accident occurred defendant narrowly missed a car going in the same direction and at one block before reaching the intersection he "raked" the foot of a chainman working in the center of the street behind a red flag. At a distance of about 34 feet from the point of the impact of the cars he applied his brakes. At the location of the collision State street is paved and marked for four lanes of traffic with additional space between the pavement and the curb for parking. There was no traffic to the right of defendant's car to prevent his driving behind Mr. Hulce's car, which had entered the intersection at a time when defendant's car was distant from the intersection more than 200 feet. Officers who promptly arrived at the scene of the accident stated that defendant admitted that he had had too much to drink. They testified that in their judgment he was intoxicated.

[1] The evidence is ample to sustain the conviction. The facts established bring the conduct within the provisions of the second subdivision of section 192 of the Penal Code, in which involuntary manslaughter is defined as the unlawful killing of a human being "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection". The jury was justified in finding that defendant was committing an unlawful act, reckless driving, and also that

he drove with such lack of due caution and circumspection as to constitute criminal negligence.

[2] Complaint is made of the ruling of the trial court in permitting the testimony of a police officer concerning certain vile remarks made by defendant at the scene of the collision. At the trial objection was made that the remarks were immaterial and it is contended now that the remarks contained admissions and that no foundation was laid for their reception in evidence. No confession or admission was made by defendant in these remarks. The officer was observing the conduct of the defendant for the purpose of determining whether or not he was intoxicated. The remarks were properly received in evidence as showing the basis, in part, for the officer's conclusion that the defendant was intoxicated.

The contention of counsel for defendant that the death of Mr. Hulce, which occurred five days after the collision, was caused by pneumonia rather than by the reckless driving of defendant is so devoid of merit as to make discussion inappropriate.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.



29 Cal.App.2d 666

In re McLENNAN'S ESTATE.

PRESBYTERIAN HOSPITAL ASS'N OF COLORADO v. JACKSON et al.

Civ. 11973.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1938.

1. Courts ⇐472(4)

A probate court which has jurisdiction over a testamentary trust has concurrent jurisdiction with superior court sitting as a court of equity to determine upon termination of trust conflicting claims to corpus of the trust.

2. Action ⇐69

Where two courts have concurrent jurisdiction to determine a matter, either court may stay proceedings before it until determination of case by the other court.

3. Courts ⇐476

A probate court which had jurisdiction over a testamentary trust did not abuse its discretion in settling final account of trustee and ordering conflicting claims to corpus of trust to be determined in quiet title action in superior court sitting as a court of equity.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

In the matter of the estate of S. Carola McLennan, deceased, wherein the California Trust Company, as trustee under a testamentary trust, filed a petition for distribution, and wherein claims were filed by the Presbyterian Hospital Association of Colorado and J. Stewart Jackson and others. From an order, the Presbyterian Hospital Association of Colorado appeals.

Affirmed.

Frederick D. Anderson and Bertram L. Linz, both of Los Angeles, for appellant.

Conroy & Conroy, Chambers & Lyman, and Don Conroy (by Robert Chambers), all of Hollywood, for respondents.

McCOMB, Justice.

This appeal transferred from the Supreme Court to this court for decision pursuant to the provisions of article 6, section 4c of the Constitution of the state of California is from an order of the superior court sitting in probate, settling the final account of a trustee under a testamentary trust and ordering that the petition of the trustee for distribution and the adverse claims of appellant and respondent herein to the trust estate be heard and determined by the superior court sitting in equity.

The essential facts are:

Decedent died testate August 27, 1929. She by the terms of her will, after making certain specific bequests, left the remainder of her estate to the California Trust Company as trustee to be held in trust by it during the life of her sister-in-law, Xenia Lambie, upon certain trusts. Upon the death of Xenia Lambie the trust was to terminate and the property was to be conveyed to "The Presbyterian Hospital of Denver, Colorado". January 21, 1931, the probate court made an order settling the

final and supplemental accounts of the executor and decreeing distribution as provided in the will.

March 24, 1937, Xenia Lambie died. June 30, 1937, the California Trust Company as trustee filed its final account and petition for distribution of the trust estate, alleging that a question had arisen as to the correct identity of the institution referred to by the testatrix as "The Presbyterian Hospital of Denver, Colorado", and that after an investigation it believed the correct name of the institution so referred to was "The Presbyterian Hospital Association of Colorado", appellant here, and requested the court to make distribution accordingly. July 23, 1937, respondents filed objections against the determination requested by the trustee, alleging that the beneficiary named in the will, to-wit, "The Presbyterian Hospital of Denver, Colorado", was nonoperative and therefore not able to take the trust estate; and further, that appellant was likewise unable to take the trust estate.

January 5, 1938, respondents filed in the superior court an action to quiet title to the property which is the subject of the trust against the California Trust Company, the Presbyterian Hospital Association of Colorado, a corporation, and The Presbyterian Hospital of Denver, Colorado, a corporation.

March 2, 1938, Judge Dockweiler, sitting as a judge of the probate court, settled the final account of the trustee and made an order that the conflicting claims of the parties to the trust estate be determined in the quiet title action above referred to, superior court No. 423845.

This is the sole question to be determined:

Is it within the discretion of the probate court, which has jurisdiction over a testamentary trust, to order, upon termination of the trust, the settlement of conflicting claims to the corpus of the trust by the superior court sitting as a court of equity?

[1, 2] This question must be answered in the affirmative. A probate court which has jurisdiction over a testamentary trust has concurrent jurisdiction with the superior court sitting as a court of equity to determine upon termination of the trust conflicting claims to the corpus of the trust. Dowdall v. Superior Court, 183 Cal. 348, 353, 191 P. 685; McCaughna v. Bilhorn, 10 Cal.App.2d 674, 684, 52 P.2d 1025. In cases where two courts have concurrent jurisdiction to determine a matter, either court may stay proceedings before it until determination of the case by the other court.

[3] In the instant case there is no showing that the probate judge in any way abused his discretion in settling the final account of the trustee and ordering the conflicting claims to be determined in the quiet title action.

For the foregoing reasons the order appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



30 Cal.App.2d 23

SOUTHERN CALIFORNIA EDISON CO., Limited, v. GEMMILL et al., and four other cases.

Civ. 2193.

District Court of Appeal, Fourth District, California.

Dec. 19, 1938.

Hearing Denied by Supreme Court Feb. 16, 1939.

1. Evidence ⇐574

While an expert is allowed to give his opinion, contrary to the usual rule, his opinion when given is neither more nor less than "evidence" which is to be weighed and considered like any other evidence in the case, and a conflict between opinions of two experts constitutes a conflict in the evidence.

[Ed. Note.—For other definitions of "Evidence," see Words & Phrases.]

2. Stipulations ⇐18(6)

Under stipulation admitting qualification of witnesses to testify as experts on issue of damages in eminent domain proceedings, question of their credibility and weight that should be accorded their testimony remained to be considered by jury and later by court in passing upon motions for new trial.

3. Eminent domain ⇐224

The trial court was not precluded from granting new trial on ground that there was no conflict in evidence because the jury was taken out to view the lands involved in eminent domain actions, and trial judge did not accompany jury, where there were three

widely varied sets of figures relating to issue of amount of damages.

4. Eminent domain ⇐224

In eminent domain actions to acquire easement across properties for purpose of operating electric power lines with right of ingress and egress, trial court did not abuse its discretion in granting a new trial on ground of insufficiency of evidence to sustain verdicts for property owners.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Actions in eminent domain by the Southern California Edison Company, Limited, against William B. Gemmill and others, against Clarence W. Smith and others, against Ida C. Wanamaker and others, against Myron F. Persons and others, and against Jesse H. Clark and others, to acquire an easement across properties of defendants for purpose of operating electric power lines. From orders granting a new trial, defendants appeal.

Affirmed.

Hill, Morgan & Bledsoe, Vincent Morgan, and Stanley S. Burrill, all of Los Angeles, for appellants.

Roy V. Reppy, B. F. Woodard, and Victor E. Koch, all of Los Angeles, and Guthrie & Curtis, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought five separate actions in Eminent Domain to acquire an easement 150 feet in width across the properties of the respective defendants for the purpose of constructing, maintaining and operating electric power lines, with the usual right of ingress and egress in connection with such construction, maintenance and operation. The five causes were consolidated for trial and tried before the same court and jury. Verdicts were returned fixing the compensation to be awarded to the respective defendants, covering both the value of the easement sought to be condemned and the severance damage. Findings of fact and an interlocutory judgment were entered in each case. Thereafter, a motion for a new trial was granted in each case, upon the ground of the insufficiency of the evidence to sustain the verdict and judgment, such a new trial to be solely upon the issue as to the amount of the compensation to be paid. The defendants, respectively, have appealed from these orders granting a new trial, and all five appeals have been presented upon one record and one set of briefs.

The evidence shows that the lands of the appellants over which these power lines were to be erected were ordinary farming lands near Chino; that some parts thereof were badly sanded up from shifting sands; that the properties were used and would in all probability continue to be used for farming purposes; and that, except where the footings for respondent's towers were to be located, the lines to be constructed would be some forty feet above the ground and would cause little or no interference with the use of the lands below them for normal farming operations. Four of the respective owners of the lands testified as to the value of the easement sought and the severance damage with respect to his particular land, the total amounts being, respectively, $23,220, $24,485, $22,967.50 and $68,672. The fifth owner did not testify in this regard. The appellants produced two expert witnesses and the respondent five. The highest and lowest figure given by each of these sets of expert witnesses and the verdict with respect to each of the five causes, are as follows:

"Defendant	Appellants' Range	Respondent's Range	Verdict
Clark	$15,000–$15,100	$2,200–$2,870	$ 9,032.00
Smith	12,500– 13,800	1,000– 1,500	5,954.85
Persons	7,500– 7,900	500– 750	2,065.25
Gemmill	10,000– 10,600	1,250– 1,600	4,150.40
Wanamaker ..	20,000– 21,000	3,000– 4,065	12,389.96"

In spite of the well-known generosity of juries in actions of this nature, it is at once apparent that the jury was unwilling to go to the length of accepting the testimony of appellants' experts as to the amount of damage to these properties and, in short, that it did not believe that testimony. It would likewise appear that it did not believe the respondent's evidence in this connection. In any event, a well-defined duty rested upon the trial court in passing upon the motions for a new trial.

In Fisher v. Zimmerman, 23 Cal.App.2d 696, 73 P.2d 1243, this court said [page 1245]: "The position occupied by a trial judge in passing on a motion for new trial made on the ground of insufficiency of the evidence to sustain the verdict and judgment has been likened to that of a thirteenth juror. He should review all the

evidence, weigh its sufficiency, and judge the credibility of the witnesses. He may believe, and accept, in whole or in part, the testimony of any witness which he concludes is true. He may reject any evidence which he believes to be false. He may draw reasonable inferences from the evidence. In so doing he is at liberty to disregard the findings of the jury which are implied from the verdict."

In Baker v. Board of Trustees, etc., 133 Cal.App. 243, 23 P.2d 1071, the court said [page 1073]: "The amount of damages is committed to the sound discretion of the jury, and next, to the discretion of the judge of the trial court who, in ruling upon the motion for a new trial, may consider the evidence anew and set aside the verdict if it is not just."

In Drathman v. Cohen, 139 Cal. 310, 73 P. 181, it is said: "In the granting of new trials, the trial court has much discretion in considering whether or not the evidence justifies the verdict. Its duty is to grant the new trial whenever, upon the whole case, it believes that injustice has been done in that respect."

In Buck v. Borchers, 203 Cal. 210, 263 P. 226, the court said: "This court has recently stated in Rosenberg v. Moore, 194 Cal. [392], 393, 229 P. 34, that, if there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict or finding is against the weight of the evidence and that there should be a new trial. It is useless to cite further authorities for a proposition of law as well settled as is the one applicable here."

While the appellants concede these rules they contend that the court here abused its discretion, since there was no substantial conflict in the evidence, for two reasons.

[1,2] The first of these contentions is based upon the fact that at the trial the respondent admitted the qualifications of the two experts offered by the appellants, to testify as expert witnesses on the question of damages in these cases, and the court remarked that under the admission it had been stipulated that these witnesses possessed the highest possible type of qualifications. It is argued that the respondent's expert witnesses were comparatively inexperienced as to the issues in these particular cases and much argument is set forth going to the weight that should be given to their testimony. It is not only argued that appellants' experts were more worthy of belief, but that "when two expert witnesses, whose qualifications are conceded to be of the highest character humanly possible, express opinions as to the market value of the property in amounts in excess of the verdict of the jury, how can it be said that the difference between their opinions and others constitutes a conflict in the evidence as to matters of fact?" It is further argued that "the evidence as to the facts was not conflicting, the only conflict being in the expression of an opinion as to value." While an expert is allowed to give his opinion, contrary to the usual rule, his opinion, when given, is neither more nor less than evidence which is to be weighed and considered like any other evidence in the case, and a conflict between the opinions of two experts constitutes a conflict in the evidence. While the respondent admitted the qualifications of the appellants' two witnesses to testify as experts on the issue of damages in these cases it did not stipulate that their testimony was to be taken as conclusive, and the question of their credibility and the weight that should be accorded their testimony remained to be considered by the jury and, later, by the court in passing upon the motions for a new trial. The summary above given of the testimony of the various witnesses as to the amounts of damage to these respective properties clearly shows not only that a conflict existed but that this conflict in the evidence was most substantial.

[3,4] It is next contended that no conflict in the evidence appears because the jury was taken out to view the lands in question and shown the location of the proposed right of way and the trial judge did not accompany the jury when such inspection of the premises was made. It is argued that what was there seen by the jury was evidence in the case; that this evidence was not available to the judge; that the court granted the motions for a new trial upon the ground of the insufficiency of the evidence without having before it all of the evidence that was before the jury; that it must be presumed that the physical evidence seen by the jury was sufficient to support the verdicts; and that it follows that there could have been no conflict in the evidence. Assuming all that we are asked to assume and that what was seen by the jury was sufficient to support the verdicts this would but add to the conflict which appears in the evidence. We then have three widely varying sets of figures

relating to the issue of the amount of damages in these cases and the duty still rested upon the trial judge to pass upon the question of a new trial under the established rules above set forth. Viewed from any standpoint it must be held that a most substantial conflict in the evidence existed and it in no way appears that the court abused its discretion in granting the motions for a new trial. Koyer v. McComber, Cal.Sup., 82 P.2d 941.

The respective orders granting a new trial are affirmed.

We concur: MARKS, J.; GRIFFIN, J.



GUILLOT v. HAGMAN et al. *

Civ. 12006.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1938.

Rehearing Granted Jan. 12, 1939.

1. Appeal and error ⇐930(1)

Where defendants contended, on appeal from judgment for pedestrian in action for injuries sustained when struck by defendants' automobile, that pedestrian was contributorily negligent as a matter of law and that defendants were not negligent as a matter of law, it was the duty of the Court of Appeal to view the evidence in the light most favorable to pedestrian.

2. Automobiles ⇐244(6, 38, 50)

Evidence was sufficient to sustain jury's implied findings that driver of defendants' unlighted automobile was guilty of negligence proximately causing accident, and that pedestrian who was struck by automobile while crossing boulevard at intersection was not contributorily negligent.

3. Trial ⇐296(4)

In pedestrian's action for injuries sustained when struck by defendant's automobile, a formula instruction containing phrase "if you believe that plaintiff being himself free from any negligence contributing directly and proximately to the happening of the accident" was not erroneous as leaving out element of contributory negligence and directing jury that pedestrian was free from any negligence where the court in other instructions carefully instructed jury at defendants' request on question of pedestrian's contributory negligence.

4. Automobiles ⇐16

Whether automobile seller, which was made a defendant in pedestrian's action for injuries sustained when struck by automobile, still owned automobile at time of accident, was for jury.

5. Appeal and error ⇐1170(9)

Where it appeared that there had been no miscarriage of justice in pedestrian's action for injuries sustained when struck by defendants' automobile, the Court of Appeal was not required to discuss in detail allegedly erroneous instructions given and requested instructions refused. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by E. F. Guillot against Earl P. Hagman and others for injuries sustained when struck by defendants' automobile. From a judgment for plaintiff, defendants appeal.

Affirmed.

Kenneth J. Murphy, of Los Angeles, for appellant Kelley Kar Co.

Kryne Van Den Akker, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

[1] This is an appeal from a judgment in favor of the plaintiff in an action for damages arising out of the collision of the defendants' automobile with the plaintiff as a pedestrian. It is the contention of the defendants that the plaintiff was guilty of contributory negligence as a matter of law, and that as a matter of law the defendants were not guilty of any negligence. It is our duty to view the evidence in the light most favorable to the plaintiff.

[2] Eureka drive extends into Ventura boulevard, but not beyond it. Ventura boulevard runs east and west. Eureka drive runs into the boulevard in a northwesterly direction. The plaintiff parked his automobile on the south side of Ventura boulevard, a few feet west of Eureka drive, walked to the southwest corner of

*For subsequent opinion see 86 P.2d 865.

the intersection, and as a pedestrian started to cross Ventura boulevard. The plaintiff went from 7 to 10 feet from the curb in the unmarked crosswalk when he stopped, waiting for traffic to be favorable so that he could proceed safely. During that period 25 or 30 cars with their lights lit passed in both directions. When he thought his way was clear, the plaintiff again proceeded across Ventura boulevard, and while doing so looked in both directions. He proceeded on until he passed the double white line of the street, a distance of over 60 feet from the south curb, and continued for a short distance, when without warning he was struck by the defendants' car operated by defendant Earl Hagman, eighteen years of age, who was driving along Ventura boulevard in a westerly direction. The lights of his car were not lighted. He had obtained the car from the dealer the day before.

Practically the entire argument of the defendants is built upon the contention that the plaintiff was 30 feet west of the unmarked crosswalk at the time of the accident and was obliged to yield the right of way to the defendant. This contention is not meritorious because the defendants, to make it, prolonged the wrong sidewalk lines. At the intersection of the two streets there appears a short sidewalk running north and south, approximately 5 feet in length, extending into and at right angles with Ventura boulevard. That sidewalk line is the line to be prolonged and it marks the westerly boundary of the unmarked crosswalk at that intersection, pointing across Ventura boulevard at right angles.

There is substantial evidence in the record to sustain the implied findings of the jury that the defendant driver was guilty of negligence which was the proximate cause of the accident, and that the plaintiff was free from negligence which contributed to the accident.

The defendants next contend that the instructions of the court on the subjects of negligence and contributory negligence were erroneous and prejudicial to the defendants. Defendants' objections, however, are mainly based upon the claim that the plaintiff was negligent as a matter of law and that there was no evidence to show that the driver was negligent. We have already held that these contentions are untenable. All of the instructions, but one, concerning which the defendants complain under this point, have heretofore been approved by the appellate courts of this state.

[3] The instruction which has not heretofore been approved is a formula instruction which contains the phrase, "therefore, * * * if you believe * * * that the plaintiff, E. F. Guillot, being himself free from any negligence contributing directly and proximately to the happening of the accident, * * *." The contention of the defendants is that this formula instruction leaves out the element of contributory negligence, and the defendants even contend that the instruction directs the jury that the plaintiff was free from any negligence. But the fact is that in six or seven other instructions the court carefully instructed the jury, at the defendants' request, on the question of the contributory negligence of the plaintiff. The court merely used the wrong tense of the verb when it used the word "being", intending to use the word "was", so that in essence the instruction read, "if you believe from the evidence that the plaintiff, E. F. Guillot, was himself free from any negligence", etc. There is nothing in this contention which would warrant a reversal.

[4] The defendants next contend that the judgment against the Kelley Kar Company is without support in the evidence and is contrary to law. Under this title the defendants contend that the Kelley Kar Company had sold the automobile to the Hagmans the day before the accident and had turned possession of the car over to the Hagmans, and that there is not the slightest dispute in the evidence of such facts. However, there is in evidence "Exhibit 5", a conditional sales contract covering the sale of the automobile dated four days after the accident, and there is substantial evidence in the record from which the jury might reasonably infer that at the time of the accident the Kelley Kar Company still owned the automobile.

The defendants next contend that the rulings of the court on the admission of evidence constituted prejudicial error, but we see no ground for the reversal of the case on this contention.

[5] Finally, the defendants contend that the instructions given by the court on owner's liability were erroneous and further that the court's refusal to give to the jury defendants' requested instruction No. 22 was erroneous. We do not set the instructions out in full because of their

length and because in our view of the case there has been no miscarriage of justice (Constitution of California, art. 6, § 4½), and it is not necessary for us to discuss the instructions in detail.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



30 Cal.App.2d 1

WARNOCK v. KRAFT.

Civ. 11942.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1938.

Rehearing Denied Jan. 12, 1939.

Hearing Denied by Supreme Court Feb. 16, 1939.

1. Evidence ⇐538

To qualify a physician as an expert witness in a malpractice action, it must be shown that he possesses learning and knowledge of the subject under inquiry sufficient to qualify him to speak with authority on the subject and also familiarity with treatment and degree of care and skill of other practitioners in the locality in question sufficient to qualify him to testify whether treatment furnished plaintiff was consistent with what other physicians in the same community in exercise of reasonable care would do under similar circumstances.

2. Physicians and surgeons ⇐14(1)

A physician or surgeon in a small community or village not having the same opportunity and resources for keeping abreast of the advances in his profession should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities.

3. Evidence ⇐10(2, 6)

It is common knowledge that Pasadena and Los Angeles are contiguous, are located in the same county, and have the same general hospital, that it is less than 20 miles from the business center of one city to that of the other, and that in the absence of signs marking the city limits of the respective cities, one would be unable to determine the boundary line between them.

4. Evidence ⇐20(1)

It is common knowledge that physicians and surgeons in Pasadena and Los Angeles belong to the same medical society, attend the same lectures, and have available the same facilities for the treatment of patients and for keeping abreast of the advances in their profession.

5. Evidence ⇐538

A physician and surgeon practicing in Los Angeles and qualified to give an expert opinion concerning the ordinary care and skill required of a physician and surgeon in that city is also qualified to express an expert opinion on whether a physician and surgeon practicing in Pasadena has exercised that degree of care and skill ordinarily possessed by physicians and surgeons in Pasadena.

6. Evidence ⇐538

Los Angeles and Pasadena are in the same "locality" for purposes of rule requiring that a physician to qualify as an expert witness in a malpractice case must be familiar with treatment and degree of care and skill of other practitioners in the local ity in question sufficient to qualify him to testify whether treatment furnished plaintiff was consistent with what other physicians in the same community in exercise of reasonable care would do under similar circumstances.

[Ed. Note.—For other definitions of "Locality," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by David B. Warnock against Rollan W. Kraft to recover damages for malpractice. From a judgment for defendant, predicated on the granting of defendant's motion for a nonsuit, plaintiff appeals.

Reversed.

Hansen & Sweeney and Stephen Monteleone, all of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment in favor of defendant predicated upon the granting of defendant's motion for a nonsuit in an action to recover damages for malpractice.

So far as material the essential facts are:

June 22, 1936, plaintiff received personal injuries while riding on a drag attached to a tractor. He was unconscious for several days and among other injuries suffered a dislocation of one of his toes. Defendant, a physician and surgeon practicing in the city of Pasadena, who treated him, failed to have an X-ray taken of plaintiff's foot, although plaintiff frequently complained of pains in it, with the result that such injury was not discovered until several months after the accident occurred.

At the time of the trial, after Dr. Gordon Havstad was qualified as an expert physician and surgeon familiar with the ordinary and usual practice of physicians and surgeons in the city of Los Angeles, he was asked by plaintiff's counsel a hypothetical question framed to show that plaintiff had not been treated by defendant with the knowledge and skill ordinarily possessed by physicians and surgeons in the city of Pasadena.

This is the sole question to be determined:

Is a physician and surgeon who is qualified to testify as to the degree of care and skill possessed by the average practitioner in metropolitan Los Angeles also qualified to give an expert opinion upon a question of medical practice pertaining to the act of a physician and surgeon whose practice is confined to the city of Pasadena?

[1] This question must be answered in the affirmative. The law is established in California that in a malpractice case to qualify a physician as an expert it must be shown that the witness possesses learning and knowledge of the subject under inquiry sufficient to qualify him to speak with authority on the subject, and also a familiarity with the treatment and degree of care and skill of other practitioners in the locality in question sufficient to qualify him to testify whether or not the treatment furnished the plaintiff was consistent with what other physicians in the same community in the exercise of reasonable care would do under similar circumstances. Rasmussen v. Shickle, 4 Cal.App.2d 426, 430, 41 P.2d 184.

[2-4] The answer to the question in the instant case is dependent upon the definition of the word "locality". So far as our research discloses the word "locality", in connection with the above stated rule of law, has never been defined by the courts of California. "Locality" is defined in Funk & Wagnalls Practical Standard Dictionary (1938) as "a definite region in any part of space; geographical position". The theory supporting the rule of law above stated is that a doctor in a small community or village, *not having the same opportunity and resources for keeping abreast of the advances in his profession,* should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities. In the present case, however, it is a matter of common knowledge that the city of Pasadena and the city of Los Angeles are contiguous, are located in the same county, and have the same general hospital; that it is less than twenty miles from the business center of one of such cities to that of the other; and that in the absence of signs marking the city limits of the respective cities one would be unable to determine the boundary line between them. It is a matter of common knowledge also that physicians and surgeons in both cities belong to the same medical society, attend the same lectures, and have available the same facilities for the treatment of patients and for keeping abreast of the advances in their profession.

[5, 6] We therefore hold that a physician and surgeon practicing in the city of Los Angeles and qualified to give an expert opinion as to the ordinary care and skill required of a physician and surgeon in that city is also qualified to express an expert opinion upon whether a physician and surgeon practicing in the city of Pasadena has exercised that degree of care and skill ordinarily possessed by physicians and surgeons in the city of Pasadena; also, that for the purposes of the rule of law above stated, the cities of Los Angeles and Pasadena are in the same locality. See Turner v. Stoker, Tex.Civ.App., 289 S.W. 190, 193; Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170, 171; Willard v. Norcross, 86 Vt. 426, 85 A. 904, 906; Tennant v. Barton, 164 Wash. 279, 2 P.2d 735, 737; Iterman v. Baker, Ind.App., 15 N.E. 2d 365, 371.

For the foregoing reasons it was prejudicially erroneous for the trial judge to sustain the objection to the hypothetical question asked Dr. Havstad.

The judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

WESTBERG et ux. v. WILLDE et al.*

Civ. 11939.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1938.

Hearing Granted by Supreme Court Feb. 16, 1939.

1. **Death** ⇐58(1)

In action for death, where evidence discloses the acts and conduct of deceased immediately prior to and at the time of accident, the presumption that deceased obeyed the law is inapplicable.

2. **Courts** ⇐91(1)

All courts in state inferior to Supreme Court are bound to follow law approved by the Supreme Court.

3. **Appeal and error** ⇐1066

In death action, the giving of an instruction that presumption exists that deceased obeyed the law, where it is inapplicable, is prejudicial error if contributory negligence of deceased would bar a recovery.

4. **Appeal and error** ⇐1066
Death ⇐104(2)

In action for death of motorist, instruction that the presumption was that every man obeys the law and the presumption in the case was that the deceased was traveling at a lawful rate of speed and on the proper side of the highway at all times was error and prejudicial, where there was testimony regarding deceased's acts prior to and at time of accident, and evidence from which jury might have found that deceased was contributorily negligent.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Edward Westberg and wife against Stanley H. Willde, B. Talsky, and B. Talsky, doing business under the fictitious firm name of Reliable Delivery Service, and others, to recover damages for the death of plaintiffs' son. From an adverse judgment, the named defendants appeal.

Reversed.

Parker & Stanbury, Harry D. Parker, and Vernon W. Hunt, all of Los Angeles, for appellant Stanley H. Willde.

Richard E. Reese, of Los Angeles, for appellant B. Talsky.

Earle M. Daniels and W. Eugene Craven, both of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from a judgment in favor of respondents after trial before a jury in an action to recover damages as the sole heirs of Morris E. Westberg, deceased.

The essential facts are:

March 12, 1937, at the intersection of Twenty-third and Trinity streets in the city of Los Angeles a collision occurred between an automobile which was being operated by Morris E. Westberg and a truck owned by appellant Talsky and at the time of the accident operated by appellant Willde. As a result of the accident Westberg received injuries from which he died.

This is the sole question to be determined:

Did the trial court commit prejudicial error in instructing the jury as follows:

"The presumption is that every man obeys the law, and the presumption in this case is that the plaintiff's son, Morris E. Westberg, was traveling at a lawful rate of speed, and on the proper side of the highway at all times. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence"?

[1] This question must be answered in the affirmative. In Campbell v. City of Los Angeles (September 20, 1938), 82 P.2d 720, this court, in reversing the judgment of the trial court because an instruction similar to the one here questioned had been read to the jury, said at page 720:

"This is the sole question necessary for determination:

"Did the trial judge commit prejudicial error in instructing the jury as follows:

"'There is a presumption that Howard Campbell used ordinary care for his own safety.'

"This question must be answered in the affirmative. The law is established in California that where the evidence introduced by plaintiff discloses the acts and conduct of the injured party immediately prior to and at the time in question, the presumption of law set forth in the instruction quoted above is inapplicable." (Citing numerous cases.)

Mr. Justice Wood, in concurring in the judgment in the case above referred to, ex-

*For subsequent opinion see 94 P.2d 590.

pressly disagreed with the opinion of the majority of the court, saying at page 721: "I cannot agree with the statement in the majority opinion concerning the circumstances under which the presumption may not be invoked."

[2] Thus the question of the accuracy of the rule of law as stated by the majority of this court was squarely placed in issue before our Supreme Court when thereafter a petition for hearing therein was filed with that tribunal, which petition was on November 17, 1938, denied. It is therefore clear that any confusion which may have arisen as to the correct rule of law by reason of apparently conflicting language in several decisions has been settled by our Supreme Court, and that all courts inferior thereto in the state of California are now bound to follow the law as stated in the majority opinion in Campbell v. City of Los Angeles, supra.

[3, 4] The law is likewise settled that the giving of the instruction set forth above in a case where it is inapplicable is prejudicial error if contributory negligence of plaintiffs' decedent would bar a recovery. Campbell v. City of Los Angeles, supra. Applying the rule of law above stated to the instant case, it is evident that the instruction should not have been given, for the reason that respondents introduced testimony of witnesses who related in detail and without conflict the acts of deceased prior to and at the time of the accident. Also there was evidence from which the jury might have found that decedent was contributorily negligent. It is self-evident that, if decedent was contributorily negligent, respondents could not recover in the instant case, and therefore the giving of the questioned instruction constituted prejudicial error.

For the foregoing reasons the judgment is reversed.

I concur: CRAIL, P. J

WOOD, Justice.

I dissent. The instruction which, according to the majority opinion, necessitates a reversal was given in identical language in Olsen v. Standard Oil Co., 188 Cal. 20, 24, 204 P. 393, 395: "The presumption is that every man obeys the law and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence." The court in affirming the judgment approved the instruction, saying: "The defendant claims that this is erroneous. We think it is correct. * * * The instruction is therefore strictly in accordance with the Code on the subject." No ruling adverse to the ruling of the Olsen Case has since been made by the Supreme Court.

Much confusion has resulted from the various decisions of reviewing courts in California on the subject of giving to juries the rule concerning presumptions of law as evidence. In Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 7, 210 P. 269, 272, the confusion was recognized as then existing, for the court stated: "There seems to be some confusion in the decisions of this state with respect to the extent to which under various circumstances presumptions of law are to be regarded as evidence of facts." The court referred to three distinct lines of cases, or groups, which had brought about the confusion. The court attempted to "resolve this apparent conflict" and set forth this rule: "From the foregoing we deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case." The rule of the Mar Shee Case was followed in Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, wherein the subject is fully and clearly discussed in the opinion by Mr. Justice Shenk.

Several decisions have been made by the Supreme Court after the Mar Shee and Smellie Cases, which in my opinion have resulted in the resurrection of the confusion which caused so much trouble up to the time of the Mar Shee decision. I refer particularly to Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709, and Mundy v. Marshall, 8 Cal.2d 294, 65 P.2d 65[illegible] wherein statements are to be found inconsistent with the rule of the Mar Shee and Smellie Cases. In the Paulsen Case the discussion was clearly unnecessary to the decision of the issue before the court and in the Mundy Case it was held that from the testimony of the eye witnesses the decedent was guilty of contributory negligence as a matter

of law. The testimony of the plaintiff's witnesses was therefore "wholly irreconcilable" with the presumption sought to be invoked. The brief statement in the Mundy Case, based upon the Paulsen Case, which is cited as authority, must therefore be considered only as a dictum. In Tuttle v. Crawford, 8 Cal.2d 126, 132, 63 P.2d 1128, the court again referred to the Paulsen Case but held that the giving of the instruction had not resulted in a miscarriage of justice.

The Supreme Court again affirmed the doctrine of the Mar Shee and Smellie Cases in the case of Engstrom v. Auburn Automobile Sales Corp., 77 P.2d 1059, wherein it is stated [page 1063]: "Generally speaking, however, it may be said that a presumption is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness, when such testimony was not the product of mistake or inadvertence." The latest ruling by the Supreme Court on the subject was made on November 22, 1938, in the case of Ellison v. Lang Transp. Co., 84 P.2d 510, wherein the court in an opinion written by the author of the opinion in the Smellie Case, again reverts to the rule of the Mar Shee and Smellie Cases. The trial court had instructed the jury that "the presumption is that a person takes ordinary care of his own concerns. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence". [page 511.] Notwithstanding the plaintiffs had "presented testimony as to the details of the accident and the conduct of the decedents before and at the time of the occurrence", the court held in effect that the evidence presented by plaintiffs was not wholly irreconcilable with the presumption involved. The court pointed out that the jury had been instructed that the presumption remained "only until it was overcome by satisfactory evidence" and in this regard it was to be distinguished from Kelly v. Fretz, 19 Cal.App.2d 356, 65 P.2d 914, wherein the qualifying language was not included in the instruction given.

The evidence presented by plaintiffs' witnesses in the case now under review is not wholly irreconcilable with the presumption concerning which the jury was instructed. Neither was the instruction lacking in the qualifying clause which was lacking in Kelly v. Fretz, supra. In view of the two latest decisions of the Supreme Court, the Engstrom Case, supra, and the Ellison Case, supra, I cannot reach the same conclusion as that of the majority opinion.

I cannot agree with the majority in their statement that the denial by the Supreme Court of a petition for a hearing in the case of Campbell v. City of Los Angeles, Cal. App., 82 P.2d 720, is decisive of the question now under consideration. The instruction which brought about the reversal in the Campbell Case was different from the instruction in the present case in that the qualifying language, "unless it is overcome by satisfactory evidence", was not included in the instruction given in the Campbell Case. Moreover, it has been held by the Supreme Court that the denial in any case of an application for the transfer of the case decided by a District Court of Appeal to the higher court is not to be taken "as an affirmative approval" by the Supreme Court "of the propositions of law laid down in such opinion". People v. Davis, 147 Cal. 346, 350, 81 P. 718, 720. Again it is to be noted that the Ellison Case was decided after the hearing was denied in the Campbell Case.

It is unfortunate indeed that so much confusion has been brought about by the numerous decisions on the subject of instructing juries concerning the presumption hereinabove discussed. It has become extremely difficult for the most painstaking trial judges to instruct juries on the subject with any confidence that the verdicts will be sustained by reviewing courts. This of course results in great expense to the litigants and very frequently in an obstruction or denial of justice. A particularly distressing feature of the situation is that in all probability the instructions on this subject have not influenced the juries in the slightest and that the verdicts would have been the same if the questioned instructions had not been given. The words of Mr. Justice Seawell in Tuttle v. Crawford, supra, 63 P.2d 1131, are appropriate: "The presumption is a natural one, and the bare Code section, as given by the court, told the jury nothing that the philosophy of life and human experience do not impart to the average person. * * * It is probable that the instruction as given made no impression whatever on the minds of the jury."

I have just received from Judge William J. Palmer, chairman of a committee of superior court judges of Los Angeles county collaborating with a committee of law-

yers, a report containing an excellent set of instructions for use in civil jury trials. These instructions will doubtless prove of inestimable value. Their general use will result in the elimination of many pitfalls which have caused reversals of judgments founded on verdicts of juries. Of special interest at this time is instruction No. 60, under the heading, "Presumption of Ordinary Care". The committee points out that doubt has arisen from statements in some of the opinions of reviewing courts, citing the cases referred to above, and proposes an instruction which, if given, doubtless would prevent a reversal on the point in question. The proposed instruction follows: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care for his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption (and any evidence that may support the presumption), to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."



29 Cal.App.2d 687

NAUDACK v. CANINI et al.

Civ. 11573.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1938.

Hearing Denied by Supreme Court Feb. 10, 1939.

1. Appeal and error ⇐1030

In pedestrian's action against employer and employee for injuries sustained when pedestrian was struck by automobile driven by the employee, the overruling of objection to proceeding with second trial against the employer after entry of judgment against employee and granting of employer's motion for new trial, on ground that a several judgment was not proper against the employer, was not reversible error, where court permitted full inquiry into extent of pedestrian's injuries at second trial, and considered such element in instructions, and verdict at second trial was the same as that rendered at the first trial. Code Civ.Proc. § 579.

2. Automobiles ⇐245(31)

In pedestrian's action against employer and its advertising manager, for injuries sustained when pedestrian was struck by automobile driven by the manager who had no regular hours of employment and furnished his own automobile, being paid mileage fee by employer for use of the automobile in employer's business, whether the manager, who at time of accident was returning to town of his headquarters after spending week-end in city visiting and engaging in activities in furtherance of his employer's business, was acting within the scope of his employment, at time of accident, so as to render employer liable for pedestrian's injuries was for jury.

3. Master and servant ⇐302(6)

Where an employee is combining his own business with that of his employer at the time a third person is injured as a result of negligence of the employee, the employer will be held responsible for the injuries unless it clearly appears that the employee could not have been directly or indirectly serving the employer at the time the third person was injured.

4. Automobiles ⇐160(3)

A conclusion that motorist ought to have observed pedestrian in time to avoid striking her may be derived from the circumstance that other persons saw pedestrian at a distance which would have been sufficient to enable motorist to prevent the accident.

5. Automobiles ⇐244(6)

In pedestrian's action against motorist and his employer for injuries sustained when motorist's automobile struck pedestrian, evidence *held* to sustain judgment for the pedestrian on ground of negligence of the motorist who, on clear night, approached intersection which pedestrian was crossing, at a speed of 35 miles an hour, and did not observe pedestrian in time to stop automobile.

6. Automobiles ⇐245(72)

The contributory negligence of pedestrian who attempted to cross street at intersec-

tion while automobiles were approaching the intersection, but who looked in both directions before attempting to cross, was for jury.

7. Automobiles ⇐217(6)

A pedestrian cannot be said to be guilty of contributory negligence merely because he attempts to cross a street when an automobile is approaching.

8. Automobiles ⇐206

A pedestrian has a right to expect that those operating automobiles on a public street will operate them in manner and at speed customary at the particular place.

9. Appeal and error ⇐999(3)
Automobiles ⇐217(6), 245(72)

Whether a pedestrian is guilty of contributory negligence in attempting to cross a street in front of an approaching automobile depends upon circumstances under which he acted, and is a question for trier of facts, whose finding thereon is binding upon the reviewing court.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Cecile Naudack against Marco Canini and another for injuries sustained when the plaintiff was struck by an automobile operated by the named defendant, an employee of the defendant Seaside Oil Company. Judgment was for the plaintiff. A new trial was granted as to the defendant Seaside Oil Company. From an adverse judgment, the defendant Seaside Oil Company appeals.

Affirmed.

Leonard J. Meyberg and Paul M. Joseph, both of Los Angeles, for appellant.

Louis P. Pink and J. Earl Haskins, both of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an action to recover damages for personal injuries sustained by respondent, who, while walking across Vine street at its intersection with Fountain avenue was struck by an automobile which was being operated by the defendant Canini, an employee of appellant oil company.

The action was originally brought by respondent and her husband, who were subsequently divorced, and the case continued by respondent alone, resulting in two trials in each of which the jury returned a verdict in favor of the said respondent. Defendant Canini defaulted, but upon the first trial the question of damages to be assessed against him was submitted to the jury, and after motion for judgment notwithstanding the verdict was denied, judgment was entered for the sum of $15,000 in favor of respondent and against defendant Canini and appellant oil company. Thereafter, a new trial was granted as to appellant oil company upon the ground of insufficiency of the evidence.

Upon the second trial, which was begun a year later and after the judgment against defendant Canini had become final, appellant objected to proceeding with said trial and made two motions to dismiss, one on the ground of lack of diligence on the part of respondent in prosecuting the action after appellant's motion for new trial was granted, and the other on the ground of "prejudice to appellant on the state of the record and the nature of appellant's liability", both of which motions were by the court denied. Appellant's motions for directed verdict, for judgment notwithstanding the verdict and for new trial were also denied, and judgment was entered in favor of respondent and against appellant for $15,000 which is the amount of the judgment recovered in the first trial. This appeal is prosecuted by appellant oil company from the judgment entered against it in said second trial upon the following grounds:

1. The court erred in overruling appellant's objection to proceeding with the second trial and denying its motion to dismiss the action because of the state of the record and the nature of appellant's liability under the doctrine of respondeat superior;

2. The evidence is insufficient to sustain the implied finding that the driver of the automobile was acting as agent of appellant within the scope of his employment at the time of the collision;

3. The evidence is insufficient to sustain the finding of negligence implied in the verdict;

4. The evidence is uncontradicted that respondent was guilty of contributory negligence;

5. The court erred in giving certain instructions to the jury.

In connection with its first point, appellant contends that while it is provided by section 579 of the Code of Civil Procedure

that "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper", under the rule of respondeat superior, a several judgment is not proper against the master. It argues in support of this theory that the judgment rendered against defendant Canini, the employee, which was based upon the verdict of the jury assessing damages against him in the amount of $15,000, together with the granting by the trial court of appellant's motion for a new trial, ipso facto foreclosed said appellant upon the second trial from going into the extent of the injuries and amount of respondent's damage resulting therefrom, because the same judgment must be rendered against the master and the servant when the liability of the master is based upon the doctrine of respondeat superior.

[1] Over a thousand pages make up the reporter's transcript of the second trial of this action, an examination of which instantly reveals the fact that the trial court did not limit appellant in this regard, but permitted it to conduct a full inquiry as to the extent of respondent's injuries and the amount of damage which she sustained by reason thereof. Moreover, the court considered this element in its instructions to the jury, and as a matter of fact the verdict which the jury returned in the second trial was for the same amount as the verdict which was rendered in the first trial. There is no showing that appellant was prejudiced in any way by a denial of its motion to dismiss and the overruling of its objection to proceeding with the second trial, especially in view of the fact that the second trial was granted pursuant to appellant's own motion for new trial.

The following facts were developed by the evidence adduced at the trial and will be used in discussing appellant's second, third and fourth points. On Sunday evening, September 24, 1933, respondent after visiting with friends in the neighborhood walked with them to the northeast corner of the intersection of Vine street and Fountain avenue in Hollywood, and stood talking to them while she waited for traffic to clear on Vine street. At approximately 10:30 o'clock she stepped from the curbing having first looked to her right, which would be to the north, and observed the lights or machines in the distance. She then looked to the left and observed the headlights of a machine about a block or a block and a half to the south of the intersection, whereupon she started to walk from east to west across Vine street in the zone provided for pedestrians. When she had progressed about one-fourth of the distance across the intersection she again looked to the south and saw the lights of two automobiles approaching, the nearest of which was more than half a block to the south of the intersection. At that time she also testified that there were no cars coming from the north within a block north of the intersection. She proceeded to walk forward and when almost in the center of the street, she was struck by defendant Canini's automobile and thrown a distance of fifteen feet with such force as to cause her to turn a complete somersault in the air before she landed unconscious in the street, thereby sustaining severe and permanent injuries. The night was clear and the visibility good, and there were lights in the intersection. A man, who was riding with the driver of the first car observed by respondent approaching from the south, was an eyewitness to the collision. He testified that defendant passed the car in which said witness was riding at a point about two-thirds of a block south of the intersection at a speed of approximately 35 miles per hour; that defendant did not decrease his speed as he approached the intersection and did not alter the course of his machine until just before it struck respondent, when it swerved sharply to the left in the center of the intersection. Before he struck respondent, defendant applied his brakes with such force that he slid the wheels and skidded practically all of the way across the south half of Fountain avenue. This witness also testified that he saw respondent look to the south, which was in his direction, as she stepped from the curb, and that she looked to the north when she reached approximately the center line of Vine street just before the collision.

As to the status of the defendant Canini, it appears that he was employed as advertising manager for appellant Seaside Oil Company about January 1, 1933, and continued in its employ for the entire year of 1933, his office being furnished to him at the company's plant at Summerland, although he resided at Santa Barbara. Owing to the fact that appellant Seaside Oil Company operated its Summerland plant on a five-day week basis, it was closed on

Saturdays and Sundays except for a skeleton force then on duty. However, defendant testified that he worked Sundays, Saturdays, nights and any number of hours that were necessary in order to complete the work and "to do his job satisfactorily". No bulletins were issued by the company nor rules established fixing definite hours of employment, and defendant had many conferences with Winslow Bushnell, sales manager of appellant, relating to company business after regular working hours. Except for one week-end during each month, defendant spent Saturdays and Sundays of each week visiting in Los Angeles. At the time of his employment, it was agreed between him and appellant that he should purchase an automobile, as part of his duties required him to attend to company business away from its office in Summerland, and it was also agreed that he should be reimbursed for the use of said automobile during such times as defendant used it for the business of the company. He was not very careful about making charges for the use of this automobile, and on many occasions either failed or forgot to make charges to which he was entitled. He covered the territory from Ventura to San Jose, and upon occasions attended to company business in Los Angeles, Colton and San Bernardino.

In August and during the early part of September, 1933, appellant oil company decided to place a new gasoline on the market which was to be known as "Silver Gull", a name conceived by defendant. During September, defendant prepared a prospectus and an analysis of a general scheme for advertising and merchandising this new product and delivered it to Mr. Winslow Bushnell, said sales manager. Defendant had various other advertising data, books and pamphlets which he wished to study with a view to perfecting his analysis, which were located at an address where he stopped when in Los Angeles. On Friday, September 22, 1933, defendant left his office in Summerland to make his customary week-end trip to Los Angeles, for the avowed purpose, as he testified, "to do the various things I have spoken of heretofore—that is to get the information I wanted from Foster & Kleiser—to go through these papers and books of mine, and to see Twomey Company", and that none of these objects was for himself personally, but all in connection with the advertising campaign of Silver Gull gasoline for the benefit of appellant company. On Saturday morning, September 23, 1933, defendant called at the office of Foster & Kleiser in Los Angeles, found it closed, and then went to call upon E. F. Twomey, and had a long conference with him about "ridge signs" and other advertising material for appellant. In connection with this call, Mr. Twomey testified that defendant had visited him at his office in Los Angeles on the Saturday morning in question, and that although he did not remember just what was discussed, he thought it was regarding Seaside business and probably was regarding Seaside ridge signs—a large sign which could be placed on the ridge of the roof of an oil station distributing Seaside gasoline. On cross-examination of this witness, it was brought out that some time previous to this date defendant had submitted to said E. F. Twomey an invention for an advertising display sign which he wished Mr. Twomey to manufacture and sell for him on a royalty basis, the implication being that the Saturday morning conference was with regard to this display sign rather than the ridge signs. There was also evidence to the effect that the ridge signs had been ordered only once during the year that defendant was in the employ of the appellant oil company, to-wit, on September 12, 1933, from Smith-Martin Company, advertising specialists in Los Angeles, and that defendant was aware of this fact.

It was shown that on both Saturday and Sunday defendant Canini spent a great deal of time going over his advertising data, books and material at his room at 922 So. Kingsley drive, Los Angeles; that he called upon his fiancee both Saturday and Sunday evenings, and that on Sunday night, September 24, 1933, around 9 o'clock he took his brief case and advertising data, including the company's prospectus for the new Silver Gull gas campaign and departed from his room on Kingsley drive, preparatory to starting his drive to his office at Summerland. Owing to the fact that he had ascertained that a fog was blowing in over the coast route, he changed his course from that to the inland route via Ventura boulevard, and in so doing he drove his automobile north on Vine street, where in crossing Fountain avenue he collided with and severely injured the respondent, under the circumstances hereinbefore set forth. After the accident he left respondent at the receiving hospital in Hollywood and continued in his automobile to the appellant company's plant at Summer-

land, where he stopped and deposited his brief case, advertising data, memoranda and prospectus, looked over his desk for mail and possible instructions regarding work for the ensuing day, and then proceeded to his hotel at Santa Barbara.

There was evidence introduced to the effect that when defendant was expected to work on Saturday or Sunday, or was to leave Summerland on business for the company, excepting to go to Santa Barbara, he was to obtain instructions or permission from either Winslow Bushnell, sales manager, or J. F. Bushnell, general manager of appellant oil company, before undertaking to do such work or before leaving Summerland. It was also shown that defendant had an arrangement in writing with appellant whereby on Saturday mornings while in Los Angeles on his own private business, he would make calls upon firms there who supplied advertising materials to the appellant, and that when such calls were required, he would charge the company 7c per mile for the use of his car from his room in Los Angeles to such places of business, as well as the expense of parking and telephoning in connection with such calls. Several definite written memorandums of this arrangement appear in evidence in defendant's own handwriting, commencing with calls made by him in January, 1933, immediately after he went to work for appellant, and continuing throughout the year. No memorandum of expense was introduced in evidence covering the particular week-end here in question.

It was also shown that on September 16, 1933, defendant had tendered a written resignation to Winslow Bushnell, who had asked defendant to reconsider his action, and a few days before the accident occurred, defendant had assured said Bushnell that he would continue his employment with the said company until a successor could be found and trained. In the middle of December, 1933, such successor was employed, and after acquainting him with the work to be done, defendant severed his connection with appellant company on December 31, 1933. Defendant did not report the accident to appellant until after he was served in the instant action which was begun on April 9, 1934.

[2] Under the facts and circumstances presented by the record, it was a question of fact for the jury to determine whether or not defendant Canini was acting within the scope of his employment at the time the accident occurred. The evidence upon this issue is in direct conflict, the officers of appellant corporation testifying that said defendant was not engaged in company business during his week-end trips to Los Angeles, while defendant testified that on the particular week-end in question he was directly engaged in working out the details of the campaign to introduce appellant's new product "Silver Gull" gasoline to the motoring public. Defendant admitted that he spent the evening of Saturday and also of Sunday with his fiancee, but testified he was on his way back to his office at Summerland when the accident occurred, and that later that night he actually stopped there leaving his brief case and other data concerning the said campaign.

[3] "It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master." Ryan v. Farrell, 208 Cal. 200, 204, 280 P. 945, 946, citing Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 191 P. 894; Kruse v. White Bros., 81 Cal.App. 86, 253 P. 178; May v. Farrell, 94 Cal.App. 703, 271 P. 789; Dennis v. Miller Automobile Co., 73 Cal.App. 293, 238 P. 739.

Again in Barton v. McDermott, 108 Cal. App. 372, 384, 291 P. 591, 596, it is stated: "Generally speaking, the question whether a deviation from the strict course of an agent's duty is so material or substantial as to amount to a complete departure from the scope of the agency, is a question of fact." It therefore appears that the jury having found in favor of respondent and against appellant in both trials, this court is bound thereby.

With respect to appellant's third point that the evidence is insufficient to sustain the implied finding of defendant's negligence, the summary of facts hereinbefore set forth reveals that defendant was operating his automobile at a speed of 35 miles as he approached the intersection and that he failed to see respondent until he struck her. Another witness, who was riding in the machine which defendant

passed somewhere in the block south of the intersection in question, testified that he saw respondent when she stepped from the curb, saw her look in his direction at that time and again when she was part way across the intersection.

[4, 5] A conclusion that defendant ought to have seen respondent in time to avoid striking her may be derived from the circumstance that other persons saw her at a distance which would have been sufficient to enable defendant to prevent the calamity. 2 Cal.Jur.Supp. 369. In the circumstances, the conclusion is irresistible that defendant failed to maintain a proper lookout for pedestrians. The evidence is amply sufficient to sustain the implied finding that defendant negligently operated his machine at the time and place in question.

[6-9] As to the question of contributory negligence of respondent, it appears that under the more recent decisions of the courts of this state that question must be deemed to be one of fact for the determination of the jury. "It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street when an automobile is approaching. If that were so, he never could attempt to cross a street upon which automobiles are being operated, and consequently, where there is almost always an approaching machine. He has a right to expect that those operating automobiles upon a public street will operate them in the manner and at the speed customary at the particular place. Whether such a person is guilty of contributory negligence in attempting to cross a street in front of an approaching automobile would depend upon all the circumstances under which he acted. This question is one for the determination of the jury or the trial court, and their finding thereon is binding upon an appellate court. Scott v. San Bernardino Valley, etc., 152 Cal. 604, 93 P. 677; Clark v. Bennett, 123 Cal. 275, 277, 55 P. 908; Schneider v. Market Street Ry. Co., 134 Cal. 482, 488, 66 P. 734." Flach v. Fikes, 204 Cal. 329, 332, 267 P. 1079, 1080.

Appellant finally contends that the court erroneously gave certain instructions to the jury. A careful reading of all the instructions given by the trial court discloses that the jury was fully and fairly directed and informed as to the law involved in the issues presented to it, and that no prejudicial error resulted therefrom so far as this appellant is concerned.

The judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.



30 Cal.App.2d 92

YEREMIAN v. TURLOCK DEHYDRATING & PACKING CO., Inc.

Civ. 5973.

District Court of Appeal, Third District, California.

Dec. 21, 1938.

Hearing Denied by Supreme Court Feb. 16, 1939.

1. Evidence ⇐450(8)

In action against buyer for breach of agreement to furnish grower with sufficient boxes for grape crop, where buyer had purchased grower's entire crop, evidence that parties mutually agreed to advance date for commencement of picking grapes was properly admitted for purpose of reconciling provision in agreement vesting buyer with asserted right of exclusively determining rate of delivery of grapes with right of grower to have entire crop delivered within period that would permit harvesting of greatest quantity of grapes.

2. Contracts ⇐154

A contract must receive such interpretation as will make it reasonable. Civ.Code, § 1643.

3. Sales ⇐81(7)

An agreement, specifying that grower should start picking grapes on a specified date and thereafter at such times and in such quantities as buyer of entire crop directed, was to receive a reasonable interpretation, and not one which would give buyer the right to arbitrarily refuse delivery of grapes which met the standard requirements of the agreement. Civ.Code, § 1643.

4. Sales ⇐81(7)

An agreement, which in terms required grower to start picking grapes on a specified date and thereafter at such times and in such quantities as buyer of entire crop

directed, did not give buyer exclusive right to determine time for picking and quantities to be delivered, nor entitle buyer to refuse to supply boxes in sufficient number to permit crop to be harvested within a reasonable time.

5. Sales ⇐81(7)

Where buyer, knowing that Thompson grapes must be picked from ten days to two weeks after arriving at required 22 per cent. sugar content, agreed that date for commencing picking of crop be advanced one week ahead of that specified in agreement, buyer was bound to supply boxes in accordance with terms of agreement in sufficient number to complete harvest within ten days to two weeks after picking was commenced.

6. Sales ⇐439

In action against buyer for breach of agreement to furnish grower with boxes for grape crop, buyer could not complain that grower did not prove that grapes which were lost were of character or type specified in agreement, where such issue was not raised in the pleadings, particularly since if relied on as a breach of warranty, burden rested on buyer.

7. Appeal and error ⇐1011(1)

Where there was competent evidence in the record to support the trial court's findings, the District Court of Appeal could not disturb them simply because of conflict therein.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Paul Yeremian against the Turlock Dehydrating & Packing Company, Incorporated, for damages from breach of contract. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hjelm & Hjelm, of Turlock, for appellant.

S. P. Galvin, of Merced, for respondent.

STEEL, Justice pro tem., delivered the opinion of the court.

Defendant has appealed from a judgment in favor of plaintiff for damages alleged to have been sustained as a result of the failure of the defendant to furnish plaintiff with sufficient boxes in which to place grapes when ready to harvest or pick, thereby compelling plaintiff to allow the grapes to remain upon the vines for such period of time that in harvesting and cutting them from the vines the grapes dropped from the stems or bunches, and fell to the ground, occasioning the loss complained of.

The agreement, which is the subject of this litigation, reads as follows:

"Turlock Dehydrating & Packing Co.,
"Grape and Fruit Buying Contract.
"No. 2077.

"Turlock, Calif., Sept. 11, 1935.

"In consideration of $1.00, receipt of which is hereby acknowledged, I have this day sold to Turlock Dehydrating & Packing Co. Inc., and Turlock Dehydrating & Packing Co., Inc., has bought my entire crop of Thompson Seedless grapes for the season of 1935, grown on Old Hansan Ranch, situated S. of Planada, as follows: 80 acres of Thompson Variety, estimated at 600 tons; Price $12.00; delivered to roadside. * * * Remarks: About 200 tons Girdel; if market advance, seller can sell for more; shall divide profit. Grower to pick fruit starting on or about Oct. 1, 1935, and thereafter at such times and in such quantities as buyer directs.

"Quality of above contracted fruits shall be of such quality to make extra choice raisin, buyer having the option to reject such fruit as does not come up to such standards. Grapes must test 22% sugar or better and be free from mildew and measles. Boxes to be furnished by buyers. Grower to be paid at buyers' office at Turlock, ten days after completion of deliveries—on the 1st, 10th, or 20th day of the month. Seller hereby guarantees said fruit to be his sole and absolute property, free from all encumbrances, except: Merced Corp. Production Ass'n.

"Turlock Dehydrating & Packing Co., Inc.
"By S. Knutsen.

"Paul Yeremian, Grower, Tioga Hotel, Merced, Address."

Thereafter, by mutual agreement of the parties, the date for the commencement of picking the grapes was advanced from October 1, 1935, to September 23, 1935, for the reason that temperature conditions were such as to cause the grapes to ripen earlier than originally contemplated. Picking operations commenced on or about September 23, 1935, and continued to October 13, 1935, when they were completed.

Evidence was introduced, and the court found, to the effect that Thompson grapes

require picking and should be harvested when a sugar content of 22 per cent is reached, and unless picked within ten days to two weeks thereafter, the sugar content will have increased to the extent that when it is attempted to cut the bunches from the vines, the grapes will drop off, fall to the ground, and be lost.

There was evidence of numerous (written as well as oral) demands by plaintiff for additional boxes, during the picking of the crop.

[1] Appellant attacks the findings and judgment as not supported by the evidence, and among the several assignments of error it is urged that the agreement of sale fixes the time and manner of delivery, and could not be varied by parol or other testimony, and that consequently the defendant had the sole power to determine the rate of deliveries of the grapes, and that plaintiff's complaint that boxes in sufficient quantities were not supplied is of no avail.

It will be observed that by the agreement the defendant purchased plaintiff's entire crop of Thompson grapes. The evidence discloses that the plaintiff, as well as the officers of the defendant corporation, had been engaged in and were familiar with the grape growing industry for a number of years. The court found that defendant knew that good husbandry in grape culture and the harvesting of Thompson grapes, required that they be picked within such period of ten days to two weeks after they had ripened; that they reached a sugar content of 22 per cent, and also found such period to be a reasonable time within which Thompson grapes must be picked and harvested.

While the agreement contains the following language: "Grower to pick fruit starting on or about Oct. 1, 1935, and thereafter at such times and in such quantities as buyer directs," we are unable, considering the contract in its entirety, to interpret this provision as placing with the defendant the entire right to determine the time for picking, the quantities to be delivered, and the times when such quantities should be delivered, as contended by appellant.

The plaintiff having sold, and the defendant having purchased plaintiff's entire crop of Thompson Seedless grapes, evidence was properly received, not for the purpose of changing the terms of the written agreement, but for the purpose of reconciling, if possible, the provision vesting in the defendant the asserted right of exclusively determining the rate of delivery of such grapes, with the right of the plaintiff to have his entire crop delivered at a time, and in a manner which would, in the ordinary practice of good husbandry, return to plaintiff his selling price, based upon the harvest of the crop, within a period of time that would permit the harvesting of the greatest quantity of grapes. Alvernaz v. H. P. Garin Co., 127 Cal.App. 681, 16 P.2d 683.

[2] The Alvernaz Case, supra, is in many respects similar to the instant case. Therein, the plaintiff, as seller, sold to the defendant, as buyer, a crop of green and ripe tomatoes grown upon a certain 30-acre tract of land, one of the provisions of the contract being as follows: "The time of harvesting said crop, both commencing and ending, shall be entirely up to the shipper [buyer], and he will at all times have his agents and representatives keep in close touch with the grower [seller], so as to post him as to growing * * * packing and delivery of the same." [Page 684.]

The evidence disclosed that the defendant (buyer) notified the plaintiff (seller) in early August that no more ripe tomatoes would be received, and between November 10th and 15th the defendant refused to accept deliveries, notifying plaintiff in substance by letter on November 17th, that no more tomatoes would be received. It was shown on these dates there remained between 75 and 100 tons unpicked, and that they were undamaged by frost. The defendant contended, as the appellant does here, that it (buyer) had the right to determine when the season should begin and when it should end. In disposing of this contention the court stated:

"According to defendant's interpretation of the contract, the provision therein that 'the time of harvesting said crop, both commencing and ending, shall be entirely up to the shipper * * *,' gave the right to the shipper to determine when the season should begin and end. We cannot agree with this view. The provision should be read in connection with the remainder of the clause and the succeeding paragraph, the clear intention being to allow the shipper to advise the grower when as a matter of good husbandry the crop should be picked and delivered, but not to

give the shipper the right to arbitrarily refuse deliveries which met the requirements of the contract.

"A contract must receive such interpretation as will make it reasonable. Civ. Code, § 1643; 6 Cal.Jur., Contracts, § 269, p. 271. Here the interpretation urged by defendant would render the contract unreasonable and unfair, and its language does not require such interpretation."

[3-5] It is thus apparent that the contract here under consideration should receive a reasonable interpretation and not one which would give the buyer the right to arbitrarily refuse delivery of grapes which met the standard requirements of the contract, by failing to supply boxes in sufficient number to permit the crop to be harvested within a reasonable time. Appellant argues that if a reasonable rate of delivery is the test, then the rate of delivery, as shown by the evidence, was reasonable, and the finding to the contrary is not supported. It is then urged that the advance in the date to commence picking from October 1st to September 23d, was made solely as an accommodation to plaintiff (seller), and therefore, the defendant (buyer) should not be penalized for its cooperation. Whether or not the advance in the date was an accommodation, is of no consequence, for it was changed by mutual agreement by the parties, and presumably for their mutual benefit, for the reason, as we have heretofore mentioned, that the grapes were maturing or ripening earlier than expected, and had reached the required 22 per cent sugar content at the advanced date. The defendant, therefore, knowing that Thompson grapes must be picked from ten days to two weeks after arriving at such sugar content, was bound to supply boxes in sufficient number to complete the harvest within such period of time.

[6] Appellant further complains that there is no proof upon the part of plaintiff that the grapes that were lost were of the character or type specified in the contract. This does not appear to have been an issue in the pleadings, and if relied upon as a breach of warranty, the burden of proof rests with the party asserting it. 55 Cor. Jur., p. 837; Waltz v. Silveria, 25 Cal. App. 717, 145 P. 169; Cerruti Mercantile Co. v. Simi Land Co., 171 Cal. 254, 152 P. 727.

On the other hand, there is evidence to support the court finding that the grapes were in all respects up to the standard required by the terms of the contract.

[7] Our conclusion upon the main assignments of errors renders it unnecessary to discuss other alleged errors, as they could in no event affect the determination of the case. There is competent evidence in the record to support the findings of the trial court, and we may not disturb them simply because of conflicts therein.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



30 Cal.App.2d 5

HUSTON v. ABBOTT, Sheriff, et al. (two cases).

Civ. 10679, 10685.

District Court of Appeal, First District, Division 1, California.

Dec. 19, 1938.

1. Attachment ⇐186

The failure to apply for appointment of receiver by creditor who has attached perishable property or property which will greatly depreciate unless properly cultivated is not in and of itself negligence, but may be negligence, depending upon particular facts. Code Civ.Proc. §§ 547, 547a, 548.

2. Crops ⇐1

A growing lettuce crop may be generally classified as "perishable property" incapable of manual delivery of such a type that in regular course of nature, with proper cultivation and care, it would continue in good condition to and including maturity.

[Ed. Note.—For other definitions of "Perishable Property," see Words & Phrases.]

3. Attachment ⇐186

A creditor who attached a growing crop of lettuce was not negligent by failure to apply for appointment of a receiver, where at no stage of the growth of crop was it necessary to take steps to keep crop in sound condition. Code Civ.Proc. §§ 547, 547a, 548.

4. Attachment ⇐128

An attaching creditor is not required to deposit fees for a keeper of growing crop unless sheriff requires deposit as prerequisite to attachment. Code Civ.Proc. § 542.

5. Attachment ⇐198

If property attached is perishable, sheriff may sell in manner in which property is sold on execution, although it is better practice to proceed under statute providing for sale of attached property. Code Civ.Proc. §§ 547, 548.

6. Statutes ⇐231

The sections of Code relative to attachment should be read together if possible and construction given that is fair and reasonable to statutory system of which sections form a part. Code Civ.Proc. §§ 540, 542, 547, 547a, 548.

7. Attachment ⇐186

A growing crop is generally classified as "immovable property" but may be reduced to status of movable property through severance from the land, and hence when attached should be safeguarded either by placing a keeper in charge, or sold as perishable property. Code Civ.Proc. §§ 540, 542, 547, 548.

[Ed. Note.—For other definitions of "Immovable," see Words & Phrases.]

8. Sheriffs and constables ⇐118

A sheriff who in attaching a growing crop of lettuce did not require attaching creditor to deposit fees for a keeper was liable to attaching creditor for loss of crop which was sold by debtor. Code Civ.Proc. §§ 520, 542, 547, 548.

9. Attachment ⇐182

A purchaser of legally attached growing crop of lettuce from debtor of attaching creditor was liable to sheriff who was liable to attaching creditor for loss sustained by such sale. Code Civ.Proc. § 542.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Gilman Huston, a minor, by Clarence Huston, his guardian, against Carl H. Abbott, as sheriff of Monterey county, and the surety on his bond for damages resulting from sheriff's failure to properly protect a growing crop attached by plaintiff wherein the sheriff cross-complained against the Ice Kist Packing Company. From a judgment, the sheriff, the surety, and the Ice Kist Packing Company appeal.

Affirmed.

In case No. 10679:

Harry L. Noland and Noland & Segretti, all of Salinas, for appellant.

C. C. Baker, of Salinas, and Louis Cohen, of Atascadero, for plaintiff and respondent.

Garth V. Lacey, of Salinas, and Thomas E. Davis, of San Francisco, for defendants, cross-complainants and respondents.

In case No. 10685:

Garth V. Lacey, of Salinas, and Thomas E. Davis, of San Francisco, for appellants.

C. C. Baker, of Salinas, and Louis Cohen, of Atascadero, for plaintiff and respondent.

WARD, Justice pro tem.

These appeals arise out of the sale of a growing crop of lettuce upon which an attachment had been levied in an action by plaintiff against the owner of the crop. In the original action the sheriff of Monterey county served a copy of the attachment upon the occupant of the land and properly recorded the notice thereof. Subsequently a judgment was obtained and a writ of execution returned wholly unsatisfied. Prior to judgment, but after the levy of the attachment, the occupant of the land sold the growing crop to the Ice Kist Packing Company, a corporation. The attaching creditor filed an action against the sheriff, and the bonding company for the sheriff. The sheriff cross-complained against the packing company, praying for damages identical as set forth by the plaintiff in the complaint against the sheriff and the bonding company. The court found: that the sheriff had neglected to safely keep the attached property, as by law required, in that he left the crop unattended from the date of the levy to the period of the removal of the crop; that the packing company purchased the crop at a time when it was a perishable crop and subject to the levy of attachment; that in "harvesting and carrying away", the packing company converted the crop to its own use; that plaintiff knew of the progress of growth and the time when the crop was ready for harvest but that he was not negligent in failing to apply for the appointment of a receiver, and directed the entry of judgment in favor of plaintiff on the complaint against the sheriff, and in favor of the sheriff on the cross-complaint against the packing company.

The main question raised by the appeals is whether it was negligence on the part of the sheriff under the provisions of the Code of Civil Procedure at the time of the attachment proceedings requiring him to "safely keep" the property, to fail to appoint a keeper to care for the crop until matured, or to fail to sell the property; or was it negligence of the attaching creditor to fail to apply to the court for the appointment of a receiver.

[1] Section 547a of the Code of Civil Procedure provides in part: "Whenever a writ of attachment is issued and the holder of such writ desires to attach, or has attached, property which is perishable, or which will greatly deteriorate in value unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the holder thereof, and after due notice to the owner of said property, may appoint a receiver to take charge of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property." This section seems to have been enacted for the benefit primarily of the attaching creditor and, if invoked, depending upon the terms of the order, might relieve the sheriff entirely from the disposition of the property. It was probably inspired by reason of the limitations of sections 547 and 548 of the Code of Civil Procedure, which provide merely for the sale and not the care or cultivation of perishable property, or other property which would deteriorate in value unless special attention and care should be given. It is possible that cultivation or care might result in a delayed sale to the benefit of the debtor as well as the creditor. The purpose of the section is to safeguard the rights of all the parties. The expenses may be imposed upon the property or the attaching creditor. The creditor might be sending good money after bad, and so the legislature has not provided that the creditor must avail himself of the remedy set forth in section 547a, but has merely made it permissive. If the holder of the writ "desires to attach, or has attached", he may apply for the appointment of a receiver, but the right to appoint is left entirely to the discretion of the court. We conclude that the failure to apply is not in and of itself negligence, but it may be negligence, depending upon the facts of a particular case.

[2] In this case the attachment was levied upon a growing lettuce crop, which may be generally classified as perishable property incapable of manual delivery (Raventas v. Green, 57 Cal. 254, 255), of such a type that in the regular course of nature, with proper cultivation and care, it would continue in good condition to and including maturity.

[3] There is no dispute upon the finding that plaintiff at all times had knowledge of the condition of the crop, was acquainted with the progress of its growth and knew when the crop would be ready for harvest. The crop actually matured, and it does not appear that at any stage of its growth was it necessary to take steps by appointment of a receiver or otherwise to keep the crop in a sound condition of preservation. Plaintiff did not know of the sale by the occupant of the premises until after its consummation. Under such circumstances we cannot say that plaintiff failed to perform a duty or was in anywise negligent by refraining from applying for the appointment of a receiver.

[4] Some suggestion is made in the briefs that plaintiff at the time of the issuance of the writ of attachment should have deposited fees for a "keeper". No such duty is imposed upon an attaching creditor unless the sheriff require as a prerequisite to the attachment of such property that a sum of money be deposited sufficient to pay the expenses of keeping the property safely for the periods mentioned in section 542 of the Code of Civil Procedure.

Section 540 of the Code of Civil Procedure provides in part that: "The writ must be directed to the sheriff, or a constable, or marshal of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant * * *." The force and effect of this portion of the section is a command that the sheriff "safely keep all the property * * * not exempt from execution * * * as may be sufficient to satisfy the plaintiff's demand". See, also, Wood v. Lowden, 117 Cal. 232, 235, 236, 49 P. 132.

[5] As noted heretofore the sheriff is protected, under section 542 of the Code of Civil Procedure, by authority to require that the attaching creditor pay for the expenses of safely keeping the property. If the property is perishable, the sheriff may sell in the manner in which property is sold on execution (sec. 547, Code Civ. Proc.), although it is better practice to pro-

ceed under section 548 of the Code of Civil Procedure. Henry Cowell Lime & Cement Co. v. Figel, 27 Cal.App. 11, 14, 148 P. 796.

[6] The sections of the code relative to attachment should be read together, if possible, and a construction given that is fair and reasonable to the statutory system of which it forms a part.

[7] Real property presumably may not be removed but personal property, such as a growing crop of lettuce, though not capable of manual delivery, may be destroyed or severed from the soil, and hence it is reasonable to conclude that notwithstanding subdivision 6 of section 542 of the Code of Civil Procedure, as it provided covering the period of this attachment, was silent in reference to a "keeper", still under the provisions of section 540 the sheriff was required to "safely keep all the property". A growing crop is generally classified as immovable, yet it may be reduced to the status of movable property through severance from the land, and therefore should be safeguarded either by placing a keeper in charge, or sold as perishable property. Code Civ.Proc. §§ 540, 542, 547, 548.

[8] There is no liability and therefore no obligation upon a sheriff to take over personal property capable of manual delivery unless as a prerequisite the attaching creditor upon demand by the sheriff deposit expenses to pay for the safe keeping of the property. This property was actually delivered to the packing corporation. The sheriff's failure to protect himself by making a demand that he be paid the expenses to safely keep the property placed the sheriff in the position of responsibility for the loss of the property. If the property was perishable property, and the court so found, it was the duty of the sheriff to sell the property before it perished. Prior to this period the property was taken by a party who had no interest in the attachment proceedings. The sheriff accordingly was liable for the loss of the attached property.

[9] Cross-defendant and appellant, Ice Kist Packing Company, a corporation, purchased a legally attached growing crop of lettuce from the debtor of the attaching creditor. The sheriff was the legal custodian of the crop. A copy of the writ, together with a description of the property attached and a notice of attachment had been duly recorded. The sheriff did all that the law required of him in attaching a growing crop (sec. 542, Code Civ.Proc.) as against any party who removed the crop and converted the lettuce to its own use. Appellant corporation contends that the negligence of the sheriff in failing to appoint a keeper and in failing to sell the perishable property relieved the corporation from liability for its conversion. No authority has been cited in support of this theory; that one who is legally in possession but fails to "safely keep" the property is barred from maintaining an action for its recovery or the value thereof against a conversioner.

The judgment as entered, in favor of plaintiff against the sheriff and his surety, and in favor of the sheriff against the corporation is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



29 Cal.App.2d 663

BALDIN v. FRIEDMAN et al.

Civ. 2408.

District Court of Appeal, Fourth District, California.

Dec. 15, 1938.

Appeal and error ⇐787

Where no notice to prepare transcript on appeal was made or filed, no proposed bill of exceptions was filed, no proceeding for preparation of record on appeal was pending and time to institute such proceeding had expired, and more than two years elapsed between time notice of appeal was filed and time notice was given of motion to dismiss appeal and no appearance was made on behalf of appellant when motion to dismiss came on for hearing, the motion would be granted.

Appeal from Superior Court, Riverside County.

Action by George P. Baldin against Carl Friedman and others. From an order denying a preliminary injunction, the plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

No appearance for appellant.

A. Heber Winder, of Riverside, for respondents.

BARNARD, Presiding Justice.

Respondents have moved to dismiss this appeal, supported by the certificate of the county clerk from which it appears that an order denying a preliminary injunction was entered on August 7, 1936; that written notice of entry of that order was served on July 29, 1936; that notice of appeal was filed on August 7, 1936; that no notice to prepare a transcript on appeal has been made or filed; that no proposed bill of exceptions has been filed; that no proceeding for the preparation of a record on appeal is pending in the trial court, and that the time to institute such a proceeding has expired.

More than two years elapsed between the time notice of appeal was filed and the time notice was given of a motion to dismiss, and no appearance was made on behalf of the appellant when the motion to dismiss came on for hearing. Under these circumstances the motion to dismiss should be granted. Rees v. Roberts, 24 Cal.App.2d 69, 74 P.2d 296.

The appeal is dismissed.

We concur: MARKS, J.; GRIFFIN. J.



29 Cal.App.2d 665

FRIEDMAN v. BALDIN et al. (LEWIS, Intervener).

Civ. 2409.

District Court of Appeal, Fourth District, California.

Dec. 15, 1938.

Appeal and error ⇐787

Where no notice to prepare transcript on appeal was given or filed, no bill of exceptions was filed, no proceeding for preparation of record on appeal was pending in trial court and time to institute such a proceeding had expired, and where more than two years had elapsed since notices of appeal were filed and no appearance was made on behalf of appellant when motions to dismiss appeals came on for hearing, the motions would be granted.

Appeal from Superior Court, Riverside County.

Action by Carl Friedman against George P. Baldin and others, wherein Helen Turley Lewis intervened. From an adverse judgment, and from an order denying a motion to vacate a default and to recall an execution, the defendants appeal. On motion to dismiss appeals.

Appeals dismissed.

No appearance for appellants.

A. Heber Winder, of Riverside, for respondent.

BARNARD, Presiding Justice.

It appears from the certificate of the county clerk that the judgment appealed from was entered on July 1, 1936, and that notice of appeal therefrom was given on August 7, 1936. It also appears that an order denying a motion to vacate a default and to recall an execution was entered on July 29, 1936, and that a notice of appeal from said order was filed on July 31, 1936. It further appears, with respect to each of these appeals, that no notice to prepare a transcript on appeal has been given or filed; that no bill of exceptions has been filed; that no proceeding for the preparation of a record on appeal is pending in the trial court; and that the time to institute such a proceeding has expired. More than two years has elapsed since each notice of appeal was filed. The respondents filed two notices of a motion to dismiss, one relating to each of these appeals. No appearance was made on behalf of the appellants when the motions to dismiss came on for hearing. The motions should, therefore, be granted. Rees v. Roberts, 24 Cal.App.2d 69, 74 P.2d 296.

The appeals are dismissed.

We concur: MARKS, J.; GRIFFIN, J.

McALLISTER et al. v. DRAPEAU et al.*

Civ. 11932.

District Court of Appeal, Second District, Division 1, California.

Dec. 15, 1938.

Hearing Granted by Supreme Court Feb. 9, 1939.

1. Constitutional law ⇐62

Congress had power to provide in Home Owners' Loan Act for the authority to be exercised by board of directors of Home Owners' Loan Corporation. Home Owners' Loan Act of 1933, § 4(a, k), 12 U.S.C.A. § 1463(a, k).

2. Accord and satisfaction ⇐1
Mortgages ⇐303

A release executed to Home Owners' Loan Corporation by mortgagee at time of its receipt of bonds of corporation, stating that mortgage constituted a lien or claim on title to mortgagors' property, and that mortgagee agreed to accept the bonds, which amounted to less than mortgagor's obligation, in full settlement of its claim, was designed to enable corporation to acquire a first lien, and did not constitute an "accord and satisfaction" extinguishing mortgagors' obligation under second trust deed executed to mortgagee at time of obtaining loan from corporation. Home Owners' Loan Act of 1933, § 4(a, k), 12 U.S.C.A. § 1463(a, k).

[Ed. Note.—For other definitions of "Accord and Satisfaction," see Words & Phrases.]

3. Mortgages ⇐303

A release which was executed to Home Owners' Loan Corporation by mortgagee at time of its receipt of bonds of corporation, and which stated that mortgage constituted a lien or claim on title to mortgagors' property and that the bonds, amounting to less than mortgagors' obligation, were accepted in full settlement of mortgagee's claim, was effective only to enable corporation to acquire a first lien, and did not relieve mortgagors from further obligation to mortgagee under second trust deed executed at time of obtaining loan from Home Owners' Loan Corporation. Home Owners' Loan Act of 1933, § 4(a, k), 12 U.S.C.A. § 1463(a, k).

4. Novation ⇐1

A release which was executed by mortgagee to Home Owners' Loan Corporation at time of receiving bonds of corporation, and which provided that mortgage constituted a lien or claim on mortgagors' property and that bonds, amounting to less than mortgagors' obligation, were accepted in full settlement of that claim, did not constitute a "novation" as to note and second trust deed on property given to mortgagee as part of transaction without knowledge of Home Owners' Loan Corporation. Home Owners' Loan Act of 1933, § 4(a, k), 12 U.S.C.A. § 1463(a, k).

[Ed. Note.—For other definitions of "Novation," see Words & Phrases.]

5. United States ⇐53

The board of directors of Home Owners' Loan Corporation is without power to change, alter or modify purpose of Home Owners' Loan Act, but has only such power and authority as is conferred by act. Home Owners' Loan Act of 1933, § 4(k), 12 U.S.C.A. § 1463(k).

6. United States ⇐53

The Home Owners' Loan Corporation, although declared by statute to be an instrumentality of the United States, was, so far as rights of parties to mortgage to be refunded by corporation were concerned, a private corporation, subject to same right to sue and be sued as other private corporations. Home Owners' Loan Act of 1933, § 4(a), 12 U.S.C.A. § 1463(a).

7. Contracts ⇐1

It is not the policy of the law, when parties are dealing at arm's length and in absence of fraud, to inquire into wisdom of a bargain.

8. United States ⇐53

Where regulations of Home Owners' Loan Corporation did not evidence corporation's intention of requiring mortgagee to cancel entire debt owed by mortgagors obtaining loan from corporation, a mortgagee which had agreed to accept bonds of corporation, in an amount less than mortgagor's obligation, in full settlement of its claim against mortgagors' property, had no duty, either legal or moral, to inform corporation of its intention to secure balance due on original debt. Home Owners' Loan Act of 1933, § 4(k), 12 U.S.C.A. § 1463(k).

9. Contracts ⇐108(1)

Contracts should not be declared void for being in contravention of sound public policy except in cases free from doubt.

10. Contracts ⇐123(1)

A mortgagee's consent to take bonds of Home Owners' Loan Corporation in an

*For subsequent opinion see 92 P.2d 911.

amount less than obligation of mortgagors who were obtaining loan from corporation did not constitute cancellation of balance due on original debt, and therefore note and second deed of trust executed to mortgagee as part of same transaction without knowledge of corporation were valid, in absence of any provision in Home Owners' Loan Act or regulations of corporation prohibiting the giving of a second mortgage. Home Owners' Loan Act of 1933, § 4(k), 12 U.S.C.A. § 1463(k).

11. Contracts ⇐123(1)

Where neither provisions of Home Owners' Loan Act nor regulations of Home Owners' Loan Corporation prohibited the giving of second mortgage by mortgagor obtaining loan from corporation, and no fraud or deceit was practiced by mortgagee which obtained not only bonds of corporation in connection with refunding of mortgage, but also a second deed of trust from mortgagors, second deed of trust was not void as being in contravention of public policy. Home Owners' Loan Act of 1933, § 4(k), 12 U.S.C.A. § 1463(k).

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Charles McAllister and another against Louis C. Drapeau, successor to Friend W. Richardson as Building and Loan Commissioner for the State of California in charge of liquidation of the California Security Loan Corporation, and another to cancel a trust deed and note and to recover certain moneys paid on account of the interest and principal of the note. Judgment for plaintiffs, and the named defendant appeals.

Judgment reversed, with instructions.

Robert Lee Collins and Britton Bowker, both of Los Angeles, for appellant.

Allard, Holbrook & Whyte, of Pomona, and Roland J. Brownsberger, of La Verne, amicus curiæ, California Building-Loan League, in behalf of appellant.

Felix M. Cunningham and Lawrence F. Edmisten, Jr., both of Beverly Hills, for respondents.

DORAN, Justice.

This is an action wherein plaintiffs seek to cancel a trust deed and note and to recover certain moneys paid on account of the interest and principal of said note.

The facts are as follows: Plaintiffs and respondents, Charles McAllister and Elnore McAllister, on the 27th day of March, 1929, obtained a loan from the California Security Loan Corporation (hereinafter referred to as defendant or appellant) on their home property in the sum of $11,050, secured by a note and trust deed. Various payments on account of said loan thereafter reduced the balance to $8,271.26.

On or about the 1st day of July, 1934, the amount of the loan having become past due and the foreclosure of the trust deed covering the property of plaintiffs being imminent, plaintiffs applied to the Home Owners' Loan Corporation (hereinafter referred to as the corporation) for a loan. The corporation requested that plaintiffs secure the written consent of the defendant to accept the bonds of the corporation. Defendant consented to take said bonds of the corporation on condition that plaintiffs also execute a note for $1,300, secured by a second trust deed on their home property, to the Title Guarantee and Trust Company as trustee in favor of said defendant as beneficiary, otherwise said defendant would proceed with the foreclosure under the original trust deed. Plaintiffs, in accordance with such arrangement, on or about the 16th day of July, 1934, executed a note for $1,300, secured by the second trust deed as aforesaid on their home property. Thereafter, on the 1st day of August, 1934, the defendant consented in writing (in the form which will hereinafter appear) to take said bonds of the corporation in the amount of $5,850, whereupon plaintiffs executed and delivered to the corporation a note in the sum of $5,984.38, secured by a first mortgage on their home property. The corporation then delivered to the defendant its bonds in the sum of $5,850. In connection with the transaction the corporation appraised the property at $8,650.

The execution and delivery by the plaintiffs to the defendant of the note and second trust deed were not made known to the corporation, and the corporation had no notice or knowledge of their existence either before acceptance of the consent of the defendant to take the bonds of the corporation or at any time thereafter, until shortly before the date of the commencement of the within action.

Plaintiffs paid to the defendant on account of said note and second trust deed a total of $275.

The complaint asked to have the second note and trust deed declared void, and sought the recovery of the $275 paid on account thereof. The judgment granted the relief prayed for although there was neither finding of fact nor conclusion of law that any fraud had entered into the transaction.

It is contended by appellant that it was the intention of the parties that the defendant should accept bonds from the corporation and a second deed of trust and note for $1,300 from the plaintiffs in exchange for the discharge of the original note and deed of trust; that it was error for the trial court to order the cancellation of said note and second trust deed and the repayment of the sums paid thereon on the grounds that said note and deed of trust contravened the Home Owners' Loan Act and was in violation of public policy; that the trial court was in error in granting to the plaintiffs any relief in connection with said note and deed of trust because said plaintiffs were in pari delicto and the court should therefore have left the parties in the position where it found them; and, finally, that a construction of the Home Owners' Loan Act of 1933 holding notes secured by second deed of trust to be void violates the constitutional provisions providing for due process of law.

Respondents, on the other hand, contend that the consent signed by defendant to take the bonds of the corporation was an accord and satisfaction, a release and a novation as to said note and second trust deed, and relieved the plaintiffs from any further obligations thereunder; that said "secret" note and trust deed were illegal and void under and by virtue of the express and implied provisions of the Home Owners' Loan Act; that an equitable defense cannot be interposed where a contract is illegal and void; and that the plaintiffs were not in pari delicto with the defendant.

Inasmuch as the controversy between the parties involves a consideration of the Home Owners' Loan Act of 1933, a brief synopsis of that act at the outset will be helpful. The preamble thereof is as follows: "An Act To provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States and for other purposes." Vol. 48, U.S.Stats. at Large, p. 128.

The Circuit Court of Appeals, Second Circuit, in United States v. Kay, 89 F.2d 19, describes the act as follows [page 21]: "The act was intended to supplement the Federal Home Loan Bank Act (47 Stat. 725, [12 U.S.C.A. § 1421 et seq. and notes]) by supplying direct relief to home owners. For this purpose, the Home Owners' Loan Corporation was organized with a capital stock which was not to exceed $200,000,000, and which was wholly subscribed for by the Secretary of the Treasury on behalf of the United States. To further finance its activities, the corporation was authorized to issue bonds originally in the amount of $2,000,000,000 but later increased to $4,750,000,000, the bonds to bear interest at 4 per cent. and to be guaranteed both as to interest and principal by the United States.* For a period of three years after June 30, 1933, the corporation was authorized to exchange its bonds, in a limited amount, for mortgages and to pay, within limits, any accrued taxes, assessments, necessary maintenance and repairs, and incidental costs in cash. The maximum interest payable by the home owner is 5 per cent. If the mortgagee refuses to accept the bonds and the home owner is unable to obtain a loan through ordinary channels, the corporation is authorized to make limited cash advances at interest not to exceed 6 per cent. The corporation carries the indebtedness as a first lien for 15 years, amortized monthly, quarterly, semiannually or annually as necessity requires. Also, bonds may be exchanged and cash advanced to redeem foreclosed property. The act only deals with homes valued at not over $20,000 and no single loan, whether in bonds or cash, may exceed $14,000. In creating this governmental agency and investing it with the described functions, Congress relied on its power to tax, borrow, and appropriate public money. * * *"

In particular the act provides as follows:

"Sec. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State,

*Bonds issued prior to April 27, 1934, or issued thereafter pursuant to commitments outstanding on that date, were guaranteed only as to interest.

and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of *this section.* The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation. * * *

"(k) The Board is authorized to make such bylaws, rules and regulations, not inconsistent with the provisions of *this section,* as may be necessary for the proper conduct of the affairs of the Corporation." (Vol. 48, U.S.Stats. at Large, pp. 129, 132, 12 U.S.C.A. § 1463 (a, k)). (Italics added.)

[1] The power of Congress to provide in the act for the authority of the board of directors therein recited is well settled. U. S. v. Grimaud, 220 U.S. 506, 521, 31 S.Ct. 480, 55 L.Ed. 563, 569; U. S. v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85, 53 S.Ct. 42, 77 L.Ed. 175.

If the weight of authority is to be measured by the *number* of judicial decisions holding that a second mortgage or trust deed such as the one herein under consideration is void on the ground of public policy, then the weight of authority supports respondents' contention. A brief review of such decisions therefore becomes important. The facts in all of the following cases are similar in varying degrees to the facts in the case at bar.

Jessewich v. Abbene, 154 Misc. 768, 277 N.Y.S. 599, decided by the municipal court of New York, borough of Brooklyn, second district, on February 19, 1935, appears to be one of the first, if not the first, case purporting to construe the Home Owners' Loan Act of 1933. In that case the facts apparently were essentially similar to the facts in the case at bar except that the agreement to pay the difference between the original debt and the amount in corporation bonds was not secured by a mortgage or trust deed. The agreement to pay the difference was dated June 14, 1934. The court held [page 600]: "This agreement is illegal and void, being made in violation of a statute, and plaintiffs cannot recover thereunder. * * * Such contract is forbidden by the Home Owners' Loan Act and *Information for Applicants to the Home Owners' Loan Corporation,* dated September, 1934, which provides: 'No loan will be made where a separate understanding or agreement, calling for any payments other than those required by the corporation, is made between the debtor and the holder of the mortgage.' The court takes judicial notice of, and the parties hereto are bound by, this provision and the fact that the Home Owners' Loan Corporation, owned by the People of the United States, is strictly a relief agency to save homes from threatened or pending foreclosures, to save lifetime savings investments of home owners in distress, to save them from becoming paupers, and is the rehabilitating agency to guard and protect the small home owner by judiciously refinancing his obligations with enough to pay all the encumbrances on his home, but limiting the new mortgage to 80 per cent of its appraisal value for the property, so he can meet his amortized mortgage by monthly payments on principal with interest. * * * Collusive agreement between creditor and home owner creating on the owner occupied home encumbrances too heavy and terms too severe for the home owner to work out his problem would easily defeat the very purpose of this act, interfere by trickery with this corporation collecting its bonds, and the government's financial assistance would merely delay the inevitable foreclosure suit which it meant to prevent. The second mortgagee would thereby benefit by his own wrong, first, in being paid by the government the greater part of his second mortgage in its tax exempt bonds which it guarantees unconditionally both as to principal and interest; then by getting the defendant's homestead through foreclosure for the small balance due; and, lastly, by getting the benefit of the excellent first mortgage thereon, never intended for him. * * * In my opinion, the existence of such concealed, collusive agreement constitutes a conspiracy to defraud, a fraud and chicanery interfering with the governmental function of rehabilitation which is the purpose of the Home Owners' Loan Corporation * * *." (Italics added.)

Inasmuch as the foregoing opinion is cited in support of many of the decisions which followed, it should be noted at this point that the contract declared by the trial judge to be a secret collateral agreement was neither in fact nor in law forbidden by the Home Owners' Loan Act as recited in the opinion. Whatever (as referred to in the opinion) the "Information for Applicants to the Home Owners' Loan Corporation" amounted to, it was not then the law nor is it the law now. "Information for Applicants" is not a rule or regulation officially adopted by the corporation, and manifestly does not

rise to the dignity of a statute. Moreover, assuming, but only for the sake of argument, that such could have been the law the trial judge then applied a regulation, according to the opinion, which did not go into effect until September, 1934, as controlling an act which took place on June 14, 1934. It should be noted, also, that there is nothing in the Home Owners' Loan Act or any of its rules or regulations which declares literally or inferentially that the purpose of the act is "to save lifetime savings investments of home owners in distress" and "to save them from becoming paupers". Nor is there anything in the act, nor in any of the regulations, that such act is "the rehabilitating agency to guard and protect the small home owner by judiciously refinancing his obligations with enough to pay *all the encumbrances on his home*". (Italics added.)

What appears to be the next case in chronological order is the First Citizens Bank & Trust Co. v. Speaker, 159 Misc. 427, 287 N.Y.S. 831, May 12, 1936, decided by the supreme court of Oneida county, New York, (the equivalent of the superior court of California). This case also considered a transaction involving Home Owners' Loan Corporation bonds, in connection with which the mortgagee accepted the bonds and also notes for the difference between the amount of the original debt and the bonds. The trial judge quoted from the Jessewich Case, supra, and added [page 834], "In the Jessewich Case, the court pronounced in clear language the policy of the government established for the public weal by the statute itself. The trend of judicial decisions interpreting transactions under the Home Owners' Loan Act is uniform in the recognition of the public policy ascribed to this statute in that case." (No cases cited.) The trial judge concluded as follows: "In principle, if this action is permissible under the statute, then the authorized holder of a second mortgage could secretly take back a note payable the next day and immediately enforce this obligation to the utter destruction of the purpose of the statute. A survey of the transaction as a whole leads to the conclusion that to give validity to the note sued upon would be to sanction a violation of the spirit of the statute and contravene public policy."

The supreme court of New Mexico, on July 20, 1936, had occasion to pass on a question somewhat similar to the issues involved in the within appeal, in Chaves County Building & Loan Ass'n v. Hodges, 40 N.M. 326, 59 P.2d 671. In that case, in a transaction involving the application of the Home Owners' Loan Act, the mortgagee signed a release dated October 14, 1933, identical in form with the release signed by the appellant herein. The court held that by the terms of the release the mortgagee accepted the bonds in full settlement of its claim and that such settlement was a valid accord and satisfaction and that no action would lie against the debtor to recover the balance. The Jessewich Case, supra, was also cited as authority. The court further observed [page 672], "It has been held that the courts should take judicial notice of the fact that the Home Owners' Loan Corporation is strictly a relief agency, organized to aid distressed home owners in saving their homes. The reduction in the amount of the home owner's debt (which, of course, can be accomplished only with the consent of his creditor) is the most effective aid, in most instances, which can be rendered to him. Merely to put off the evil day of foreclosure would fail to carry out the purposes of the act. If the debt is more than 80 per cent. of the value of the home, and the creditor refuses to discount his claim, the law affords no remedy. However, the creditor generally chooses to exchange his lien for a smaller sum in bonds. The Home Owners' Loan Corporation is interested in the reduction of the indebtedness of the home owner who procures a loan." It should again be noted that there was nothing in the Home Owners' Loan Act, or in the rules and regulations of the corporation, which suggested that the Home Owners' Loan Corporation was interested in the reduction of the indebtedness, as such, of the home owner who procured the loan. The interest of the corporation in keeping the loan to the home owner within an amount which such home owner was likely to be able to pay was obviously for the expected benefit and protection of the corporation, and not, out of sympathy or for any other apparent reason, for the purpose of reducing the total indebtedness.

Incidentally, the words "mortgage" and "trust deed", as well as their related terms, are used synonymously in the within opinion.

In Stager v. Junker, 188 A. 440, 14 N.J. Misc. 913, December 14, 1936, the supreme court of New Jersey declared void an agreement between the mortgagor and the mortgagee to protect the mortgagee against any loss sustained by reason of the sale of the bonds at market value, if such market value

were less than the face value of the bonds. The decision recites the exact phraseology employed in the Jessewich Case, supra, the source of which phraseology is referred to in said last mentioned case as being contained in the "Information for Applicants to the Home Owners' Loan Corporation", which information, as heretofore noted in substance, was of no legal importance. There is no reference in the Stager Case to the Amendments to the Home Owners' Loan Act, § 8(e), approved May 28, 1935 (vol. 49, U.S.Stats. at Large, pp. 293, 298, § 21, 12 U.S.C.A. § 1467(e), which amendment to the act specifically prohibits any contract representing the payment of any difference which may exist between the market value and the par value of the bonds. The Stager Case is of no particular importance except as an apparent example of the relation that the decisions all appear to bear to the Jessewich Case, supra.

In Cook v. Donner, 145 Kan. 674, 66 P. 2d 587, 110 A.L.R. 244, by the supreme court of Kansas, April 10, 1937, the validity of a second note and mortgage executed in connection with a Home Owners' Loan Corporation loan was in issue. It appears that the mortgagee signed the same form of release as was signed by the mortgagee, defendant, in the case at bar. The court held that said second note and mortgage were out of harmony with the statute and rules authorizing the work of the Home Owners' Loan Corporation, showed bad faith, were against public policy, and therefore were null and void. The date of the release does not appear in the opinion. This case cites and quotes from the Jessewich Case, supra, the First Citizens Bank Case, supra, and the Stager Case, supra, and points out that [page 591]: "Many of the decisions specifically classify the work of the Home Owners' Loan Corporation as an emergency relief, and state that to sanction a violation of the spirit of the statute and rules would be against public policy."

In Ridge Inv. Corporation v. Nicolosi, 193 A. 710, 15 N.J.Misc. 569, the supreme court of New Jersey, on July 23, 1937, held on the issue as to the validity of the second note and mortgage executed under the circumstances herein under consideration, as follows: "We are unable to agree with the contention of the appellants that agreements for payments over and above the amount of the Home Owners' Loan Corporation mortgage are entirely void and illegal. The most favorable view of the statute and the cases thereunder cited would be that fraudulent agreements, made in collusion to induce the granting of the mortgage loan by the corporation, are unenforceable. As stated, the factual finding here is that there was no fraud or collusion, and that the arrangement was openly made with the knowledge of all parties, including the representative of the corporation."

In Bay City Bank v. White, 283 Mich. 267, 277 N.W. 888, the supreme court of Michigan, on February 24, 1938, held the second note and mortgage valid in a transaction involving the Home Owners' Loan Corporation where the second note and mortgage were secured by other and different property than that upon which the loan was secured from the corporation. Nevertheless the court cited and quoted from the Jessewich Case, supra, and as well cited the First Citizens Bank Case, supra, the Stager Case, supra, and the Ridge Investment Case, supra, but distinguishes these cases by pointing out that the transaction before the court so far as the plaintiff was concerned was in no way characterized by fraud, secrecy or collusion.

In a later case, Meek v. Wilson, 283 Mich. 679, 278 N.W. 731, the supreme court of Michigan, April 4, 1938, declared such a second note and mortgage, similar to the others herein mentioned, having been given in contravention of public policy should be set aside. In this case the court with regard to the Home Owners' Loan Act observes [page 734]: "Its purpose was not to assist holders of liens against the property, but to enable owners of homes to save their homes from foreclosure by advancing on first mortgages, sums to be used to pay off liens and to lighten the burdens of the home owners. Any benefit that might accrue to lienholders would be incidental. The H. O. L. C., in refinancing a home owner's obligations, sought to readjust them in accordance with his ability to make payments. The salutary effect of such a readjustment would be nullified if a lienholder were permitted, without regulation, to defeat the purpose of the Home Owners' Loan Act. An agreement exacted by a lienholder which tends to counteract the relief of the home owner sought by the act is contrary to the purpose of the act and to the regulations adopted thereunder. * * * Since the exacting of the second mortgage was contrary to the purpose of the act and to the regulations, it is contrary to public policy and unenforceable." The decision cites all of the cases hereinbefore reviewed.

The superior court of Pennsylvania considered the same question in Anderson v. Horst, 200 A. 721, in an opinion dated July 15, 1938, in which case the mortgagee had signed, on October 7, 1933, a release and an agreement to accept bonds of the Home Owners' Loan Corporation. In an action to foreclose the second mortgage the mortgagor defended on the ground that said second mortgage was in violation of the provisions of the Home Owners' Loan Act. In declaring the note and second mortgage void the court observed [page 722]: "The purpose of the Act was, by agreement of the parties, to create a novation and reduce the principal of the mortgage debt and the interest, and extend the term of the mortgage, so as to permit the home owner to remain in possession and by monthly payments, not considerable in amount, liquidate both principal and interest within fifteen years. * * * The purpose and intent was to relieve pressing conditions and give the home owner a chance to work out his salvation. This could not be accomplished if following the refunding, and as a condition for the mortgagee's consent to it, the home owner should be burdened by a re-assumption of the debt, or part of it, which had been settled and released. * * * We are of opinion, therefore, that an agreement between the mortgagee and the home owner, made without the approval of the Corporation, by which the home owner assumes or agrees to pay all or any part of the mortgage debt which had been settled and released by the refunding effected by the Corporation, is void as against public policy and will not be allowed to be enforced by the mortgagee. * * * This construction of the Act, and its effect upon subsequent agreements in conflict with or violation of its terms, is in accord with the great majority of the cases where the question has arisen." (Citing all of the cases hereinbefore reviewed, excepting only the Meek Case, supra.) In particular the opinion quotes from the Stager Case, supra, which as heretofore pointed out followed the Jessewich Case. In connection with a consideration of the foregoing decision, (the Anderson Case), attention is directed to the fact at this point that there is no provision in the Home Owners' Loan Act, nor in any of the rules and regulations adopted by the board of directors of the corporation, declaring the purpose of the act to be "to create a novation and reduce the principal of the mortgage debt".

A somewhat comprehensive but not unlimited research reveals but one case holding to the contrary of the above decisions. In Romano v. Magliulo, 154 Misc. 814, 278 N.Y.S. 986, March 18, 1935, the municipal court of New York, borough of Brooklyn, eighth district, upheld a judgment for services rendered in connection with the securing of a home loan, which contract for services it was contended by defendants was in violation of the Home Owners' Loan Act. In construing the act the court observed [page 990]:

"We come now to the portion of the services rendered after the acceptance of the application. This service consisted in negotiations to induce the holders of the mortgages to reduce the amount of their claims and resulted in a saving to the defendants of about $1,200. The freedom of contract is guaranteed by the Fifth Amendment to the Constitution, which includes the right to engage in honest and useful work or profession for compensation. [Citing cases.] The power of Congress to limit or curtail those rights is confined to cases where a sound public policy requires the protection of certain classes of individuals or the funds appropriated by Congress for their use. This is why limitations on the amount to be charged by attorneys under the Pension Act of June 27, 1890 (26 U.S.Stat. at Large, 182 [section 4 of the act, 38 U.S.C.A. § 324]), and under the Omnibus Claims Act of March 4, 1915 (38 U.S.Stat. at Large, 962), * * * have been sustained. [Citing cases.]

"The Home Owners' Loan Act 1933 makes no provision for the outright payment of money to any particular class. It simply provides a means for loaning money to home owners to an amount not exceeding 80 per cent. of the appraised value and in no case more than $14,000 on any one parcel of property. The loan bears interest and has to be repaid within a definite period of time. The loans are not limited to those who are improvident or incapable of properly protecting their own interests. The benefits of this act are open to all those who, because of the financial emergency, are unable to amortize their debt elsewhere. Public policy, therefore, does not require that this class of citizens be protected against extortion or improvident bargains. Indeed, the type of person who owns his own home is usually well able to make contracts and to fully protect his rights. This is not a case, therefore, where Congress may interfere

with the guaranties under the Fifth Amendment [U.S.C.A.Const. Amend. 5]."

The foregoing decisions may be regarded as representing the weight of authority, unless due to some deficiency or fault therein they lose that value as authority which would otherwise attach in the absence of such deficiency or fault. The dates of such decisions, as well as the dates of the releases or agreements providing for the additional security, are included for convenience in considering such decisions in the light of the rules and regulations of the corporation which, together with their effective dates, will hereinafter appear.

Returning now to a consideration of the facts in the case in general, and in particular to a consideration of the release and agreement to accept bonds hereinbefore referred to, such release, by reason of its importance, is herewith set forth in full. It is on a form supplied by the corporation.

"Mortgagee's Consent to Take Bonds"

"To Home Owners' Loan Corporation:

"The undersigned is a holder of a first mortgage or other obligation, which constitutes a *lien or claim on the title* to the home property of Charles and Elnora McAllister located at 1171-73½ E. 49th Street, Los Angeles, California, the sum of $———, including unpaid balance of principal and interest, to date.

"Being informed that said owner has made application to Home Owners' Loan Corporation to refund his said indebtedness, the undersigned has considered the method of refunding mortgages provided in Home Owners' Loan Act of 1933, as passed by Congress and approved by the President, and the undersigned hereby consents, if said refunding can be consummated to accept in full settlement of the claim of the undersigned the sum of $5850.00, face value of the bonds of Home Owners' Loan Corporation, to be adjusted with not exceeding $25 cash and thereupon to *release all the claim of the undersigned against said property.* We agree to accept Bonds in conformance with Home Owners' Act Amendment of April 28, 1934.

"It is understood that the Home Owners' Loan Corporation will incur trouble and expense in connection with its effort to refund the indebtedness of said home owner, and this consent is executed in consideration of the same and shall be binding for a period of 30 days from date, and thereafter until 10 days written notice shall have been given to the State manager of the Corporation.

"This, the 1st day of August, 1934.

"California Security Loan Corporation

"By E. E. Anderson

"Secretary.

"315 E. Colorado Street, Pasadena."

(Italics added.)

From a reading thereof it is at once evident that the release is required by the corporation for the benefit and protection of the corporation. At most it is but a declaration or offer which, if acted upon by the corporation, forecloses the mortgagee from thereafter asserting any claim as against the corporation on account of the original debt. It should be noted that the word "debt" is not used. It recites "The undersigned is a holder of a first mortgage or other obligation, which constitutes a *lien or claim* on the title", and further recites "* * * if said refunding can be consummated to accept in full settlement *of the claim* of the undersigned the sum of $5,850.00". (Italics added.) To construe such words to mean that the mortgagee intended thereby to cancel the entire debt clearly adds something to the writing which it does not contain. The obvious purpose of the requirement was to enable the Home Owners' Loan Corporation to acquire a first lien. As between the original mortgagor and the mortgagee, the release clearly signified no other purpose and could have no other legal effect, for obviously it was the intention of both such mortgagee and the mortgagor to secure the balance due on the original debt, which intention was conclusively established by the execution of the second note and trust deed.

[2-4] Respondents' contention, therefore, that the release constitutes an accord and satisfaction is refuted by the record. There is nothing in the release from which it can be inferred that the mortgagee intended to extinguish the obligation, and it is difficult to understand how the mortgagor can conscientiously assert such an intention on the part of the mortgagee after paying interest for a year and a half on the note secured by the second mortgage. Respondents' contention, therefore, that the above mentioned release or consent "to take the bonds of the H.O.L.C." was an accord and satisfaction, a release and a novation as to said note and trust deed, and relieved the McAllisters (respondents)

from any further obligations thereunder", may be disregarded as trifling.

Nor is there any mention in the release, or elsewhere in the evidence, of any intention on the part of the corporation that the mortgagee, by accepting bonds of the corporation, should cancel the balance due from the mortgagor on the original debt. If there can be any question as to the intention and attitude of the corporation in this regard such intention or attitude must be ascertained from the act itself, as well as from a consideration of the rules and regulations regularly adopted by the board of directors, in addition to a consideration of the release signed by appellant. The rules and regulations officially and regularly adopted by said board of directors of the corporation pertinent to the issues herein involved, at the expense of brevity, are herewith recited in full:

"(2) Homes, Mortgages and Other Obligations and Liens

"(b) Second Mortgages, Etc.

"The Corporation may take up second mortgages or other inferior liens, provided the same is done along with the first mortgage and the total is within the Act. *The Corporation has no means of preventing the home owner from undertaking to pay any indebtedness he may owe over and above that refunded by the Corporation and has no means of preventing his giving a second mortgage or other security for any such indebtedness.* However, State Managers *are directed, as a matter of policy in dealing* with home owners, to decline to conclude a refunding of a portion of the indebtedness against the home where the home owner is proposing to give a second mortgage for any excess indebtedness he may owe unless such second mortgage financing is so arranged that the home owners will have a reasonable probability of being able to carry his first mortgage to the Corporation and the second mortgage indebtedness." (Italics added.) (The foregoing was adopted September 8, 1933.)

"(11) Bond Exchanges.

"(c) Excess Claims or Payments:

"In the case of bond exchange loans, if the home owner owes more than 80 per cent of the value of his premises *he may remain indebted for that portion that the Corporation cannot refund, provided the Corporation secures a first lien, and he may secure the excess indebtedness with a second lien.* However, such refunding will not be carried through unless such excess indebtedness is placed on a payment basis so that the home owner will have a reasonable opportunity to pay the same and meet his obligations to this Corporation. The Corporation will not proceed to refund indebtedness for mortgagees who insist upon more in face value of bonds or who insist upon any other consideration (such as second mortgage, cash or other consideration) than the net amount owing to such mortgagee, together with accrued (sic) interest to date of exchange. The Corporation will not participate in any refunding where, by any means, the indebtedness of the home owner is increased or the home owner is being called upon to pay more than his debt with interest." (Italics added.) (The foregoing was adopted November 3, 1933.)

"Whereas it is the policy of Home Owners' Loan Corporation to endeavor to make complete settlement in the refunding of home mortgage indebtedness in all cases where such is possible, and

"Whereas second mortgages for excess indebtedness over and above that which the Corporation can refund are permitted *only in limited* cases and then only on a basis so that the Home Owner will have reasonable probability of being able to pay his full obligation to the Corporation and meet the terms of such second mortgage indebtedness, and

"Whereas it is necessary for each case to be considered on its merits and in the light of all the circumstances of the property involved and the applicant, therefore

"Be it resolved by the Board of Directors of Home Owners' Loan Corporation that the following principles be followed in *all cases where* the corporation can refund *only a portion of the indebtedness* against a home:

"(1) If the home owner's income is so reduced that he is unable to meet full amortization payments from the beginning on his obligations to the Corporation, the second mortgage shall not require any principal payments prior to June 13, 1936, and payments thereafter shall be on a schedule which the home owner may reasonably be able to meet.

"(2) In all cases where the home owner is able to meet his full amortization payments to the Corporation from the beginning and is able to make additional payments from the beginning on the second mortgage, then the second mortgage may

be amortized from the beginning, provided the payments thereon are not in excess of what the home owner may be reasonably able to pay and at the same time keep his obligation to the Corporation, making full amortization payments.

"(3) In cases where the home owner is a man of substantial means or is a man with substantial prospective income but is temporarily distressed so that it is proper for the Corporation to refund his indebtedness, *any second mortgage indebtedness may be placed on any reasonable basis.*" (Italics added.) (Effective January 9, 1934.)

"d. Liens Ineligible for Refinancing

"(1) Incidental Agreements.—The Corporation *will not refund* any indebtedness where the mortgagor is required to pay *more than he owes,* through agreements either to pay future interest to the original mortgagee, or to absorb any loss of interest by the original mortgagee, or to guarantee any difference between the face value of the bonds plus accumulated interest thereon and the market value of the same, *or to cover any assumed loss on account of acceptance of the bonds of the Corporation by the mortgagee.* The Corporation will not become a party to any contract between a mortgagor and a mortgagee in reference to indebtedness refunded by the Corporation.

"(2) *Second Mortgages.—Where the full amount of the indebtedness against the property cannot be refunded by the Corporation, the mortgagee or other lien holder will be permitted to take a second mortgage or second deed of trust if the amount of such second mortgage or deed of trust does not exceed the difference between the Corporation's appraisal and the amount of the Corporation's first mortgage.* In no case shall the second trust or second mortgage to such other mortgagee or lien holder be in terms which would cause the mortgagor's payments to the Corporation to be a hardship, or deprive the mortgagor of reasonable opportunity (sic) to pay such second mortgage or second trust." (Italics added.) (The foregoing was adopted October 10, 1934.)

[5, 6] Before continuing with a consideration of the intention of the corporation as to the release and agreement to accept bonds of the corporation, attention will be directed to certain phases of the act and to the rules and regulations adopted by the board of directors, which should be emphasized. First, the act itself declares its purpose, as hereinbefore set forth and referred to as the "preamble". Second, the board of directors is without power to change, alter or modify the purpose of the act, but has only such power and authority as the provisions of section 4 of the act, supra, 12 U.S.C.A. § 1463, confers; the board of directors was given power to prescribe by-laws, rules and regulations as specified therein "for the accomplishment of the purposes and intent of *this section*" and "to make such bylaws, rules and regulations, not inconsistent with the provisions of *this section,* as may be necessary for the proper conduct of the affairs of the Corporation". (Italics added.) Third, the act contains no provision declaring any violation of the rules and regulations adopted by the board of directors, on the part of anyone participating either directly or indirectly in the application for a home loan, to be an offense either penal or moral. Fourth, the Home Owners' Loan Corporation, although declared in the act to be an instrumentality of the United States, nevertheless, so far as the rights of the parties involved in the within appeal are concerned, is a private corporation, subject to the same right to sue or be sued in either the federal or state courts, as any other private corporation.

Summarizing in substance and effect the rules and regulations of the corporation hereinbefore set forth, it will be noted that the corporation asserts no authority to prevent the home owner from "giving a second mortgage" or other security for any such indebtedness, but to the contrary, permits the home owner to "secure the excess indebtedness with a second lien" provided the corporation secures a first lien. The corporation declared it to be the *policy* which at most is but the practical application of business judgment, in dealing with home owners to avoid refunding transactions involving second mortgages unless it appeared reasonably probable that the home owner could carry both mortgages. Such was the state of the law when the transaction involved in the within appeal was consummated. Later, to-wit, on October 10, 1934, the regulations were modified as hereinbefore noted to provide that the "lien holder will be permitted to take a second mortgage or second deed of trust if the amount of such second mortgage or deed of trust does not exceed the difference between the Corporation's appraisal and the amount of the Corporation's first mortgage".

[7] By taking the foregoing rules and regulations into account in connection with a consideration of the release signed by appellant, it is evident that the corporation had no intention of exacting from the mortgagee the cancellation of the entire debt. There is nothing either in the act itself, or in the rules and regulations, indicating an intention or purpose on the part of the corporation to condemn and to mulct the mortgagee, or to exact or expect from such mortgagee either unwillingly or willingly a contribution to charity. To the contrary, both the act and the regulations respect the liberty of contract as well as vested property and contractual rights. There is no intimation of an attempt to assist in the evasion of a lawful debt and this is as it should be, for any other policy would be inconsistent with common honesty and decency. The corporation had the right, as its declared policy provided, to inquire into the ability of the mortgagor to carry both the first and second mortgage, a question which addressed itself to the judgment of those officials of the corporation called upon to determine such questions. The failure of the corporation so to do is no concern of the mortgagors, who are the plaintiffs in the within litigation. There is no evidence in the record that the corporation has complained, and it should be emphasized that the corporation is not a party to the within action. Moreover, in this connection it should be noted that it has never been the policy of the law, when parties are dealing at arm's length and in the absence of fraud, to inquire into the wisdom of a bargain.

[8] The corporation, the mortgagors, and the mortgagee were all dealing at arm's length and there was no duty, either legal or moral, upon the part of the mortgagee to inform the corporation of an intention to secure the balance due on the original debt. The attempt, therefore, of the plaintiffs and respondents herein to base a cause of action on the alleged failure of the mortgagee to perform some duty assertedly owed to the Home Owners' Loan Corporation is unavailing. The major transaction was that which took place between the corporation and the home owner; the release of the original mortgage, to accommodate them, was incidental and in that regard there is no evidence in the record even tending to establish bad faith on the part of the mortgagee.

Referring again to the cases hereinbefore cited as authority in support of respondents' contentions, and considering them in the light of the rules and regulations of the corporation hereinbefore set forth—what justification can there be for the reference in those cases to second mortgages as "being made in violation of a statute" and "forbidden by the Home Owners' Loan Act"? Moreover, what justification can there be for a reference to the acts of the mortgagee in that connection as "trickery", "fraud and chicanery", "conspiracy to defraud", "interfering with the governmental function of rehabilitation", and "bad faith", and reference to the contract as a "collusive agreement" and "against public policy"? It is worthy of note that in none of the cited cases does it appear that the rules and regulations of the Home Owners' Loan Corporation, as hereinbefore set forth, are taken into account.

[9] With regard to the doctrine of "public policy", the Supreme Court of California has observed: "What is the 'public policy' of a state, and what is contrary to it, if inquired into beyond what its constitution, laws, and judicial decisions make known, will be found to be matter of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will differ." Wells, Fargo & Co. v. Enright, 127 Cal. 669, 673, 60 P. 439, 441, 49 L.R.A. 647. And again: "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." Stephens v. Southern Pac. Co., 109 Cal. 86, 89, 41 P. 783, 784, 29 L.R.A. 751, 50 Am.St.Rep. 17. "The power to invalidate agreements on the ground of public policy is so far reaching and so easily abused that it should be called into action only in case[s] where the dangerous tendency clearly and unequivocally appears from the contract itself. Courts are reluctant, therefore, to declare a contract void as against public policy, and will refuse to do so, if by any reasonable construction it may be upheld." Maryland C. Co. v. Fidelity, etc., Co., 71 Cal.App. 492, 497, 236 P. 210, 213. It has been affirmed, too, that "Before a court should declare a contract not malum in se opposed to sound public policy, it must be entirely satisfied that the public will be

substantially benefited, and that such advantage is not merely theoretical or problematical." Cox v. Hughes, 10 Cal.App. 553, 563, 102 P. 956, 960. And, finally, "* * * if there is one thing more than another, which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract, and that every contract, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by the courts of justice." Northwestern M. F. Ass'n v. Pacific Co., 187 Cal. 38, 44, 200 P. 934, 937.

Referring again, and in conclusion, to the Home Owners' Loan Act a consideration of its provisions scarcely warrants the inference that the act originated out of sympathy for the home owner; it is more reasonable to assume that its adoption was deliberately calculated on the basis of knowledge and experience. The home owner has long been regarded as a social, economic and political bulwark of national existence, and the argument that governmental assistance made available to tide such a class over a critical period would from a practical standpoint alone redound to the public good, may be difficult to rebut. Indeed, for the sake of argument it may be conceded, but from such concession it does not necessarily follow, that the Home Owners' Loan Act contemplated the benefit of one class at the expense and sacrifice of another.

[10, 11] From the foregoing the conclusion is inevitable that the mortgagee's consent to take bonds did not constitute a cancellation of the balance due on the original debt; that the second deed of trust and note were in entire accord with the Home Owners' Loan Act as well as with the rules and regulations adopted by the board of directors of the Home Owners' Loan Corporation; that said second trust deed and note were valid in every respect; that the mortgagee owed no duty to the Home Owners' Loan Corporation to inform such corporation of an intention to secure the balance due on the debt by means of a note and second trust deed; that no fraud or deceit was practiced by the defendant and appellant in connection with the transaction; that the doctrine of "public policy" is not applicable; and that the acts of the mortgagee in thus securing the balance due on the debt gave rise to no cause of action on any basis to cancel the note and second trust deed.

This being merely a suit asking that the note and second trust deed be declared void and praying that the said note and second trust deed be ordered delivered up and canceled, and asking for recovery of $275 heretofore paid on the said note, it is ordered, for the foregoing reasons, that the judgment appealed from be, and it is, reversed, and the court below is instructed to enter a judgment in accordance with the prayer of the amended answer, to-wit, "that plaintiffs take nothing by their complaint on file herein and that the answering defendants recover their costs of court incurred herein."

We concur: YORK, P. J.; WHITE, J.



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CITRON v. FIELDS.

Civ. 2150.

District Court of Appeal, Fourth District, California.

Dec. 20, 1938.

1. Physicians and surgeons ⇐24(3)

Testimony tending to show patient's ability to pay is admissible in physician's action for services rendered.

2. Evidence ⇐18

The value of professional services rendered by physicians is not a subject within scope of judicial notice.

3. Physicians and surgeons ⇐24(3)

Proper proof as to value of physician's services requires evidence of those familiar as experts with such work in particular locality.

4. Physicians and surgeons ⇐23

A physician is entitled to recover ordinary and reasonable charge usually made for such services as he has rendered by members of the same profession of similar standing.

5. Physicians and surgeons ⇐23

Usually, annual net income is evidence only of ability to pay, and hence is one element to be properly considered in matter

of determining whether reasonable value of physician's services performed, and fixing the value of services must be in light of other elements than ability to pay such as professional standing, capacity, and reputation of person performing services.

6. Evidence ⇐555

All elements that go into fixing reasonable value of services rendered by physician must be considered by an expert in expressing an opinion relative to reasonable value of professional services performed.

7. Evidence ⇐553(1, 4)

A hypothetical question which assumed that patient's income was $6,000 per week, that he had an accumulated surplus of about $700,000, and that patient was a prominent motion picture star, was incompetent where $6,000 salary was discontinued on certain date and there was no showing how long that sum had been paid or that it was revived, or what patient's net income was and question left out of consideration matters of training, skill, experience, and professional standing of physician suing for services and assumed without evidence that patient was a motion picture star.

8. Physicians and surgeons ⇐23

The vocation of the patient is not an element in fixing of reasonable charge against him for medical services rendered.

9. Evidence ⇐543(2)

A witness, who had no knowledge of customs and practice of medical profession in fixing reasonable value of services in community where services were performed and where physician seeking to recover compensation for services practiced, did not qualify as an expert to express an opinion thereon.

10. Appeal and error ⇐1048(1)

The admission of testimony of a witness who did not qualify as an expert, in answer to hypothetical question which assumed facts not proven by evidence, that charge for professional services should be between 5 and 10 per cent. of patient's net income, constituted prejudicial error.

11. Physicians and surgeons ⇐23

One of the elements in determining proper amount to be charged for reasonable value of services rendered by physician is his standing in his profession in the community.

12. Physicians and surgeons ⇐24(3)

In physician's action to recover value of services rendered, testimony as to earnings of physician and his customary charges during a reasonable time prior to rendering of services should have been admitted.

13. Appeal and error ⇐931(1)

The construction to be given to evidence on appeal must be that which will support judgment of the court if reasonable conclusions based thereon so warrant, and any conflict in testimony must be resolved against the appellant.

14. Evidence ⇐474(17), 543(2)

A person who renders services is competent to testify as to their value.

15. Physicians and surgeons ⇐23

The measure of value of services rendered by physician is not the value to the patient, but the reasonable value of services in the community where they were rendered by person who rendered them.

16. Physicians and surgeons ⇐23

Evidence did not sustain finding that $12,000 was reasonable value of services rendered by physician to motion picture actor for 23 days while afflicted with pneumonia.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Jesse Citron against W. C. Fields to recover for services rendered by plaintiff, a physician. From a judgment for plaintiff, defendant appeals.

Reversed.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellant.

Frank S. Hutton, of Los Angeles, and Albert H. Ford, of Riverside, for respondent.

WARMER, Justice pro tem.

Plaintiff and respondent herein is a practicing physician in the state of California, and has his office in Hemet, Riverside county, a town of about 3000 population. Defendant and appellant herein is an actor.

Sometime prior to June 12, 1936, appellant was temporarily living at Saboba Hot Springs, a few miles distant from Hemet, and was a patient of respondent. Respondent was paid for his services up to that date.

On June 12, 1936, respondent was called to attend appellant and found him to be a very sick man, suffering from bronchial pneumonia. Appellant was afflicted with

polyneuritis and Paget's disease and was in the habit of drinking whiskey day and night, consuming from one to two quarts each twenty-four hours. He was a man fifty-six years of age and in a very serious condition, due primarily to the pneumonia. Respondent advised hospitalization at once, to which appellant agreed, upon the express condition that respondent would go with him to the hospital and remain with him as long as he remained there, and if consultants were called, respondent was to remain in charge of the case.

Appellant was taken to the Riverside Community Hospital in an ambulance and respondent arranged for a consultant who was a specialist in the diseases of the chest. Later, he arranged for a further consultant or specialist in the treatment of pneumonia. All agreed that the appellant had a very slight chance of recovery from pneumonia alone at his age, and less chance because of his drinking habits, his affliction with polyneuritis and Paget's disease.

Respondent testified that appellant left the hospital cured of the pneumonia July 5, 1936. That he left cured is disputed by rather convincing evidence.

The respondent began practicing his profession at Hemet, California, in 1931. Immediately before that time he had practiced at Beverly Hills, California, for a period of twelve years, specializing in obstetrics. After moving to Hemet, California, his license to practice medicine and surgery was revoked by the State Medical Board in October, 1932, and such revocation was vacated in February, 1934, on certain terms and conditions. He has been practicing his profession since that date at Hemet. During the early part of his practice in Hemet, a large percentage of his patients came from places outside of the vicinity of Hemet, but during the latter part, most of his patients came from Hemet and vicinity.

During the time respondent was in attendance upon the appellant at the Riverside Community Hospital he occupied a room immediately adjoining the room occupied by the appellant. His board and room were paid for by appellant. During said time he made one or two trips a week from the hospital to his home at Hemet for the purpose of securing changes of clothes, and made a trip to Arrowhead Hot Springs to determine if it would be a satisfactory place to take appellant when he was able to leave the hospital.

Respondent had another patient at the Riverside Community Hospital during said time under his personal care, an obstetrical case. This patient was admitted to the hospital on June 21, 1936, and left on July 4, 1936.

During the early part of the time that respondent was in attendance upon appellant at the hospital, aside from the consultations hereinbefore mentioned, he made more or less frequent trips to the room occupied by the appellant in the discharge of his duties as a physician, sometimes in answer to a call from the nurse or patient, and on a few occasions, as early as six or seven o'clock in the morning.

There is considerable in the record concerning the respondent's treatment of and attendance upon appellant. Appellant went from the Riverside Community Hospital to a sanitarium in Los Angeles county for care and treatment, where he remained for a considerable time.

A doctor called by the appellant as an expert witness, who was familiar with the customs and practice of physicians and surgeons in the community of Hemet and Riverside county in fixing their charges, testified in response to a hypothetical question that the reasonable value of the services performed in the case at bar was between $1,000 and $2,500.

Respondent brought this action for the sum of $12,000, alleging it to be the reasonable value of the services rendered. After trial, judgment was rendered by the court for the sum prayed for, to wit, $12,000.

Defendant appealed, and specifies among other things, error in the admission or rejection of evidence and that the evidence is insufficient to support the findings and judgment.

First we will consider the admission of certain expert testimony intended to prove the reasonable value of said services.

The testimony on the point here under discussion is that sometime about the middle of May, 1936, respondent had a conversation with appellant at appellant's apartment at Saboba Hot Springs, in which the appellant told respondent:

" 'They are trying to cut me off from my income.' * * *

"Q. You will please state what was said by Mr. Fields concerning his income to you at that time. A. He stated, 'They are

trying to cut me off from my contract which I am getting $6,000 a week.' I said, 'Are you still getting it?' He said, 'Yes, I have been getting it ever since I left the studio. They are trying to cut me off. That was why they are trying to send this fellow out here, to find if I can recover, so they can cut me off.' I said, 'Well, Bill, when the doctor comes, we will see whether he has to report it. He probably will make a report, and then you can tell.' And subsequent to that examination, and after that examination, I understood that on June 1st he was taken off of his income for a certain period of time until he would show whether he was going to be able to return to the studio or not. * * * I said, 'Well, you have other income; you won't miss it,'—after I found out that he was taken off. I said, 'You have some stocks and bonds, haven't you?' He said, 'No, I don't own a piece of real estate, or any stocks or bonds. I have got $700,000 in banks all through the country, and I have got to live off that while I haven't got this income.' "

We have quoted the above testimony as being all of the evidence offered by respondent relative to the income of appellant. His income of $6,000 a week was a drawing account that was terminated on June 1, 1936. The record does not disclose whether the weekly payment was ever restored to appellant. It does not disclose when the payment of $6,000 per week began. It was further shown by the appellant's testimony that he was under a contract with a studio to make three pictures at the rate of $100,000 a picture, and that the $6,000 per week was to be applied upon the payment of the same. His net annual income for the year 1935 was $57,687.51 and for the year 1936 it was $82,238.93, as shown by federal income tax returns.

It would therefore appear from the above testimony that it sufficiently shows that the appellant had the ability to pay for the reasonable value of the services rendered.

Respondent called as an expert witness a physician from another county, to wit, Santa Monica, in Los Angeles county, who stated he was familiar with the various methods used by physicians and surgeons in determining the just and fair charges for services rendered. He had never practiced in Riverside county and knew nothing of the practice or customs of physicians there. Respondent's counsel asked this witness:

"Will you please state to the court the various factors entering into the determination of a just and fair charge?" To which the witness replied: "The two main factors are the difficulty and the amount of work represented in the case; and second, the ability of the patient to pay. The ability of the patient to pay depends primarily upon his net income, and as to whether or not he has dependents.

"The Court: When you speak of the difficulty encountered, do you consider the responsibility of the case? A. Very definitely.

"Q. (By Mr. Hutton): Doctor, assume that the patient is a man fifty-six years of age suffering from Paget's disease, and a man who has been in the habit of using up to two quarts of whiskey a day, was taken with bronchial pneumonia, the patient being a prominent motion picture star with a reputed income of $6,000 per week and with an accumulated surplus in the neighborhood of $700,000, the doctor in attendance being in constant attendance upon the patient day and night from June 12, 1936, to July 5, 1936, and the patient having made a complete recovery from the pneumonia, what would in your opinion be a fair and reasonable charge for the services rendered by the physician?"

The question was objected to as incompetent, irrelevant, and immaterial; that it assumed facts not in the evidence; that no proper foundation was laid for it; and that the portion of the question that asked the doctor as to the basis on which a charge is made is incompetent, irrelevant, and immaterial, and calls for the conclusion of the witness upon a matter not in issue. The objection was overruled after argument by counsel. The witness testified:

"A. It is my opinion that the charge should be somewhere between five or ten per cent of the net income.

"Q. That is, the annual net income? A. Yes, sir." The witness said he was not familiar with medical practice in the so-called Hemet valley or Riverside county and had never practiced there, and that he was not familiar with the customs and practices of physicians and surgeons in that community in the matter of fixing the reasonable value of services rendered.

[1-5] Testimony tending to show a patient's ability to pay is admissible, Zumwalt v. Schwarz, 112 Cal.App. 734, 297 P. 608. The value of professional services render-

ed by physicians is not a subject of general knowledge or within the scope of judicial notice. Proper proof as to the value of a physician's services requires evidence of those familiar as experts with such work in a particular locality. In re Watzek's Estate, 211 Wis. 50, 247 N.W. 330; 21 R. C.L., p. 415, sec. 57. A physician is entitled to recover the ordinary and reasonable charge usually made for such services as he has rendered by members of the same profession of similar standing. 48 Corpus Juris, p. 1166, sec. 188. There is a difference between ability to pay and an annual net income. However, annual net income may be in such an amount that, when related to the amount claimed, proof thereof would establish the ability to pay the claim. Usually, annual net income is evidence only of ability to pay, and therefore is one element to be properly considered in the matter of determining what is the reasonable value of services performed. Fixing the value of services must be in the light of other elements than ability to pay, such as professional standing, capacity, and reputation of the person performing the services. In other words, his capabilities as measured by all of the elements that go into the demand for his personal services must be taken into consideration, as well as the difficulties of the problem presented and the amount of time necessarily occupied in the consideration thereof, etc.

As can readily be seen, one who has just been licensed to practice could not have established within a community, public opinion or demand for his services that would justify a charge equivalent to a charge that would be made by a Mayo, although he might in a given instance prescribe the same treatment and direct the same care of the patient. Nor could a surgeon who was performing his first operation be considered to have demonstrated his capacity to justify a fee therefor in an amount equal to one of the outstanding surgeons of the world, although the results of such operation might be entirely satisfactory.

[6] Furthermore, when a doctor possesses a rare gift in the matter of professional accomplishments and the demand for his time and services becomes very great, he is entitled to a greater compensation than as though such were not the fact. All of the elements that go into fixing the reasonable value of services must be considered by an expert in expressing an opinion relative to the reasonable value of the professional services performed. Respondent was a general practitioner, with no special training or experience proved in treating pneumonia.

[7, 8] The hypothetical question we are considering assumes that appellant's income was $6,000 a week. While it appears that at one time he received that salary it was discontinued on June 1, 1936. There is no showing as to how long that sum had been paid appellant and nothing to indicate that it was revived. There was nothing either in the question or the evidence introduced up to that stage of the trial to indicate the net income of appellant. The question left out of consideration the important matters of the training, skill, experience, and professional standing of respondent. The hypothetical question further assumed that the appellant was a prominent motion picture star, without any evidence to support it. The vocation of the appellant is not an element in the fixing of a reasonable charge against him. The reasonable charge would be the same whether he was a motion picture star, a banker, or a rancher. It therefore appears that the objection should have been sustained.

[9] The witness, having no knowledge of the customs and practice of the profession in fixing the reasonable value of services in Hemet and Riverside county, the community where the services were performed and where the respondent practiced, did not properly qualify as an expert witness to express an opinion thereon. In re Watzek's Estate, supra; Scanlon v. Anderson, 49 R.I. 470, 144 A. 146. Therefore, the objection to his testimony as an expert should have been sustained.

In the case of Merchants' Collection Agency v. Gopcevic, 23 Cal.App. 216, 137 P. 609, the trial court said [page 611]: "The court adopted the view that the services were performed for appellant, but it rejected the theory of an express promise to pay $10 an hour or $240 a day. Of course any conscientious judge would require the most convincing evidence of such contract before he would allow an enormous charge like that. Nor is it likely that he would hold $6,960 to be a reasonable charge for the services, even of a physician, for 29 days."

[10] Under the circumstances before us, it would appear that the learned trial judge must have given great probative value to the evidence of such witness in fixing as the reasonable value of the services of the respondent herein the sum of $12,000, for the period of time from June 12 to July 5th, or twenty-three days, or over $500 per day, and the admission thereof constituted prejudicial error.

[11] The appellant sought to show by the examination of the respondent what his earnings were for the three years immediately preceding 1936 (being the years immediately preceding the one in which the services were rendered which give rise to the present action). This was objected to as incompetent, irrevelant, and immaterial. The objection was sustained. Objections were also sustained to questions seeking to elicit from respondent his customary charges for calls and services to patients. Counsel have cited no case in this state that determines this precise question and we have found none. However, it may be said that one of the elements in determining the proper amount to be charged for the reasonable value of services rendered by a physician is his standing in his profession in the community. In Davis v. Webber, 66 Ark. 190, 49 S.W. 822, 45 L.R.A. 196, 74 Am.St.Rep. 81, it is stated that [page 826]: "The professional standing of the attorney, the amount of his professional business, and the nature and importance of the controversy in which the services were rendered, are all to be considered."

In Phelps v. Hunt, 40 Conn. 97, at page 100, the court said: "The value of professional services may depend, very considerably, upon the character and standing of him who performs them. * * *"

See 2 R.C.L. p. 1059, sec. 145.

In Sills v Cochems, 36 Colo. 524, 85 P. 1007, the court said:

"But one question is presented for determination in this case: Is testimony tending to show that plaintiff was busily engaged in the practice of his profession admissible in an action brought by a physician to recover judgment for the value of professional services rendered, where the price to be charged for such services was not agreed upon?

"It is said that 'when an attorney sues upon a quantum meruit for professional services, his professional standing is a proper subject of inquiry as affecting the value of his services. And the amount of his professional business may be inquired into, as tending to show his professional standing.' Weeks on Attorneys at Law, 681; Phelps v. Hunt, 40 Conn. 97. Counsel has called our attention to no case, and we know of none, wherein it is held that a different rule should obtain in determining the value of a physician's services. The same reasoning which prompts the doctrine as to attorneys seems to warrant its application to physicians. The value of professional services may depend very considerably upon the character and standing of him who performs them. In the first place, there are diversities of gifts. The period of time passed in the profession, the experience acquired, degree of skill, and the faculty of using professional knowledge make great differences in individuals. The services of some are worth more than the services of others, because they will command more. Should a question arise as to the value of services, in an action brought by a physician to recover fees, where the nature of the services performed makes the possession of certain qualifications to constitute an important element in the value of those services, as in this case where the plaintiff was called because of his peculiar skill as a diagnostician, evidence of professional standing is clearly admissible and is entitled to consideration.

"The fact that plaintiff was extremely busy tends to show his professional standing, and tends to show, in connection with other testimony concerning the length of time he had practiced medicine in that community, his experience, which gave him the requisite knowledge and ability to properly diagnose and prescribe the necessary medicines for diseased persons. If constant practice in the art of his profession renders a practitioner more capable than he otherwise would be, the extent of such a practice is a matter which may be properly inquired into for the purpose of determining the value of the services rendered."

[12] The professional standing of the respondent was one of the elements properly to be considered in determining the reasonable value of the services rendered. The earnings of the respondent and his cutomary charges were also proper subjects of inquiry to aid in determining his professional standing and the reasonable

value of the services rendered. We think the testimony as to the earnings of the respondent and his customary charges during a reasonable time prior to the rendering of the services should have been admitted. The sustaining of the objection was prejudicial error.

The appellant argues that there is no evidence to sustain the finding that $12,000 was the reasonable value of the services for the period between June 12, 1936, and July 5, 1936.

[13] The rule is well settled that "In considering the testimony it should be remembered that the construction to be given to it must be that which will support the judgment of the court, if reasonable conclusions based thereon so warrant, and that any conflict in the testimony must be resolved against the appellant." Holder Lumber Co. v. Scarborough, 28 Cal.App. 152, 151 P. 674.

[14, 15] Applying this rule, we must look to the record to ascertain if there is any substantial evidence to sustain the judgment, and if so the appellant must fail on this point. The only evidence on this question in the record, other than that which we have considered, is found in the testimony of respondent in rebuttal, as follows:

"Q. (By Mr. Hutton, respondent's counsel): Doctor, I asked you a question as to what bills you rendered to Mr. Fields for your services, and you stated to me $12,000. A. I did.

"Q. Was that the reasonable charge for the services you rendered to Mr. Fields in this case? A. Much less than the services are worth.

"Q. Less than the reasonable value? A. Yes, sir."

It further appears from the testimony of the respondent, during the course of his direct examination, that his counsel asked him: "Will you please state in money what the reasonable value, in your opinion, was for the services that you rendered to Mr. Fields? A. One twelfth of his annual income."

A person who renders services is competent to testify as to their value. Rosenow v. Wiener, 11 Cal.App. 294, 104 P. 839; Merchants' Collection Agency v. Gopcevic, supra. However, if the question meant the value of the services to Mr. Fields, it was improper, as the measure of the value of services is not the value to the appellant but the reasonable value of the services in the community where they were rendered, by the person who rendered them. 48 Corpus Juris, p. 1171; 21 R.C.L. p. 415, sec. 57.

An examination of the above-quoted testimony of the respondent on the question of reasonable value of services shows that even in the mind of the respondent he was considering that the value of his services was so related to the annual net income of the appellant as to form one whole, incapable of separation. As he stated, "one-twelfth of the annual income," and when pressed for an answer in dollars, he replied in effect that the bill for $12,000 was much less than his services were worth. And further, when his counsel asked him, "Less than the reasonable value?" he answered "Yes." Does such testimony, standing alone, constitute substantial evidence of the reasonable value of the services?

In Herbert v. Lankershim, 9 Cal.2d 409, at page 471, 71 P.2d 220, at page 251, the Supreme Court said:

"There must be more than a conflict of mere words to constitute a conflict of evidence. The contrary evidence must be of a substantial character, such as reasonably supports the judgment as applied to the peculiar facts of the case. The rule announced in Morton v. Mooney et al., 97 Mont. 1, 33 P.2d 262, correctly states the rule which has been approved by this court in a number of our decisions. It is thus stated:

" 'While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court (Grant v. Chicago, etc., R. Co., 78 Mont. 97, 252 P. 382), and in determining this question "the credulity of courts is not to be deemed commensurate with the facility and vehemence with which a witness swears. 'It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude its judgment.' " '

"The rule in cases such as the one before us is that the court must view the transaction with the 'most scrutinizing jealousy.' This means, of course, any court in which the issue may be raised."

It is clear from the record that respondent went into the trial court with the fixed idea that appellant's annual net income was

very large and that one-twelfth of this income would be more than twelve thousand dollars. He started to try his case on that theory. In his own testimony and that of his expert witness he based the reasonable value of his services solely on a percentage of the annual net income of appellant. When he realized that this annual net income for 1936 was only about $82,238.93, which would make his fee about $6,853.25, at the most, he then changed his theory and testified that the reasonable value of his services was more than $12,000.

Of course, under ordinary circumstances, this would be some evidence to support the judgment. However, a study of the record does not convince us that this should be classed as an ordinary case. Respondent stands impeached by his own testimony and the evidence furnished by him. He testified that for his treatment of appellant at Soboba he charged at the rate of $20 an hour for day visits and $30 for night visits. This is contradicted by the bills he rendered and which were paid. He first testified that the reasonable value of his services were one-twelfth of appellant's annual net income. Translated into dollars and cents, this is testimony that his services were reasonably worth about $6,853.25. Without excuse or explanation, he then testified that the same services were reasonably worth more than $12,000. In view of the unreliability of this witness, we must regard much of what he said as "mere swearing" (Herbert v. Lankershim, supra), which cannot be regarded as substantial evidence supporting the rather remarkable judgment of $12,000 to a physician whose past history in his profession is not without serious blemish and who was protected from any cross-examination on his usual charges and his actual earnings in his profession.

[16] We regard these errors of refusing reasonable cross-examination of respondent on the financial returns from his practice and his usual charges as most serious, in view of the very large judgment given him which must shock the conscience until supported by more substantial evidence than now appears in the record.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

29 Cal.App.2d 699

TROMBLEY et ux. v. KOLTS.

Civ. 11621.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1938.

1. Limitation of actions ⇐197(1)

Evidence, in action against surgeon for negligence in performing operation, viewed in light of plaintiff's offer of proof, *held* sufficient to require denial of defendant's motion to exclude further testimony on ground that undisputed evidence showed that cause of action was barred by one-year statute of limitations. Code Civ.Proc. § 340, subd. 3.

2. Evidence ⇐591

While party may show by one witness what is opposed to another witness' testimony, he cannot say for his own advantage that his own testimony shall be treated as false and that of opposing witness as true.

3. Limitation of actions ⇐55(6)

The one-year statute of limitations did not commence to run against patient, suing surgeon for negligence in leaving skin clip in plaintiff's body after operation, until termination of relationship of physician and patient between parties, but was tolled during all of time plaintiff was under defendant's care and consulted with him only concerning condition produced by presence of such clip, which he assured plaintiff would never cause her any trouble. Code Civ.Proc. § 340, subd. 3.

4. Limitation of actions ⇐55(6)

A right of action for continuing tort is also continuing.

5. Appeal and error ⇐926(5)

Evidence set forth in plaintiffs' offer of proof must be deemed true as stated in offer on appeal from order granting defendant's motion to exclude further testimony and judgment for defendant.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Floyd B. Trombley and his wife, Ethel E. Trombley, against Dr. Robert Kolts, to recover damages for negligence in performance of an operation on plaintiff wife. From a judgment for de-

fendant and orders granting defendant's motion to exclude further testimony and denying plaintiff's motion for a new trial, plaintiffs appeal.

Appeals from orders dismissed, judgment reversed, and cause remanded for a new trial.

Eugene L. Wolver, of Los Angeles, for appellants.

Armand H. Blum and Donald Kolts, both of Los Angeles, for respondent.

WHITE, Justice.

This action is one for damages against the defendant and respondent, a physician and surgeon, based upon certain acts of alleged negligence upon the part of respondent in the performance of an operation upon one of the plaintiffs. The plaintiffs are husband and wife. In their amended complaint they alleged that on the 24th day of January, 1932, plaintiffs employed the respondent as such physician and surgeon to perform an operation upon the plaintiff Ethel E. Trombley. It is further alleged that thereafter, to-wit, on the 12th day of February, 1932, the respondent, pursuant to said employment, undertook to and did perform a surgical operation upon the said Ethel E. Trombley, and that while performing said operation or during the post-surgical care rendered thereafter by respondent, he caused a skin clip to drop or fall and become placed in the body of said Ethel E. Trombley. It is further alleged that thereafter, upon the advice of respondent, Ethel E. Trombley obtained certain treatments from a person not a physician and surgeon; that as a prerequisite to such treatments X-rays were taken, after which respondent was informed that the X-rays indicated the presence of a foreign body, namely, the skin clip, within the body of said appellant Ethel E. Trombley. It is further pleaded that upon her inquiry of respondent as her physician and surgeon concerning the effect of said skin clip within her body, she was informed by respondent that the same would have no ill effect or detriment, and that she would not thereafter be caused any trouble, injury or ill effect by reason thereof. It is further alleged that respondent was the only physician and surgeon who treated or advised her in regard to the skin clip until the 12th day of October, 1934, when she was otherwise advised by another physician and surgeon concerning the deleterious effects upon her health as a result of the skin clip's remaining within her body. It is also set forth that from the time she first consulted respondent concerning the presence of the skin clip in her body up until the aforesaid date in October, 1934, Ethel E. Trombley relied upon respondent's statement and believed the same to be true. It is then charged upon information and belief that when respondent made said statements he knew the same to be false and incorrect, and that the same were made for the purpose of misleading and concealing from appellants the ill effect and detriment to the health of appellant Ethel E. Trombley that would result by reason of said clip's remaining in her body.

By his answer respondent denied the material allegations set forth in the second amended complaint, and in addition thereto offered as affirmative defenses that the appellants' cause of action was barred by section 340 of the Code of Civil Procedure; that appellant Ethel E. Trombley was guilty of contributory negligence in that she failed to exhibit said X-rays to respondent; and that appellants' cause of action was further barred by section 339 of the Code of Civil Procedure; and as a final defense respondent alleged that in June, 1933, appellant Ethel E. Trombley placed herself under the care of physicians and surgeons other than the respondent herein, which physicians and surgeons were advised of the existence of the skin clip in the body of said appellant and rendered "certain medical treatments relating to said clip", all of which, it is alleged in respondent's affirmative defense, transpired more than one year prior to the institution of appellants' suit.

It will be noted from the allegations of the second amended complaint that respondent undertook to perform said operation on February 12, 1932, at which time, or during the post-surgical treatment following, he caused said skin clip to become embedded in plaintiff's body, and which said skin clip was not removed until October, 1934, a period of some thirty-two months. The statute of limitations pleaded by respondent provides that an action for injury caused by the wrongful act or neglect of another must be commenced within one year from the date of the injury. Code Civ.Proc. § 340, subd. 3. The position of the respondent, which was sustained by the trial court as indicated by the findings of fact, is that the negligence of respondent, if any existed, by reason of

his failure to remove the skin clip from the body of appellant Ethel E. Trombley, occurred on or before the time when she sought and obtained the services of other physicians and surgeons, and placed herself under their professional care, which it is claimed was more than one year prior to the commencement of this action. It should furthermore be stated that the second amended complaint shows that the plaintiffs' ignorance of their right to commence this action was due directly and solely to the conduct of respondent and to the advice given by him to the effect that the presence of the foreign substance or skin clip in the body of Ethel E. Trombley would not injuriously affect her health.

At the trial of the cause, upon the conclusion of the testimony of appellant Ethel E. Trombley and before plaintiffs had rested their case, the trial judge stated that he would entertain an objection to the introduction of any further evidence. This objection accordingly was made by respondent's counsel on the grounds "that the undisputed and uncontradicted evidence in this case shows that this lady, the plaintiff in this case, was under the care of other physicians and surgeons, namely, those in the General Hospital, who had actual knowledge of the existence of this foreign body, this foreign substance in her body, for over a year and a half prior to the institution of the suit. And she placed herself under the care of other physicians who rendered her services; that she had no longer a right to rely upon any representations, if any, false or otherwise, alleged to have been made or made by defendant in this case * * * the undisputed facts show the plaintiff is barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure." When the court sustained this objection, but before the dismissal of the jury, appellants made an offer of proof, naming the witnesses, including Ethel E. Trombley, who would testify:

"That she had no information, advice or other knowledge from any other doctor in regard to the clip or the effect of the clip until after the second operation of Dr. Smith, namely, in the month of October, 1934. I offer to prove by other witnesses, that the defendant, Dr. Kolts, admitted that he had seen the X-ray. I offer to prove that by the witness Swanson, and also the condition of mind of Ethel Trombley at all times, that she relied on the statements and advice of Dr. Kolts. I offer to show the condition of mind which I offer to prove by the witness Mrs. Hickerson, that the witness accompanied the plaintiff, Ethel Trombley, together with the first two X-rays, exhibits 1 and 2, to the office of Dr. Kolts, and waited in the waiting room while Mrs. Trombley went into the private office of Dr. Kolts with the two X-rays; that upon coming to the door she heard the conversation between the two, in substance as follows: 'Mrs. Trombley, you need not worry. You will not be caused any ill effect.'

"I offer to prove by the witness Dr. Wilburn Smith, that the leaving of a clip in during an operation is a negligent act; that the leaving of a clip in during the post-surgical care is a negligent act; that at the time the supposed conversation was had at which the two X-rays were used by the defendant, Dr. Kolts, it was the general knowledge of physicians and surgeons in this community that a foreign body in the person of a party in the same physical condition as Mrs. Trombley, would thereafter cause infection and be detrimental to her health.

"I offer to prove that he operated upon her for a cyst the first time; that he did not discuss the clip with her until after the second operation, at which time he informed her that the clip was the cause of her trouble.

"I offer to prove also by this witness the condition of the mind, and the frame of the mind of the plaintiff, Ethel Trombley, just prior to this operation in 1934, to-wit, that at that time she had full reliance in the statements of the defendant, Dr. Kolts, that the clip would not cause any detriment or ill effect to her health.

"I further offer to prove that a clip in this condition will cause pain and suffering, and that in order to protect the health of Ethel Trombley, it was necessary subsequently to operate upon the plaintiff, Ethel Trombley; that such operation will entail an expenditure, hospital expenses necessarily incurred, and that the reasonable value of the same will be—well, I won't make any offer of proof of reasonable value. I don't know what they will ask for it, but an operation will be necessary.

"I offer to prove by the witness, Dr. Wilburn Smith, that by reason of this clip, and the existence of this clip in the tissue, that the tissue has swollen and become enlarged, and such enlarged tissue

even though the clip be removed, will forever result in a permanent injury to the person and detriment to the health of Ethel E. Trombley.

"I now offer to prove, your Honor, by the defendant under section 2055 [code Civ. Proc.] that he had a conversation with Mrs. Trombley; that he knew of the existence of this clip; that he at that time and place knew that the same was in her person by reason of the X-rays, and would cause detriment and ill effect to her health; that he concealed such fact for the purpose of preventing her bringing an action for malpractice or other choses in action against him; that he waited for approximately one year or more after the performance of the operation in order to give her a letter to the General Hospital, although his bill had not been paid for a considerable time prior thereto, in order that a year would have elapsed after the operation performed by him and Dr. Basher—by him. Strike out Dr. Basher.

"That he thereafter, after the conversation wherein the plaintiff informed him that X-rays had been taken, and the foreign body had been found in the X-rays, saw the plaintiff on several occasions, but made no further requests to see the X-rays, nor did he thereafter make any requests to her.

"I further offer to prove by the defendant, as an adverse witness under section 2055, that the defendant thereafter consulted with and advised the plaintiff until the month of September, 1934.

"I will further offer to prove that at the time the alleged conversation was had in November, at which time—the two X-rays —he knew that there was a clip, and that said clip would have an ill effect and be a detriment to her health. May the record show that the witnesses under subpoena would so testify."

Objection to the offer of proof being sustained and the jury being discharged, the court made findings as follows: "That the undisputed and uncontradicted evidence, as shown in the evidence, and proof introduced by the plaintiff Ethel E. Trombley, discloses that for more than one year prior to the institution of suit by plaintiffs that the plaintiff, Ethel E. Trombley, was under the care, observation and treatment of other physicians and surgeons other than the defendant herein, which said physicians and surgeons knew and Ethel E. Trombley knew of the existence of said alleged 'skin-clip' in the body of the plaintiff, and more particularly described in the Second Amended Complaint on file herein."

From which findings the court concluded as a matter of law that the plaintiffs' cause of action was barred under and by reason of the provisions of section 340, subdivision 3, of the Code of Civil Procedure. Judgment was accordingly entered in favor of respondent and against appellants herein, from which judgment, as well as from the order by which respondent's motion to exclude further testimony was granted, and from the denial of appellants' motion for a new trial, this appeal is prosecuted.

[1] Appellants first contend that the evidence adduced at the trial, up to and including the making of respondent's motion, did not disclose that the cause of action was barred by the statute of limitations. We find ourselves in accord with appellants' claim in this regard. And when viewed in the light of the offer of proof, the evidence was amply sufficient to require a denial of the motion. Respondent urges that the offer of proof adds nothing to appellants' cause because the testimony of Mrs. Trombley showed that the cause of action was barred by the statute of limitations and that where appellants' own evidence showed that their cause of action was barred, no useful purpose would be served by taking additional testimony, by reason whereof the trial court was correct in discharging the jury and rendering judgment for respondent. Edgecomb v. Callahan, 132 Cal.App. 248, 22 P.2d 521.

[2] It is undoubtedly true that while a party is at liberty to show by one witness what is opposed to the testimony given by another, this will not permit such party for his own advantage to say that the testimony given by himself shall be treated as false and that of an opposing witness as true. However, in the instant case, we have carefully read the testimony of appellant Ethel E. Trombley and find therein nothing that militates against the right of appellants to bring this action at the time it was instituted. The testimony of Mrs. Trombley showed that following the operation and the supposed removal of the skin clips from the incision, she remained under the post-surgical care of respondent doctor, during which time she complained to respondent that she was suffering from indigestion and gastritis; that respondent prescribed treatment for her in the form of tablets. Failing to receive relief, appel-

lant inquired of respondent as to what he thought of colonic treatments, at which time, according to appellant's testimony, respondent said, "Well, I believe they will help you, Mrs. Trombley. There is no harm in trying them." Mrs. Trombley then inquired of respondent as to whether he knew of any doctor she could consult, to which respondent answered, "No, I do not, but any doctor that specializes in colonic treatments would be all right." Thereafter, Mrs. Trombley consulted a chiropractor, who suggested as a prerequisite to the taking of such colonic treatments that X-rays be obtained. Following the taking of the X-rays, appellant stated to respondent that she had been informed the X-rays showed the existence of a foreign substance in her body. By appellant's testimony it was brought out that respondent requested to and was permitted to examine the X-rays, at which time appellant inquired of respondent whether there was a foreign object in her body, and if so, whether it would injure or be detrimental to her health, and would necessitate a subsequent operation. According to the testimony of Mrs. Trombley, respondent said, "Mrs. Trombley, don't worry about it, because it will never cause you any trouble. There are hundreds of people walking around with those things inside of them, and it never causes them trouble. And as your physician and surgeon, I would advise you against the operation." This was about November of 1932. Thereafter Mrs. Trombley continued to consult with respondent doctor until about fifteen months after the operation, when on June 7, 1933, respondent recommended Mrs. Trombley to the General Hospital.

It is respondent's contention that at this time Mrs. Trombley, by going to the General Hospital, placed herself under the professional care of doctors other than respondent, and that having failed to bring an action within one year after she sought the advice and professional care of the General Hospital physicians, such action was barred by the statute of limitations. However, when reference is had to the letter written by respondent referring Mrs. Trombley to the General Hospital, it is at once apparent that such reference was not made in connection with the presence in or removal from the body of Mrs. Trombley of the skin clip. In fact, the pertinent part of the letter addressed to the General Hospital physician reads as follows: "This will introduce Mrs. Floyd Trombley, who has been having considerable trouble with her throat. Would like to have her looked over in the throat and nose department. Anything you can do for her will be appreciated." Appellant testified that she received no advice from physicians other than respondent concerning the skin clip until the time of the operation for the removal of the same in the latter part of 1934, and the foregoing letter written by respondent lends verity to appellant's testimony in this regard. Appellant testified that the only medical advice she received with reference to the skin clip and its possible deleterious effects was from respondent doctor; that she was in constant contact with respondent doctor and saw him personally as late as September, 1934. The complaint herein was filed February 1, 1935, approximately four months thereafter.

[3, 4] Upon this state of the record, showing as it does a continuation of the relationship of physician and patient, there was a continuing obligation on the part of respondent physician, and the statute of limitations did not commence to run until the termination of the relationship, which, according to appellant's testimony, occurred in September, 1934. In the instant action the negligence consisted in leaving the skin clip in the body of appellant after the purpose for which it had been placed there had been fully accomplished, and this negligence continued up to the time of its removal in September, 1934. Where the tort is continuing, the right of action is also continuing. It was the ever-present duty of respondent doctor to remove the skin clip from the body of appellant, and especially was this his duty after he discovered from the X-rays the presence of such foreign object within the body of appellant. The evil consequences which followed the operation in the instant case gave rise to appellant's cause of action, and that cause of action extended during the entire period the surgeon was in charge of the case, and her right of action became complete only when in September, 1934, she terminated the relationship of physician and patient and sought the aid of other surgeons to remove the skin clip. It would be inconsistent to say that the appellant might sue for her injuries while the respondent doctor was still in charge of the case and advising and assuring her not to worry about the skin clip "because it will never cause you any trouble. There are hundreds of people walking around with

those things inside of them and it never causes them trouble. And as your physician and surgeon I advise you against the operation."

With reference to an argument urging a contrary rule, it was said in Huysman v. Kirsch, 6 Cal.2d 302, 309, 57 P.2d 908, 911, "It would be trifling with the law and the courts to exact compliance with such a rule, in order to have a standing in court for the vindication of her rights. It would impose upon her an improper burden to hold that, in order to prevent the statute from running against her right of action, *she must sue while she was following the advice of the surgeon, and upon which she all the time relied.*" (Emphasis added.) The relation or employment in this case, according to appellant's testimony, having continued up to September, 1934, each day's failure to remove the skin clip was a fresh breach of the contract implied by the law. The removal of the skin clip was a part of the operation, and in this respect the surgeon left the operation uncompleted. See Akridge v. Noble, 114 Ga. 949, 41 S.E. 78. Certainly the statute of limitations should not run against appellant's rights during the time she was in ignorance of the cause of her disability, and could not with reasonable care and diligence ascertain such cause, and in the instant case, where, as she testified, appellant relied upon respondent's assurances that the presence of the skin clip would not impair her health, the statute should be tolled during all the time she was under the care of respondent and consulted only with him with reference to the condition produced by the presence of the skin clip in her body.

[5] From the foregoing it is at once apparent that the trial court fell into error in sustaining the objection to the introduction of further evidence, and that neither the findings of fact nor conclusions of law arrived at by the trial court, that appellants' cause of action is barred under the provisions of section 340, subdivision 3, of the Code of Civil Procedure, find support in the evidence. When there is added to the evidence which was before the trial court at the time the motion was presented, the offer of proof—and the evidence so offered must be deemed to be true as stated in the offer—it is manifest that appellants were entitled to present their case to the jury.

By reason of the foregoing, no other points raised demand our attention.

The attempted appeals from the order granting defendant's motion to exclude further testimony and from the order denying plaintiffs' motion for a new trial are dismissed.

The judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.



30 Cal.App.2d 30

BOLTON v. LOGAN.*

Civ. 2190.

District Court of Appeal, Fourth District, California.

Dec. 19, 1938.

Rehearing Denied Jan. 17, 1939.

1. Lis pendens ⇐25(4)
Mines and minerals ⇐34

Where mortgage under which defendant claimed title to mining claims was recorded eight days before recordation of abstract through which plaintiff claimed title and an action to foreclose mortgage was filed and a lis pendens was recorded several months before execution sale to plaintiff's grantor, mortgage lien was prior to judgment lien, and plaintiff's grantor bought at execution sale with constructive notice of prior lien which was given him by lis pendens.

2. Mines and minerals ⇐38(16)

In action to quiet title to mining claims where facts showed that plaintiff's grantor bought claims at execution sale with constructive notice of prior lien of mortgage under which defendant claimed title, trial court should have admitted evidence tending to prove defendant's title, and foreclosure decree and sheriff's deed, though they did not in themselves prove title in defendant, were links in chain of title and should have been admitted.

3. Appeal and error ⇐882(11)

In action to quiet title to mining claims where plaintiff claimed title under execution sale and defendant under mortgage foreclosure sale and it appeared that offer of documents other than foreclosure decree and sheriff's deed necessary to prove defendant's

*Rehearing denied 86 P.2d 865.

title would have been rejected on ground stated in plaintiff's objection that plaintiff's grantor was not a party to foreclosure proceedings, defendant's failure to offer further evidence of his title was excusable, and hence plaintiff could not complain of defendant's failure to prove title.

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Action by Paul Bolton against R. S. Logan to quiet title to mining claims. From a judgment for plaintiff, defendant appeals.

Reversed.

Mayock & Lester, of Los Angeles, for appellant.

W. W. Kaye, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiff's title to six mining claims in Inyo county, California.

The chains of title of both parties find a common source in the Big Silver Mining Company, a corporation.

On November 6, 1933, Dana R. Weller was receiver of the Los Angeles Financial Center Building Company. On that day, he, as such receiver, recovered judgment against the Big Silver Mining Company, and others, in the sum of $10,552.50. An abstract of this judgment was duly recorded in Inyo county on November 10, 1933. On September 8, 1934, Dana R. Weller, as such trustee, bought the property at sheriff's sale and received a certificate of sale therefor. On October 8, 1935, he received a sheriff's deed to the property. Subsequently, after due authorization, Weller, as receiver, conveyed the property to plaintiff.

If he had been permitted to do so, defendant probably would have been able to prove the following chain of title: On November 1, 1933, the Big Silver Mining Company executed its mortgage on the same mining claims (excepting one claim called the Big Bobby) to secure a promissory note for $5,119.45, and interest, payable to C. F. Story. This mortgage was recorded on November 2, 1933, in Inyo county. On February 13, 1934, action by an assignee of the mortgagee was instituted in Inyo county to foreclose the mortgage and a lis pendens was duly recorded. On December 24, 1934, a decree foreclosing the mortgage was entered. On August 19, 1935, the mortgaged property was sold by the sheriff of Inyo county to defendant at foreclosure sale. A sheriff's deed was executed to defendant. The copy of the deed in the record bears date of July 19, 1936. It was acknowledged and recorded on August 20, 1936, and recites the fact of the foreclosure sale on August 19, 1935, and that one year had elapsed since such sale. No point was made in the trial court, nor is made here, that the sheriff's deed is dated July 19, 1936, less than one year after the foreclosure sale.

The plaintiff proved his chain of title by documentary evidence and rested. Defendant then attempted to prove his chain of title. He first offered the decree of foreclosure of the mortgage. Plaintiff objected to its admission in evidence because Dana R. Weller was not made a defendant to the foreclosure action. This objection was sustained. Counsel for defendant then offered to prove defendant's chain of title which was alleged in his answer and affirmative defense. He also offered other documents in that chain. The same objection was made and sustained.

As defendant was thus prevented from introducing any evidence of his title, the trial court found all facts in favor of plaintiff, and against defendant, and quieted plaintiff's title to the property.

[1] From the facts already detailed, assuming evidence to prove them, it is apparent that the mortgage under which defendant claims was recorded in Inyo county on November 2, 1933, eight days prior to the recordation of the abstract through which plaintiff claims. An action to foreclose the mortgage was filed on February 13, 1934, and a lis pendens recorded the same day. This antedated, by several months, the execution sale to Weller.

A mere recital of these facts shows that the lien of the mortgage was prior to the lien of the judgment and that Weller bought, at the execution sale, with constructive notice of the prior lien which was given him by the lis pendens. The legal effect of these priorities is clearly set forth in Johnson v. Friant, 140 Cal. 260, 73 P. 993, as follows [page 994]: "That foreclosure suit, by which it was decreed that Friant had a mortgage lien upon the property on and after July 30, 1895, was commenced three days before the execution sale under which plaintiff acquired his title, and upon the day the suit was commenced a notice of

lis pendens, in due form, was filed in the office of the recorder. It was not incumbent upon the plaintiff to have subsequently impleaded Johnson, the purchaser at that sale, but, to the contrary, Johnson, without being made a party, took his title subject to the foreclosure proceedings. As those proceedings resulted in a decree declaring that plaintiff's mortgage lien dated from July 30, 1895, the title acquired by the purchaser at that sale (the bank herein) relates back to the date of that mortgage lien (Horn v. Jones, 28 Cal. 194), and consequently vests in defendant bank a title superior to that claimed by plaintiff. The purchaser at execution sale, pending the foreclosure of a mortgage given prior to the judgment under which the execution sale took place, is not a necessary party to the action of foreclosure, though the judgment lien existed before the foreclosure suit was commenced. Such purchaser, if taking with notice of the foreclosure suit, is bound by the decree, though not made a party. Wise v. Griffith, 78 Cal. 152, 20 P. 675." See, also, Koch v. Wilcoxon, 30 Cal.App. 517, 158 P. 1048.

An examination of the record on appeal in the Wise Case shows that the factual situation there was similar to the facts of the instant case.

Plaintiff seeks to support the judgment and rulings of the trial court by Whitney v. Higgins, 10 Cal. 547, 70 Am.Dec. 748, and the cases following it. All that was held in the Whitney Case was that a junior lienholder has the right to redeem the property sold at the foreclosure of a prior lien. That cannot be construed into a holding that the junior lienholder's title was superior to that of the senior lienholder obtained through regular foreclosure proceedings.

[2, 3] It is clear that the trial court should have admitted evidence tending to prove defendant's title. The decree of foreclosure and the sheriff's deed were links in the chain of title. They should have been admitted in evidence.

Plaintiff urges that the documents offered by defendant did not prove any title in him. While this may be true, defendant offered to prove his title as set forth in his pleading. The documents which were excluded, were offered in an endeavor to prove such title. While they did not in themselves prove title they were links in the chain and should have been admitted. It is rather clear from the record that the offer of the other documents necessary to prove title would have been rejected on the ground, stated in the objection, that Weller was not a party to the foreclosure proceedings. Under these circumstances the defendant's failure to offer further evidence of his title may be excused.

As defendant was wrongfully prevented from proving whatever title he may have had, the judgment in favor of plaintiff must fall. The errors were prejudicial.

Judgment reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.



29 Cal.App.2d 722

LEEPER v. GINSBERG et al.

Civ. 6073.

District Court of Appeal, Third District, California.

Dec. 16, 1938.

Rehearing Denied Jan. 14, 1939.

Hearing Denied by Supreme Court Feb. 10, 1939.

1. Evidence ⇐425

In attorney's suit on quantum meruit for reasonable value of legal services rendered to a creditors' committee, trial court did not err in receiving oral evidence tending to vary terms of resolution adopted by committee with respect to payment of attorneys' fees where suit was not based on resolution or on any other written contract, and resolution did not conflict with attorney's theory that amount of compensation for legal services to be performed was not agreed on by the parties.

2. Attorney and client ⇐166(5)

Testimony of former member of law partnership that agreed amount of fees for foreclosure proceeding which was completed while he was a member of partnership was fully paid by defendants, and that he made no claim to fees which might be due to plaintiff for services performed after termination of partnership, was sufficient to support trial court's finding that agreed compensation of $300 for legal services performed by plaintiff while he was a member of partnership for foreclosing trust deed was fully paid.

3. Attorney and client ⇐168

Where attorney's complaint asked for payment of reasonable value of legal services allegedly performed by attorney for defendants after dissolution of law partnership, and trial court specifically found that such services had been performed by attorney but inadvertently failed to determine them or to award attorney judgment for reasonable value thereof, judgment was not supported by findings.

4. Judgment ⇐256(1)

A judgment should conform to the essential findings and may be reversed if it fails to do so.

5. Limitation of actions ⇐50(3)

Where complaint filed on August 11, 1934, asked for judgment for reasonable value of services performed by attorney after dissolution of law partnership, partnership was dissolved in March, 1931, evidence was undisputed that attorney did perform services as late as September, 1932, and attorney testified that he performed legal services to a time within five or six months of the filing of the complaint, action was not barred by statute of limitations.

6. Appeal and error ⇐1178(1)

Where record in attorney's action to recover reasonable value of fees for services rendered did not definitely disclose just what legal services were performed for defendants by attorney after dissolution of law partnership, the Court of Appeal could not justly fix fees to which he was entitled, and that court in reversing judgment against attorney directed the trial court to ascertain the nature of the services and the value thereof.

Appeal from Superior Court, Sacramento County; Arthur Coats, Judge.

Action by Thomas B. Leeper against Sam Ginsberg and others to recover the reasonable value of attorney's fees for services rendered. From a judgment for defendants, plaintiff appeals.

Judgment reversed, with directions.

Ralph H. Lewis and R. L. Shinn, both of Sacramento, for appellant.

Busick & Busick and O. F. Meldon, all of Sacramento, for respondents.

PER CURIAM.

The plaintiff has appealed from a judgment which was rendered against him in a suit to recover the reasonable value of attorney's fees for services rendered. The cause was tried by the court sitting without a jury.

The complaint alleges that while plaintiff and Charles O. Busick were engaged in the practice of law as copartners the defendants employed them on May 1, 1927, to recover from Alpha Quicksilver Mining Company an indebtedness amounting to $172,800 and accrued interest; that pursuant to that employment the law partnership performed services until its dissolution in March, 1931, at which time the claim for legal services against the defendants was transferred to plaintiff who "thenceforth and up to the present time, with the consent and at the request of the defendants, proceeded with the carrying out of the said contract", and thereafter continued to perform legal services, of the reasonable value of $5,000, no part of which has been paid except the sum of $300. The prayer asks for judgment against the defendants for the sum of $4,700. The answer denies the material allegations of the complaint and sets up the statute of limitations as a bar to the claim.

The court found that among other legal services performed by the partnership, and by the plaintiff before the dissolution of the partnership, was the foreclosure of a trust deed for $27,000 executed by the Alpha Quicksilver Mining Company; that the defendants Ginsberg, Nielson and Rablin constituted a committee representing the creditors of the mining company, and that the defendant Smith was their agent with authority to employ counsel and act in behalf of the creditors' committee; that the law partnership was employed May 1, 1927, to foreclose the $27,000 trust deed, together with certain other incidental services, for an agreed fee of $300, which was fully paid; that the law partnership was dissolved in March, 1931, but that, "Since the dissolution of said partnership, the plaintiff has rendered other services to the defendant Theodore Smith, but that said services were and are independent of said contract of employment with said partnership, and constitute independent contracts of employment with plaintiff."

The court then found that the cause of action upon which the complaint is based,

is barred by the statute of limitations. Judgment was then rendered to the effect that the plaintiff take nothing by his suit. From that judgment this appeal was perfected.

The appellant contends the court erred in permitting the introduction of oral evidence which tended to vary the terms of a written instrument in the form of a resolution which was adopted by the creditors' committee with respect to the payment of attorneys' fees; that the findings and judgment are not supported by the evidence, and that the judgment is not supported by the findings.

[1] We are of the opinion the court did not err in receiving oral evidence tending to vary the terms of the resolution of the creditors' committee. This suit is not based on that resolution or upon any other written contract. It is a suit on quantum meruit for the reasonable value of legal services. Moreover, the resolution is not in conflict with the plaintiff's theory that the amount of compensation for legal services to be performed was not agreed upon by the parties.

[2] While there is a sharp conflict of evidence regarding an agreement to pay the law partnership the definite sum of $300 for foreclosing the $27,000 trust deed, as distinguished from the compensation to be paid for other legal services performed, we are of the opinion the findings of the court to the effect that the agreed fee for the foreclosure proceeding, and certain other incidental services performed by "said partnership" before its termination, was fully paid is adequately supported by substantial evidence. Judge Busick testified in that regard: "I told him [Mr. Smith] that it would only be necessary to foreclose under the deed of trust. * * * I took it [the agreement for fees] up with Mr. Leeper after Smith was gone, and told Leeper we couldn't get any more, that Mr. Smith did not want to pay only $300.00 and costs; so, we both agreed we would take it for that. * * * There was nothing further in the office in connection with this Alpha Quicksilver Mining Company foreclosure proceeding. * * * I left there on September 1, 1931. The partnership dissolution agreement was signed in May, 1931."

Judge Busick makes no claim to any further fees for legal services performed for the defendants. He asserts that the agreed amount of fees for the foreclosure proceeding which was completed while he was a member of the partnership was fully paid. He makes no claim to any part of the fees which may be due to the plaintiff for services performed after the termination of the partnership. He testified in that regard: "I have never made any claim to Mr. Leeper that he should share this fee with me, because there isn't any balance due us, so, I wouldn't make any claim."

There is therefore sufficient evidence to support the court's finding that the agreed compensation of $300 for legal services performed by the plaintiff while he was a member of the law partnership with Judge Busick, for foreclosing the trust deed, was fully paid.

However, the record leaves little doubt that other legal services were performed by the plaintiff at the request of the defendants which were not included in the proceeding for foreclosure of the trust deed. It appears, substantially without contradiction, that legal services of importance and value, other than the foreclosure of the trust deed, were subsequently performed by the plaintiff for the defendants pursuant to his general employment, for which he has not been compensated. The record on appeal contains documents and pleadings prepared for the defendants by the plaintiff, and proceedings in which he appeared as attorney for them, which are not included in the trust deed foreclosure case, and which were not paid for. From the showing which was made at the trial it seems unreasonable to assume that the $300 fee which was paid to the copartnership to foreclose the trust deed, together with certain other proceedings found by the court to have been incident thereto, was intended to, or that it did fully pay plaintiff for all the legal services which he performed for the defendants. The court specifically found that the plaintiff did perform other services for the defendant Smith, since the termination of the law partnership "independent of said contract of employment with said partnership, and constitute independent contracts of employment with plaintiff".

There is no controversy over the fact that the defendant Smith had the authority and that he was acting as agent for the other three defendants, constituting the creditors' committee, in trying to collect certain indebtedness due to them from the

Alpha Quicksilver Mining Company. The record is undisputed that legal services of considerable value and importance were performed by the plaintiff for the creditors' committee through the agency of Theodore Smith, which were not included in the proceeding to foreclose the trust deed, and for which the plaintiff has not been paid. This is a suit on quantum meruit for the reasonable value of those very services, together with the other legal services rendered by the partnership in foreclosing the trust deed. The complaint specifically alleges the services performed by the partnership and then states that the plaintiff "thenceforth and up to the present time, with the consent and at the request of the defendants, proceeded with the carrying out of the said contract" to collect from the Alpha Quicksilver Mining Company the indebtedness owed by said corporation amounting to $172,800, "and fully performed all the terms and conditions of said contract; * * * that as a result of said services", etc.

[3] Clearly the complaint asks for payment of the reasonable value of legal services alleged to have been performed by the plaintiff after the dissolution of the partnership. The court specifically found that such services had been performed by the plaintiff. The rendering and value of those services were distinct issues in the case. Yet, inadvertently, the trial court failed to determine them or to award plaintiff judgment for the reasonable value thereof. In that regard the judgment is not supported by the findings.

[4] A judgment should conform to the essential findings, and may be reversed if it fails to do so. (3 Bancroft's Code Proc., p. 2310, sec. 1770; 2 Calif.Jur., p. 817, sec. 481.)

[5] In spite of the preceding finding the court evidently erroneously assumed the cause of action was limited to the services performed by the partnership in foreclosing the trust deed, which action was terminated in 1929, for it found that "independent of said contract of employment with said partnership", other legal services were subsequently performed by the plaintiff, but that "The cause of action upon which plaintiff's complaint is based is barred" by the statute of limitations.

The complaint asks for judgment for the reasonable value of services performed by the plaintiff after the partnership was dissolved. The partnership was dissolved in March, 1931. The evidence is undisputed that he did perform services as late as September, 1932. The complaint in this case was filed August 11, 1934, within two years after the performance of the last services. The plaintiff testified that he performed legal services in repeated consultations with Mr. Smith, in drawing documents and otherwise, to a time within five or six months of the filing of the complaint. Mr. Smith, one of the defendants, also testified:

"I became dissatisfied with the way Mr. Leeper was handling the legal affairs that were entrusted to him, by me, or by the committee, after I came back from Lakeport. * * * The Ginsberg [matter] started in September, 1932, and it ran into 1933. * * * During September [1932] the Nichols matter came up, Leeper was handling the Nichols matter. And he was also consulting with me about the title up there on the property, * * * going through from that time, carrying out to December 31, 1932, and coming right into 1933. In the controversy between Ginsberg and myself * * * at that time, Mr. Leeper was acting as attorney for the committee."

The finding that the action is barred by the statute of limitations is therefore not supported by the evidence.

[6] Since the record does not definitely disclose just what legal services were performed for the defendants by the plaintiff, after the dissolution of the partnership, we are unable to justly fix the fees to which he is entitled.

The judgment is reversed, and the court is directed to ascertain and determine the nature of the legal services and the value thereof which were performed by the plaintiff for the defendants subsequent to the dissolution of the partnership, and to render judgment in his favor for that amount.

30 Cal.App.2d 98

KRAMER v. GLADDING, McBEAN & CO. et al.

Civ. 5919.

District Court of Appeal, Third District, California.

Dec. 21, 1938.

Hearing Denied by Supreme Court Feb. 16, 1939.

1. Mines and minerals ⇐38(21)

In suit to quiet title to mining claims, which has been relocated by plaintiff's grantor, against a company claiming under the original locator, judgment for plaintiff was supported by evidence that original locator defaulted in the performance of his assessment work for several years and never filed any notice declaring that he was desirous of retaining the claims pursuant to congressional act suspending the performance of assessment work. Civ.Code, §§ 1426 et seq., 1426*l*; 30 U.S.C.A. § 28.

2. Mines and minerals ⇐24

The question of the abandonment of an original location of mining claims depends on the intention of the locator to relinquish his possession and right to the property, and such intention must be determined from the facts of each particular case.

3. Mines and minerals ⇐25

A forfeiture of a mining claim occurs by operation of law when the locator fails to preserve his rights by complying with the conditions imposed by the mining laws, whether the statute expressly so provides or not, and that forfeiture becomes effectual on a valid relocation of the same mining claim. Civ.Code, § 1426 et seq.

4. Mines and minerals ⇐38(21)

When one relying on a forfeiture of a mining claim shows that no work was performed by the original locator within the period of one year as required by law, he establishes a prima facie case entitling him to possession, in absence of evidence to the contrary. Civ.Code, § 1426*l*; 30 U.S.C.A. § 28.

5. Mines and minerals ⇐26

The forfeiture of rights to a mining claim for failure to perform the statutory work thereon, before patent has been issued, renders the claim subject to relocation. Civ.Code § 1426 et seq.; 30 U.S.C.A. § 28.

6. Mines and minerals ⇐23(5)

Congressional resolutions temporarily suspending the statutory requirement of performing assessment work on mining claims pursuant to statute did not prevent forfeiture of locator's right to mining claims for nonperformance of assessment work, where the locator filed no notice of his desire to hold the mining claim as provided by the congressional resolutions. 30 U.S.C.A. §§ 28, 28a note.

7. Mines and minerals ⇐38(17)

In suit to quiet title to mining claims, which had been relocated by plaintiff's grantor, against a company claiming under the original locator, evidence was sufficient to establish the discovery of gold-bearing quartz by the relocator, as required by statute for purpose of relocation. Civ.Code § 1426.

8. Mines and minerals ⇐17(1)

The depth, size, or quantity of gold or silver bearing vein of quartz authorizing the location of a mining claim is not material.

9. Mines and minerals ⇐26

The relocator of mining claims had a right to accept, adopt, and take advantage of the discovery of quartz by the original locator in order to fulfill the statutory requirement of discovery for purpose of relocation. Civ.Code, § 1426.

10. Mines and minerals ⇐26

In absence of statute to contrary, a relocator of a quartz mining claim may avail himself of the original locator's discovery of gold-bearing quartz in place, particularly if the evidence of such discovery is apparent to the sight of the relocator. Civ.Code, § 1426.

11. Mines and minerals ⇐26

To relocate a mineral claim, it is necessary that the locator shall have personal knowledge of the former discovery of the mineral thereon or that he himself shall find evidence of its presence in quantity sufficient to justify reasonable man in furnishing adequate labor and money to develop the claim. Civ.Code, § 1426.

12. Mines and minerals ⇐26

The statute relating to relocation of mining claims did not apply to relocation of mining claims before statute became effective. Civ.Code § 1426dc, as added by St. 1935, p. 2260.

Appeal from Superior Court, Calavaras County; J. A. Smith, Judge.

Suit to quiet title to mining claims by Charles W. Kramer against Gladding, McBean & Co. and the United States Machinery Company. From a judgment in favor of the plaintiff, the United States Machinery Company appeals.

Judgment affirmed.

Charles L. Gilmore, of Sacramento, for appellant.

Joseph H. Huberty, of San Andreas, for respondent.

PER CURIAM.

Upon rehearing of this cause it appears the defendant, U. S. Machinery Company, a corporation, has appealed from a judgment quieting title in the plaintiff to twenty-seven quartz mining claims in Mill Valley Mining District, Calaveras county, California. The appellant contends that it acquired title to two of those claims called the "Buckhorn" and the "Gold Cliff" from Gladding, McBean & Company to whom they had been previously conveyed by sheriff's deeds after an execution sale thereof to satisfy a judgment against Frederick H. Rindge, the alleged owner. The evidence shows that the "Gold Cliff" claim is the only one involved in this suit which was described in the sheriff's deed. The appellant asserts no title to any of the parcels other than the two claims mentioned. Gladding, McBean & Company filed an answer disclaiming all right, title and interest in the twenty-seven mining claims. Frederick H. Rindge, the original locator of the mining claims, is not a party to this suit.

It is contended by the appellant, with respect to the Buckhorn and Gold Cliff quartz mining claims, that the findings and judgment fail to support plaintiff's asserted title thereto for the reason that it does not appear the former locator forfeited or abandoned his claims before the plaintiff's grantor relocated them, and because there is no evidence the relocator discovered a vein or lode of quartz thereon.

The record is undisputed that between the years 1922 and 1928, Frederick H. Rindge located these same twenty-two mining claims as required by law; that he performed the statutory assessment work until 1930, and expended in developing the claims the aggregate sum of $122,785; that he performed no assessment work on any of the claims after 1930, and thereby forfeited them; that Harda Kramer, the wife of one Adam Kramer, an experienced mining man, relocated these same twenty-seven quartz mining claims, including the Buckhorn and Gold Cliff claims, on February 13, 1935, and a few days later conveyed them to the plaintiff, Charles W. Kramer; that on June 20, 1935, Sheriff Zwinge, of Calaveras county, deeded the Gold Cliff claim only, together with other property not involved in this suit, to Gladding, McBean & Company, pursuant to an execution sale of the property to satisfy a judgment previously secured against Frederick H. Rindge; that the sheriff's deed does not purport to convey any of the twenty-seven mining claims involved in this suit, with the exception of the Gold Cliff claim; that on August 27, 1935, Gladding, McBean & Company conveyed the same property received by the sheriff's deed, to the appellant, U. S. Machinery Company; that the twenty-seven quartz claims were relocated February 13, 1935, by Harda Kramer by posting and recording the notices thereof as required by section 1426 et seq. of the Civil Code; that at the time the claims were relocated Harda Kramer knew of the original discovery of quartz by Mr. Rindge, and that gold-bearing quartz in place was then found on the claims. All of the assessment work which is required by law has been performed since the relocation of the claims.

After conveyance of the real property, including the Gold Cliff claim which is involved in this suit, from Sheriff Zwinge of Calaveras county to Gladding, McBean & Company, this suit to quiet title to the twenty-seven mining claims was instituted August 27, 1935. The cause was tried and the court adopted findings favorable to the plaintiff on every essential issue. It was determined that the plaintiff is the owner and entitled to the possession of all of said claims, and that the appellant has no right, title or interest in any of them. Judgment was accordingly rendered for the plaintiff. From that judgment the U. S. Machinery Company has appealed.

[1] We are of the opinion the findings and judgment are adequately supported by the evidence. There is substantial proof that Frederick H. Rindge, the original locator, forfeited his right to the claims for non-performance of his assessment work for several consecutive years before the relocation thereof. He is not a party to this suit and is making no claim to

the property. The regularity of his original location proceedings is not questioned. The evidence is uncontradicted that he performed no assessment work on any of the claims after 1930. No notice was ever filed by him in the office where the location was recorded, declaring that he was desirous of retaining the claims pursuant to the act of congress suspending the performance of annual assessment work. He was in default of the performance of his assessment work for several years from 1930 to 1935.

[2, 3] The question of the abanadonment of an original location of mining claims depends upon the intention of the locator to relinquish his possession and right to the property which must be determined from the facts and circumstances of each particular case. McCann v. McMillan, 129 Cal. 350, 62 P. 31; Clarke v. Mallory, 22 Cal.App.2d 55, 59, 70 P.2d 664; 1 Cal.Jur. 10, sec. 7; 17 Cal.Jur. 354, sec. 47. There is, however, a clear distinction between the abandonment of a claim and the mere forfeiture thereof for failure to perform the necessary work required by law. 2 Lindley on Mines, 2d Ed., p. 1198, sec. 643; 60 A.L.R. p. 926, note. Section 1426*l* of the Civil Code provides that: "The amount of work done or improvements made during each year to hold possession of a mining claim shall be that prescribed by the laws of the United States, to wit: One hundred dollars annually."

The requirement to perform annual work upon a mining claim of the value of one hundred dollars is in accordance with the provisions of section 2324 of the Revised Statutes of the United States. Title 30, Sec. 28, U.S.C.A. The last-mentioned section provides in part that: "Upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made."

[4, 5] A forfeiture of a mining claim occurs by operation of law when the locator fails to preserve his rights by complying with the conditions imposed by the mining laws whether the statute expressly so provides or not, and that forfeiture becomes effectual upon a valid relocation of the same mining claim. Street v. Delta Min. Co., 42 Mont. 371, 112 P. 701; 40 C.J. 844, sec. 301. When a party relying upon a forfeiture of a mining claim shows that no work was performed by the original locator within the period of one year as required by law, he establishes a prima facie case entitling him to possession, in the absence of evidence to the contrary. 40 C.J. 846, sec. 303. In the present case the plaintiff established a prima facie showing that Frederick H. Rindge, the original locator, forfeited his rights to the claims which are involved in this action. The forfeiture of rights to a mining claim for failure to perform the statutory work thereon, before a patent has been issued, renders the claim subject to relocation. Russell v. Brosseau, 65 Cal. 605, 4 P. 643; Clarke v. Mallory, 22 Cal.App.2d 55, 63, 70 P.2d 664; 17 Cal.Jur. 401, sec. 78; 18 R.C.L. 1135, sec. 46; 40 C.J. 846, sec. 306.

[6] The appellant asserts that Frederick H. Rindge did not forfeit his right to the claims for nonperformance of his assessment work after 1935 for the reason that Congress adopted resolutions in 1931, 1932, 1933 and 1934, temporarily suspending the statutory requirement of performing the assessment work on mining claims pursuant to section 2324 of the United States Revised Statutes, 30 U.S.C.A. § 28, during those current years on account of the depression which existed. We are of the opinion there is no merit in this contention for the reason that in 1933 and 1934 the suspension of annual assessment work on mining claims for those current years was authorized only conditionally, and not as an absolute right. 48 U.S. Stats., p. 72, and p. 777, 29 and 30 U.S.C.A., sec. 28a, note. The resolutions for 1933 and 1934 both include a similar condition. The 1933 resolution suspending for that year the necessity of performing assessment work of the value of $100 as provided by section 2324 of the Revised Statutes of the United States contains the following proviso: "That the provision of this Act shall not apply to the case of any claimant not entitled to exemption from the payment of a Federal income tax for the taxable year 1932: Provided further, That every claimant of any such mining claim, in order to obtain the benefits of this Act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian, July 1, 1933, a notice of his desire to hold said mining claim under this Act, which notice shall state that the claimant, or claimants, were entitled to exemption from the payment of a Federal income tax for the taxable year 1932."

In Re Suncrest Packers, Inc., D.C., 8 F. Supp. 917, 920, the court has construed the preceding language to constitute the creation of "a condition precedent that the locator or owner file a notice of desire to hold the claim or claims", in order to exempt him from the performance of the required annual assessment work. In the present case no such notice was filed by Mr. Rindge so as to exempt him from the performance of the statutory assessment work during the years of 1933 and 1934. Having failed to perform the assessment work in those two years, we must assume in support of the findings and judgment, that the claims, in the language of section 2324 of the U. S. Revised Statute, thereupon became "open to relocation", in the absence of a showing that he was exempt from performing the work according to the provisions of the resolution above quoted. It follows that there is a prima facie showing in this case of the forfeiture of Mr. Rindge's title to the mining claims in question.

[7, 8] In this case there is ample evidence of the discovery of "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar", etc., to conform to the requirements of section 1426 of the Civil Code, for the purpose of relocation of the mining claims. The depth, size or quantity of a gold or silver-bearing vein of quartz authorizing the location of a mining claim is not material. Stinchfield v. Gillis, 96 Cal. 33, 37, 30 P. 839; Jupiter Min. Co. v. Bodie Cons. Min. Co., C.C., 11 F. 666, 675; 17 Cal.Jur. 318, sec. 26; 18 R.C.L. 1121, sec. 32; Nevada Sierra Oil Co. v. Home Oil Co., C.C., 98 F. 673, 677. In the case last cited it is said in that regard [page 676]: "When the locator finds rock in place containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

In 18 Ruling Case Law at page 1122, section 32, it is said: "When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, and though it be merely a crevice or seam filled with mineral deposit."

In the same section last quoted from, it is further said: "The well established test is that to constitute a valid location there must be such a discovery of mineral as that an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and money thereon in the development of the property."

In this case it appears that the original locator actually expended the sum of $122,785 in developing the claims before he forfeited them by nonperformance of assessment work. Adam Kramer, an experienced miner, testified regarding the presence of gold-bearing quartz at the time of the relocation:

"There is a ledge on the Gold Cliff that runs out underneath the barn. There is also a ledge that runs across from the face of the tunnel and connects up across the creek, which is in place. * * *

"Q. And was there at that place a vein of gold-bearing rock or quartz? A. There is.

"Q. From what you know of this property, * * * do you think a prudent man would be reasonably justified in expending time and money with the expectation of developing a paying mine? A. I do positively."

Mr. Oliver C. Wyllie, a licensed mining and civil engineer, who made the original survey of the claims for Mr. Rindge, testified with respect to the relocation:

"Q. Mr. Wyllie, at the points where these location notices were posted on the twenty-seven several and respective claims, was there a vein or lode of quartz in place bearing gold or other mineral? A. I think in practically every place there was some sort of a showing. * * * I would say in pretty nearly every case, there was a showing of quartz or something that would possibly justify a locator in locating a mining claim."

Harda Kramer, the relocator of the claims, testified:

"Q. And did you discover any rock or mineral bearing rock vein at that point? A. Yes, we discovered * * * rock."

This furnishes sufficient evidence of the discovery of gold-bearing quartz by Harda Kramer on the Gold Cliff and other mining claims at the time she relocated them, to conform to the requirements of section 1426.

[9, 10] In addition to the preceding evidence of the discovery of the presence of

gold-bearing quartz in place at the time of the relocation, it appears that Harda Kramer, and Adam Kramer, who was then present with her, found much evidence of excavations and mining operations on those claims which had been previously conducted by the original locator thereof. They had a right to accept, adopt and take advantage of the discovery of quartz by the original locator. In the absence of a statute to the contrary, a relocator of a quartz mining claim may avail himself of the original locator's discovery of gold-bearing quartz in place, particularly if the evidence of such discovery is apparent to the sight of the relocator. 1 Lindley on Mines, (2d ed.) 723, sec. 403; 68 L.R.A. 845, note; 18 R.C.L. 1136, sec. 46; Gwillim v. Donnellan, 115 U.S. 45, 5 S.Ct. 1110, 29 L.Ed. 348; Hagan v. Dutton, 20 Ariz. 476, 181 P. 578. In the last cited case, quoting with approval from 2 Lindley on Mines, third edition, section 335, it is said: "But a locator need not be the first or original discoverer of mineral on the mining claim located. He may appropriate an abandoned or forfeited discovery by locating the claim as a relocation, and it is sufficient if he knew at the time of making his location that there had been a discovery of mineral on the location." 181 P. 580.

In 18 Ruling Case Law, at page 1136, it is likewise said: "The relocator of an abandoned mining claim has the same length of time to perform each of the acts of location subsequent to discovery as the original locator; and he may, in the absence of a local statute or custom to the contrary, avail himself of the original locator's discovery."

[11] In the case of Hagan v. Dutton, supra, it is said a locator need not be the first or original discoverer of mineral for the valid locating of a claim, but he may appropriate an abandoned or forfeited discovery by relocating the same claim. It is sufficient if he knew at the time of making his relocation that there had been a discovery of mineral on the claim. To relocate a mineral claim it is necessary that the locator shall have personal knowledge of the former discovery of mineral thereon, or that he himself shall find evidence of its presence in quantity sufficient to justify a reasonable man in furnishing adequate labor and money to develop the claim.

Finally, the appellant contends that the evidence in this case fails to conform to the requirements of section 1426dc of the Civil Code to accomplish a valid relocation of mining claims. That section provides: "The relocation of any lode or placer mining location which is subject to relocation shall be made in the same way as an original location is herein required by law to be made, except that the relocator may either sink a new shaft upon the ground relocated at the discovery point to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing the deposit upon which location is based, or drive a new tunnel, adit, or open cut upon such ground at the point of discovery to at least ten feet below the surface, exposing the deposit upon which location is based; or the relocator may sink the original discovery shaft ten feet deeper than it is at the time of relocation, or drive the original tunnel, adit, or open cut upon such claim ten feet further."

[12] It is unnecessary to construe the preceding section for the reason that it was not adopted until 1935, and did not become effective until September 15th of that year. Stats.1935, pp. 2259, 2260. The claims which are involved in this case were relocated February 13, 1935. Section 1426dc was not in existence when these claims were relocated. There was then no statute in this state upon the subject of relocation of mineral claims.

The judgment is affirmed.



29 Cal.App.2d 641

BENCICH v. MARKET ST. RY. CO. et al.

Civ. 10810.

District Court of Appeal, First District, Division 2, California.

Dec. 14, 1938.

Rehearing Denied Jan. 13, 1939.

Hearing Denied by Supreme Court Feb. 9, 1939.

1. Street railroads ⇐114(21)

In fireman's action for injuries sustained in collision between interurban street car and fire engine, motorman's testimony showing that after entering street intersection at about 10 miles per hour with view down street upon which fire engine was approaching unobstructed and that upon seeing fire engine he turned on the power and collided with fire engine warranted conclu-

sion that motorman's negligence was the proximate or at least a proximate cause of the collision.

2. Trial ⇐241

In fireman's action for injuries sustained in collision between interurban street car and fire engine, instruction embodying statute relating to the duty of operator of a street car upon approach of an authorized emergency vehicle, giving audible signal by siren, which statute was not in force at the time of accident, was erroneous. St.1935, p. 187, § 554.

3. Appeal and error ⇐1066

In fireman's action for injuries sustained in collision between interurban street car and fire engine, instruction embodying statute which was not yet in force but was substantially the same as prior statute relating to the duty of operator of a street car upon approach of an authorized emergency vehicle, giving audible signal by siren, was not reversible error. St.1929, p. 542, § 133; St.1935, p. 187, § 554.

4. Appeal and error ⇐1006

In fireman's action for injuries sustained in collision between interurban street car and fire engine alleged to have resulted from motorman's failure to stop car at stop signal and failure to make reasonable use of faculties to learn of approach of fire engine in time to stop car before entering intersection, giving of instruction embodying the "imminent danger rule" but failing to inform jury that one who claims benefit of the rule must be without negligence was not prejudicial where fireman was not driver of fire engine and it was not shown that negligence of driver of fire engine was imputable to the fireman.

5. Damages ⇐182

In fireman's action for injuries sustained in collision between interurban street car and fire engine, exclusion of evidence showing that fireman approximately one year after accident was retired due to disability resulting from the injuries received in the accident and received a pension of $100 per month was proper.

6. Damages ⇐132(1)

$20,000 to fireman who suffered severe injuries which resulted in definite, permanent disability *held* not excessive.

Appeal from Superior Court, San Francisco County; James G. Conlan, Judge.

Action by John H. Bencich against the Market Street Railway Company and another for injuries sustained in a collision between an interurban street car and a fire engine. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Wm. M. Abbott, Walter H. Linforth, and Wm. M. Cannon, all of San Francisco, for appellants.

Edmund J. Holl, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, a hoseman employed in the fire department of the city and county of San Francisco, brought this action to recover damages for personal injuries sustained by him as the result of a collision between an interurban car of the defendant company and the fire chemical upon which he was riding. The cause was tried by the court sitting with a jury and plaintiff had judgment for $20,000. Defendants appeal from said judgment.

There have been three trials of this action. The first trial resulted in a verdict in favor of plaintiff in the sum of $20,000. Defendants made a motion for a new trial, which motion was granted. The second trial resulted in a verdict in favor of plaintiff in the sum of $5,000. Defendants made no motion for a new trial and took no appeal. Plaintiff did make a motion for a new trial, which motion was denied. Plaintiff then took an appeal and the judgment was reversed on the ground that the award of damages was inadequate. Bencich v. Market Street R. Co., 20 Cal.App.2d 518, 67 P.2d 398. The third trial resulted in a verdict in favor of plaintiff in the sum of $20,000 as above indicated.

On this appeal, defendants contend, first, that the trial court committed prejudicial error in giving certain instructions to the jury; second, that the trial court committed prejudicial error in its rulings excluding certain evidence; and, third, that the damages awarded were excessive. It will be noted that defendants do not claim that the evidence was insufficient to sustain a verdict in favor of plaintiff.

The facts of the case are quite fully set forth in the opinion on the former appeal. Bencich v. Market Street R. Co., supra. Defendants concede that the evidence introduced on the third trial was substantially the same as that introduced on the second trial and it appears unnecessary to repeat

here the full summary of the evidence found in the former opinion. A brief outline of the factual situation should suffice.

The collision between the interurban street car and the fire chemical occurred at about 10 a. m. on the morning of October 11, 1933, at Seventeenth and Mission streets in San Francisco. The fire chemical was proceeding in a westerly direction along Seventeenth street in response to a fire alarm. The street car was proceeding in a northerly direction along Mission street. The collision occurred after the front of the street car had passed the center of the intersection, and after the driver of the fire chemical had turned slightly to the right in an endeavor to avoid the street car. The left front portion of the fire chemical came in contact with a portion of the car at or near the right front thereof.

The fire chemical was being driven by John Wall. Plaintiff was seated in a separate front seat. Plaintiff had nothing to do with the driving of the fire chemical but it was his duty to sound the siren and ring the bell in order to warn traffic of the approach of the fire chemical. The great preponderance of the evidence shows that he was fully performing this duty. As pointed out in the former opinion, thirty-seven witnesses testified to that effect and we do not believe that defendants make any serious claim to the contrary.

The evidence with respect to the speed of the car and of the fire chemical was conflicting but there was abundant evidence to show that the car was exceeding the speed permitted by ordinance and that it proceeded into the intersection against the traffic signal located at said intersection. But aside from considerations of speed limits, traffic-signals and warning signals from the fire chemical, we believe it appropriate to set forth certain testimony of the defendant motorman which is important in determining whether the giving of the challenged instructions was prejudicial to defendants.

[1] The salient facts for this purpose, as found in the testimony of the motorman, were as follows: That the speed of the car as it traveled from Eighteenth street toward Seventeenth street was about 15 to 20 miles per hour; that as the car came into the safety zone he "checked it down to about 10 miles per hour" and continued into the intersection at that speed; that at said speed, it was possible to stop the car within a comparatively few feet; that as a street car comes to the south property of Seventeenth street, the view down Seventeenth street is not obstructed and "if you are looking that way, you could see down probably a block or so"; that he nevertheless did not see or hear the fire chemical approaching on Seventeenth street until he was "pretty near the center of the intersection" at which time "it must have been 50 or 75 feet down the street"; that he immediately turned and "put the power on, and with that, why we hit"; that he thought his car was going about 15 miles per hour at the time of the crash; that he did not see the fire chemical "move even a foot" from the time it came into his view until the moment of impact; and that there was not time for the snap of a finger between the time he first saw the fire chemical and the time of the impact. A reading of the entire testimony of the defendant motorman and particularly the foregoing excerpts therefrom, brings us to the view that the only rational conclusion that can be drawn from his own evidence is that he was chargeable with negligence which was the proximate cause, or at least a proximate cause, of the collision.

[2] The main attack upon the instructions is directed at an instruction relating to the duty of the operator of a street car upon the approach of an authorized emergency vehicle, giving audible signal by siren. The trial court gave certain instructions at the request of defendants, which instructions quoted section 133 of the Vehicle Act, St.1929, p. 542, and purported to apply that section to the facts in the case. The trial court also gave the challenged instruction at the request of plaintiff, which instruction quoted section 554 of the Vehicle Code, St. 1935, p. 187, and purported to apply that section to the facts of the case. Said sections of said codes deal with the same subject-matter, but it is conceded that said section 133 was in force at the time of the accident and that said section 554 was not in force at that time. It was therefore error to quote a section not in force at said time, but the question remains as to whether the error was of such a prejudicial nature as to require a reversal.

Said section 133 of the Vehicle Act as quoted to the jury, read as follows: "Upon the approach of any authorized emergency vehicle, giving audible signal by siren, * * * the operator of any street car shall immediately stop such street car unless at the time it is crossing an intersection, in which event it shall be operated so as to clear the intersection and shall then be

stopped, until the authorized emergency vehicle shall have passed."

Said section 554 of the Vehicle Code, as quoted to the jury, reads as follows: "Upon the immediate approach of an authorized emergency vehicle giving audible signal by siren: * * * (2) The motorman of every street car shall immediately stop such car clear of any intersection and keep it in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police or traffic officer."

[3] We find no substantial difference in the duty imposed upon the operator of a street car under the two sections and if the trial court had merely quoted said sections, no further discussion would be required to show that no prejudice could have resulted. A further question is raised, however, by the instructions of the trial court purporting to apply said sections to the facts. These instructions were proposed by the respective parties. They are lengthy and we do not believe it would serve any useful purpose to set them forth in full. We believe that a fair reading of the instructions as a whole shows that these instructions may be reconciled and, in any event, we find no error prejudicial to defendants in the giving of said instructions under the facts presented by the evidence and the theories of the parties. It was plaintiff's theory, sustained by abundant evidence, that the motorman ran the street car through the stop-signal at a high rate of speed and that he failed to make reasonable use of his faculties to learn of the approach of the fire chemical in time to stop the car before entering the intersection. It was defendants' theory that the motorman did not run his car through the stop-signal or at a high rate of speed, that he exercised due care at all times but did not learn of the approach of the fire chemical until he was near the center of the intersection and that it was then his duty under the statute to proceed across the intersection before stopping. Plaintiff's challenged instruction dealt with the duty, ordinarily imposed by statute, to stop the street car upon the approach of the fire chemical. Defendants' instructions dealt with the duty imposed by statute to proceed and clear the intersection before stopping upon the approach of the fire chemical in the event that the street car was then in the intersection. We may assume, without deciding, that it was proper for the trial court to give defendants' instructions on this subject even though the evidence of the motorman shows that there was insufficient time for the street car to clear the intersection after the motorman actually learned of the approach of the fire chemical and it further appears that any attempt by the motorman thereafter to proceed and "clear the intersection" could result only in disaster. It is highly improbable, however, that the jury's implied finding of negligence on the part of the motorman was based upon anything which the motorman did or failed to do after actually learning of the approach of the fire chemical and it is likewise highly improbable that the jury was misled to the prejudice of the defendants by the giving of any of said instructions.

[4] Defendants also complain of the giving of an instruction on the "imminent danger rule". The main point raised is that the instruction failed to inform the jury that one who claims the benefit of the rule must be without negligence on his part. It may be conceded that an instruction on this subject should be qualified in the manner indicated, but the question remains as to whether the omission of such qualification was prejudicial. Plaintiff was not the driver of the fire chemical and there was no evidence to show that the negligence, if any, of the driver of the fire chemical was imputable to plaintiff. While defendants did allege that plaintiff was guilty of contributory negligence, there is no substantial evidence in the record to support a finding to that effect. We therefore conclude that the error in said instruction could not have been prejudicial to defendants under the circumstances. Defendants make the further point that another portion of the same instruction was confusing and difficult to understand. It is not claimed there was error in said portion but even if there were, it cannot be said that defendants were prejudiced by the instruction on this subject for the reasons above stated.

[5] Defendants further contend that the trial court erred in excluding evidence showing that approximately one year after the accident, plaintiff was retired (for disability resulting from the injuries received in said accident) upon a pension of $100 per month. We find no error in the trial court's ruling. There may be some conflict of authority on the subject, but the better view appears to be that such evidence is inadmissible for the purpose of reducing the amount of damages recoverable by the injured person on account of loss of earning capacity. Heath v. Seattle Taxicab Co.,

73 Wash. 177, 131 P. 843; Ring v. Minneapolis St. R. Co., 176 Minn. 377, 223 N.W. 619; Rusk v. Jeffries, 110 N.J.L. 307, 164 A. 313; Geary v. Metropolitan St. R. Co., 73 App.Div. 441, 77 N.Y.S. 54. The case of Groat v. Walkup Drayage & Warehouse Co., 14 Cal.App.2d 350, 58 P.2d 200, is not in point as the evidence was not there admitted for the above-mentioned purpose.

[6] Defendants further contend that the damages awarded were excessive. A sufficient description of plaintiff's injuries, the treatment thereof, the disability resulting therefrom and the amount of the special damages is set forth in the opinion on the former appeal. The award is large in amount but the injuries were severe and they resulted in a definite, permanent disability. We cannot say that the award was such as to suggest that it was made under the influence of passion or prejudice.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



29 Cal.App.2d 728

BARBER v. QUATACKER et al.

Civ. 2165.

District Court of Appeal, Fourth District, California.

Dec. 16, 1938.

Hearing Denied by Supreme Court Feb. 10, 1939.

1. New trial ⇐39

Trial judge has wide discretion in passing upon motions for new trial and the fact that a certain instruction has been held proper under certain circumstances does not necessarily mean that it would not be error to use the same or similar language in a case involving different circumstances. Const. art. 6, § 4½.

2. New trial ⇐41(3)

Constitutional provisions declaring that new trial shall not be granted on ground of misdirection of jury unless error complained of has resulted in miscarriage of justice are as binding on trial judge as on appellate court. Const. art. 6, § 4½.

3. Appeal and error ⇐933(1)

Reviewing court must assume that trial judge in granting new trial examined entire cause, including the evidence, and concluded that errors resulted in a miscarriage of justice, and in so doing, he was required to consider witnesses' credibility, their manner of testifying, and weight and sufficiency of evidence. Const. art. 6, § 4½.

4. New trial ⇐157

Trial judge in passing on motion for a new trial must review cause a second time as trier of facts. Const. art. 6, § 4½.

5. Appeal and error ⇐977(3)
New trial ⇐6

Trial judges are given a wide latitude in exercising sound discretion in passing on motions for new trial, and order granting motion will not be disturbed on appeal, unless there has been abuse of such discretion. Const. art. 6, § 4½.

6. New trial ⇐39

Where throughout the trial great emphasis was placed on fact that plaintiff had lost one eye and main issue was not plaintiff's failure to observe defendant's automobile approaching intersection, but whether he was negligent in proceeding after he saw location of defendant's automobile, instruction that a driver must have a "sharp" lookout for traffic and that if plaintiff was not using due care and caution, he was negligent, required a new trial, since it placed greater burden than the law required on plaintiff and jury might thereby have been misled. Const. art. 6, § 4½.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by J. I. Barber against Germon Quatacker and others for injuries sustained in an automobile collision. Verdict for defendant, and, from an order granting a new trial, defendants appeal.

Affirmed.

Forgy, Reinhaus & Forgy, and A. M. Bradley, all of Santa Ana, for appellants.

Harry C. Westover, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries sustained in an automobile collision. The accident occurred at the intersection of Fairview avenue with Edin-

ger road, near Santa Ana. Edinger road runs east and west and Fairview avenue comes into it from the south, ending at its junction with Edinger road. Both of these roads are paved. On the north side of Edinger road and about opposite the east line of Fairview avenue, a dirt road leads into a school yard. From a map drawn to scale, which is in evidence, it appears that the entrance to this school yard is about 5 feet in width. This private road into the school yard is so situated that in order to enter it a person driving north on Fairview avenue would, upon reaching this intersection, have to turn slightly to his right and cross Edinger road.

On the occasion here in question the plaintiff drove north on Fairview avenue and, as he reached the intersection, turned slightly to his right and crossed Edinger road toward the entrance of the school yard. At the same time the defendants' car was being driven westerly on Edinger road. When the plaintiff's car had almost reached the entrance to the school yard but while its rear wheels were still on the paved portion of Edinger road, its rear portion was struck by the defendants' car, resulting in certain injuries to the plaintiff. Each driver saw the other car and the collision seems to have occurred because the plaintiff assumed that he could cross Edinger road before the arrival of the defendants' car, which he saw approaching from the east, and the driver of defendants' car assumed that the plaintiff was going to proceed easterly on Edinger road since he saw the plaintiff turn slightly to the right as he entered the intersection. A jury returned a verdict in favor of the defendants and they have appealed from an order granting the plaintiff's motion for a new trial.

In its order granting a new trial the court said:

"* * * In Defendants' Instruction No. 17, the Court instructed the jury that it is the duty of any person using a public highway in this state to at all times have a sharp lookout for traffic upon intersecting highways. Throughout the trial and during the argument, the fact was emphasized that the plaintiff had lost the sight of one eye. The foregoing instruction imposed upon the plaintiff a greater burden than the law requires. He is only required to use ordinary care and caution while operating his vehicle upon a public highway, and I believe that this instruction imposing a greater duty upon him than the law requires, together with the fact that he had lost the sight of one of his eyes might have been misleading, and, for that reason it is the opinion of the Court that a new trial should be granted."

Instruction No. 17, referred to by the court, reads as follows:

"You are instructed that it is the duty of any person using a public highway in this state to at all times to have a sharp lookout for traffic upon intersecting highways, and if you find from the evidence that the plaintiff was not using due care and caution in approaching or traversing the intersection of Fairview and Edinger Streets, such conduct on his part constituted negligence as a matter of law, and in the event that such conduct contributed directly or proximately in any degree, no matter how slight, to the accident, your verdict shall be against the plaintiff and in favor of the defendants."

The appellants contend that the care required of an automobile driver is always reasonable care; that while this standard never varies the care which is reasonably required varies with the danger involved and is proportionate thereto; that an intersection is especially dangerous and calls for the exercise of a higher degree of care; that the fact that the respondent had but one eye was a circumstance requiring additional alertness on his part in order to meet the standard of ordinary care; that under the circumstances here appearing the instruction referred to was entirely correct; and that since no error appears the court abused its discretion in granting a new trial. They rely principally on the case of Berlin v. Violett, 129 Cal.App. 337, 18 P.2d 737, where the jury was told that drivers of vehicles are required to keep a vigilant lookout ahead so as to avoid, if possible, a collision with others, and on Mathews v. Dudley, 212 Cal. 58, 297 P. 544, where the jury was instructed that a driver must at all times be vigilant and must anticipate the presence of others. It is argued that the words "sharp lookout" used in the instruction in the instant case are practically synonymous with the words used in the instructions given in these other cases and that, therefore, no error appears. In neither of the cases cited was the question of the granting of a new trial involved. In each of those cases it would appear that the driver in question failed to see the other car, and in neither of those cases does it appear that the jury was not

fully and properly instructed with reference to what constitutes negligence and reasonable care.

[1-5] The trial judge has a wide discretion in passing upon motions for a new trial and the fact that a certain instruction has been held proper under certain circumstances does not necessarily mean that it would not be error to use the same or similar language in a case involving different circumstances. In Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P. 2d 774, in considering the relation of the provisions of section 4½ of article 6 of the Constitution to the granting of a new trial, this court said [page 775]:

"Of course, these provisions are as binding on the trial judge as on the members of an appellate court. This being so, we must assume that the trial judge in granting the motion for new trial performed his duty, examined the entire cause, including the evidence, and concluded that the errors resulted in a miscarriage of justice. In so doing he was required to consider the credibility of the witnesses, their manner of testifying on the stand, and the weight and sufficiency of the evidence. While the trial judge should not lightly set aside a judgment, still it is his duty in passing on a motion for new trial to review the cause a second time as a trier of fact and after such review decide the motion. Trial judges are given a wide latitude in exercising a sound discretion in passing on motions for new trial, and an order granting such a motion will not be disturbed on appeal unless there has been an abuse of such discretion."

In Breeze v. Southern Petro Tank Line Co., 5 Cal.App.2d 507, 43 P.2d 584, an order granting a new trial was affirmed, one of the errors of law being that the court instructed the jury that it was the plaintiff's duty while operating her car "to keep a close lookout". In that case, the court said [page 586]:

"By the use of the word 'close' in connection with 'lookout,' the court went beyond the requirements of the law. Instructions stating that a 'proper lookout' shall be kept by the driver of an automobile have been repeatedly given and approved on appeal, solely on the ground that to keep a proper lookout means only the exercise of that degree of care which a prudent man should use under like circumstances and which is the degree of care which the law imposes."

[6] In the instant case the court instructed the jury that it was the duty of a driver "to have a sharp lookout for traffic upon intersecting highways", and then went on to say that if the respondent was "not using due care and caution" at the place here in question, such conduct constituted negligence on his part as a matter of law. Although the appellants had set up the defense that the accident was caused by the contributory negligence of the respondent and the further defense that the accident was caused solely by the negligence of the respondent the court, in its instructions, failed to define negligence or ordinary care or to give any of the usual instructions in that regard, except that in one long instruction on contributory negligence the following language was included: "By contributory negligence is meant the lack of such care and caution as a person of ordinary prudence would have exercised under the same or similar circumstances." Under the evidence an exceedingly close case was presented and instead of the usual instructions in this regard the jury was told that a driver must at all times have a sharp lookout for traffic and that if the respondent was not using due care and caution he was negligent.

In view of the fact that the respondent had lost one eye, which fact had been greatly emphasized throughout the trial, it is not unreasonable to believe that the jury took the court's instruction as meaning that the duty rested upon the respondent of using an unusual degree of watchfulness and that if he failed in that regard he was not using due care and caution. In view of the evidence and the circumstances here appearing the court was justified in feeling that a greater burden than the law requires had been imposed upon the respondent, and that the jury might have been misled thereby. It further appears that the respondent did see the other car and the real question involved was not as to any failure to look or to observe on the part of the respondent, but as to his possible negligence in proceeding on his course after he saw the location of the other car. While the jury was not clearly instructed on the main issue the matter of his looking was not only emphasized in the evidence and argument, but by the instruction in question a very strict, if not a rather unusual, duty in that regard was placed upon him by the court. In view of the situation which prevailed here, we think the

court did not abuse its discretion in granting the motion for a new trial.

The order is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



29 Cal.App.2d 669

In re WAY'S ESTATE.

LOVE et al. v. BROWN et al.

Civ. 11977-S.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1938.

Hearing Denied by Supreme Court Feb. 10, 1939.

1. Descent and distribution ⇐40

An intestate's surviving aunts were related to intestate in the third degree, and hence were "next of kin" entitled to take the whole estate to the exclusion of the children of intestate's predeceased aunts and uncles, who were related to intestate in the fourth degree. Probate Code, §§ 226, 251, 253, 422.

[Ed. Note.—For other definitions of "Next of Kin," see Words & Phrases.]

2. Descent and distribution ⇐36

In statute providing that if decedent does not leave relatives of specified kinds, the estate shall go to the "next of kin in equal degree," the term "next of kin" means next of kin to the decedent himself, not to decedent's ancestor. Probate Code, § 226.

3. Descent and distribution ⇐43

Under statute providing that if decedent does not leave relatives of specified kind, the estate shall go to the "next of kin in equal degree," next of kin, however remote, take per capita and not by representation. Probate Code, § 226.

4. Executors and administrators ⇐32(1)

An order appointing intestate's cousin as administrator was not conclusive on the question of cousin's right to administer and right to heirship, and probate court had jurisdiction to revoke letters granted to cousin and grant letters to public administrator on ground that cousin had no right of heirship. Probate Code, §§ 450–453; Code Civ.Proc. § 473.

5. Executors and administrators ⇐32(2)

The statutes governing rights of prior claimants of letters of administration manifest intent to provide procedure for direct attack on grant of letters without relying upon appeal, motion for new trial, or statutory relief from judgment or order. Probate Code, § 450 et seq.; Code Civ.Proc. § 473.

6. Executors and administrators ⇐29(2)

Letters of administration regular on their face may be attacked only in a direct proceeding, since they are conclusive evidence of administrator's due qualification and authority, and of the regularity of proceedings leading up to their issuance, in a case of collateral attack.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Proceeding in the matter of the estate of Mary Loy Way, also known as Mary L. Way, deceased, wherein Loy L. Love was appointed administrator, but Ben H. Brown, public administrator, filed petition for revocation of the letters of administration. From an order revoking the letters, and finding that Mrs. Jean Jackson and another were heirs at law, Loy L. Love appeals.

Affirmed.

J. L. Smith, of San Francisco, for appellant.

J. H. O'Connor, Co. Counsel, and Ernest R. Purdum, Deputy Co. Counsel, both of Los Angeles, for respondent.

Catlin & Catlin, of Los Angeles, for heirs at law.

YORK, Presiding Justice.

On or about the 1st day of March, 1937, while on board the steamship Empress of Britain, a British ship traveling near Singapore, Mary Loy Way died leaving an estate in California, the estimated value of which is over $100,000.

At the time of her death, intestate left surviving her two aunts, Mrs. Jean Jackson and Mrs. Minnie Jones, who are sisters of intestate's mother, and also some twenty-three first cousins, who are the surviving children of the deceased brothers and sisters of intestate's mother and father. In-

testate's mother died in 1905 and her father in 1932, and it was stipulated that with the exception of the two aunts, above named, all other sisters and brothers of both said father and mother had predeceased the intestate. No blood relationship existed between intestate's mother and father.

On May 15, 1937, one of the said first cousins, John E. Hartley, who is the son of a deceased brother of intestate's mother, filed a petition for letters of administration of said estate, to which Loy L. Love, the son of a deceased sister of intestate's father, and Carroll Loy Stewart, the daughter of a deceased brother of intestate's father, filed notice of opposition upon the grounds that the said Hartley was not a bona fide resident of California, was not entitled to succeed to any portion of the estate and, therefore, said opponents had a prior right to such appointment. On June 24, 1937, the matter was duly heard and Loy L. Love was appointed administrator of said estate and letters duly issued to him. On July 1, 1937, the public administrator of Los Angeles county, pursuant to the provisions of section 450 of the Probate Code, petitioned the court praying that "the letters of administration issued to the said Loy L. Love be revoked and the order appointing him administrator be vacated and letters of administration of the above entitled estate be issued to your petitioner". Upon conclusion of the hearing of said petition, the court found that Mary Loy Way left surviving her neither issue, spouse, parent, brother, sister, nor descendants of a deceased brother or sister; that she was survived by Mrs. Jean Jackson and Mrs. Minnie Jones, her aunts, the sisters of the mother of intestate; that she was also survived by some twenty-three cousins; that the petitioner public administrator had no actual notice of the hearing on the petition of Loy L. Love for his appointment as administrator. The court found as conclusions of law from the foregoing facts that "Mrs. Jean Jackson and Mrs. Minnie Jones, aunts of decedent, are her next of kin and that they are entitled to succeed to all of the property of the above entitled estate; that Loy L. Love is not entitled to any portion of the property of the above entitled estate; that the public administrator has a prior right to letters of administration over Loy L. Love and that due to the nonresidence of Mrs. Jean Jackson and Mrs. Minnie Jones the public administrator is entitled to be appointed administrator herein." It was accordingly ordered that letters theretofore issued to Loy L. Love be revoked and letters of administration issue to the public administrator.

The said Loy L. Love prosecutes this appeal from such order, urging (1) that the superior court was without jurisdiction to review, modify or revoke its prior judgment and decree excepting in the manner provided by law, i. e., by a motion and showing as required under section 473, Code of Civil Procedure, a motion for a new trial or by an appeal; (2) that the decision of the court that appellant is not an heir at law and entitled to administer the said estate is against law; (3) that the evidence introduced at the hearing was insufficient to justify the findings of the court; (4) that the decision is against law in that the court failed to find on material issues of the case.

Before discussing appellant's first point, it is deemed expedient to pass upon the second question presented by this appeal, to-wit: "That the decision of the court that appellant is not an heir at law and entitled to administer the said estate is against law." Appellant's argument in this respect appears to be that the surviving aunts of intestate and the surviving children of the aunts and uncles who predeceased intestate are all in the same degree of relationship to intestate for the purpose of participating in her estate under section 226 of the Probate Code, and that said children of said predeceased aunts and uncles take by right of representation the shares their mothers and fathers would have taken had they survived intestate.

Appellant based his right to letters of administration upon section 422 of the Probate Code which outlines the order of priority of the right to such letters and provides that the relatives of the decedent are entitled to priority only when they are entitled to succeed to the estate or some portion thereof. Appellant asserts his right to succeed to a portion of said estate by virtue of section 226 of the Probate Code: "If the decedent leaves neither issue, spouse, parent, brother, sister, nor descendant of a deceased brother or sister, *the estate goes to the next of kin in equal degree,* excepting that, when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote." (Italics added.)

"The degree of kindred is established by the number of generations, and each generation is called a degree." Section 251 of the Probate Code.

"Collateral consanguinity is the relationship between people who spring from a common ancestor, but are not in a direct line. The degree is established by counting the generation from one relative up to the common ancestor and from the common ancestor to the other relative. In such computation the first relative is excluded, the other included, and the ancestor counted but once. Thus, brothers are related in the second degree, uncle and nephew in the third degree, cousins german in the fourth, and so on." Section 253 of the Probate Code.

[1] Under the sections of the Probate Code above quoted, the surviving aunts of intestate are related to intestate in the third degree, and are therefore next of kin and entitled to take the whole estate to the exclusion of first cousins of intestate, who are related to her in the fourth degree. See Estate of Nigro, 172 Cal. 474, 478 and 479, 156 P. 1019; Estate of Ingram, 78 Cal. 586, 21 P. 435, 12 Am.St. Rep. 80; Estate of Moore, 162 Cal. 324, 326 and 327, 122 P. 844.

[2, 3] "This subdivision (subd. 5 of sec. 1386, Civ.Code, now sec. 226 of the Probate Code) applies, as its language shows, to cases where the decedent leaves neither issue, husband, wife, father, mother, brother nor sister surviving. The term 'next of kin' as used herein means next of kin to the decedent himself, not to an ancestor of his. (In re Pearsons' Estate, 110 Cal. 524, 42 P. 960.) With reference to the share of each, a construction of the section leads to the conclusion that next of kin, however remote, take per capita, not by representation. In every other subdivision in section 1386 of the Civil Code, the legislature carefully specified inheritance by right of representation, when inheritance in this manner was intended, and as representation was not mentioned in subdivision 5, it follows that the legislature intended that descent should go to all next of kin in equal degree per capita, and not by representation. (Estate of Nigro, 172 Cal. 474, 156 P. 1019.)" 9 Cal.Jur. 464.

Because of the conclusion reached upon this point, it is not deemed necessary to discuss various arguments presented by appellant in connection therewith.

[4] Returning now to appellant's first point, he argues that the order appointing him administrator is final and conclusive on the question of his right to administer the said estate, as well as on the question of heirship, and that sections 450–453 of the Probate Code do not give the right to review or readjudicate what has been decided in granting the original letters of administration, nor to reopen the question whether the person originally appointed was entitled to such appointment.

Section 450 of the Probate Code, upon the authority of which the order appealed from was made, provides as follows: "Prior claimants for letters. When letters of administration have been granted to any person other than the surviving spouse, child, parent, brother or sister of the intestate or the public administrator, any one of them who is competent and had a prior right to letters, or any competent person at the written request of any one of them who is competent and had such prior right, may obtain the revocation of the letters, and be entitled to the administration, by filing a petition praying the revocation, and that letters of administration issue to him."

In Estate of Aldrich, 147 Cal. 343, 81 P. 1011, which appellant cites in support of this contention, letters of administration were granted to the nominee of one Lenora Aldrich, who claimed to be the surviving wife of decedent. Several months thereafter, one Sarah Aldrich, also claiming to be the surviving wife of decedent, petitioned the court under the provisions of section 1383, Code of Civil Procedure, for revocation of said letters of administration and praying for issuance thereof to her. This petition was by the court denied on the ground that the first decree was conclusive upon those things therein adjudicated, one of which was that Lenora was the surviving wife of decedent. In construing said section 1383, supra (now section 450 of the Probate Code as amended by the addition of the public administrator as one of the preferred classes therein enumerated), the court said at page 345, 81 P. page 1012: "But this section evidently deals with classes of persons who are given, respectively, statutory priority in their rights to letters of administration. It does not allow the former decree to be reviewed or assailed, but merely permits it to be superseded by a person of another and superior class. It refers to a case where letters have been granted to one

not claiming, or having been adjudicated, to be one of the persons mentioned in section 1383, as, for instance, where the public administrator, or a creditor, or some other person legally competent, but not enumerated in said section, has been appointed. It does not embrace a case where the one appointed had applied as one of the persons enumerated in the said section, and had been adjudicated by the court to be the surviving husband or wife, or one of the other persons enumerated therein. The decree * * * is conclusive as to the things therein adjudicated, one of which was that Lenora was the surviving wife." This case can readily be distinguished from the instant case because both Lenora and Sarah petitioned as the "surviving wife" which is "one of the persons enumerated in the said section". In other words, the cited case is direct authority for the procedure followed in the instant case "where letters have been granted to one not claiming or having been adjudicated to be one of the persons mentioned [therein] as, for instance, where * * * a creditor, or some other person legally competent, but not enumerated in said section, has been appointed". Obviously, appellant could not bring himself within the purview of said section and therefore, as one of the preferred persons enumerated therein, the public administrator properly asserted his right to letters of administration, and it was equally proper for the court to revoke the letters theretofore issued to appellant and to supersede them by letters to one of a superior class.

Again in the Estate of Carter, 9 Cal.App. 2d 714, 717, 50 P.2d 1057, 1058, it is said: "The rule is settled beyond controversy that no person in any of the preferred classes mentioned in section 1383 could assert his prior rights under that section if original letters had been issued to any person within any one of the classes specifically mentioned in that section. Estate of Shiels, 120 Cal. 347, 349, 52 P. 808, Estate of Aldrich, 147 Cal. 343, 345, 81 P. 1011, 1012. Since its adoption that section has been held to apply only in cases where original letters have been issued to one 'other than' those specifically mentioned in that section."

"The general purpose of the section has been declared to be to allow a prior right to letters to be asserted against one who has obtained a grant of letters by virtue of a secondary right; to permit the former administrator to be superseded by a person of another and superior claim. See Estate of Wooten, 56 Cal. 322, 326; Estate of Aldrich, 147 Cal. 343, 345, 81 P. 1011. It is solely in the interest of the person having such prior right or belonging to such superior class. * * * This being the situation, the Legislature provides for the initiation of proceedings for revocation when letters have been granted to any other person than to a husband or wife, child, father, mother, brother, or sister of the deceased 'by any one of them who is competent.'" Estate of Martin, 163 Cal. 440, 442, 125 P. 1055, 1056.

"A prior right to letters of administration on an estate may be asserted at any time against one who has obtained a grant of letters by virtue of a secondary right. (§§ 1383, 1386, Code Civ.Proc.) The assertion of such right is expressly provided for by §§ 1383, 1384 and 1385 of the Code of Civil Procedure; and if the right be established, and the applicant is found to be competent, the letters of the former administrator must be revoked, and a grant of letters of administration made to the applicant." Estate of Wooten, 56 Cal. 322, 326.

[5, 6] It therefore becomes apparent that the legislature in enacting section 1383 et seq. of the Code of Civil Procedure, which have been carried forward into the Probate Code as section 450 et seq., intended to provide a means whereby one having a superior right thereto could directly attack a grant of letters of administration to one having a secondary right thereto (or no right at all, as here) instead of having to rely upon an appeal, a motion for a new trial or a showing under section 473 of the Code of Civil Procedure, as is here contended by appellant. Letters of administration regular on their face may be attacked only in a direct proceeding, since they are conclusive evidence of the due qualification and authority to act of the administrator and of the regularity of the proceedings leading up to their issuance in a case of collateral attack. Lane v. Starkey, 59 Cal.App. 140, 142, 210 P. 277.

For the foregoing reasons, it is the irresistible conclusion of this court that sections 450–453 of the Probate Code outline the procedure for a direct attack upon letters of administration and that by virtue thereof the Superior Court had jurisdiction to revoke its prior order and issue letters to the respondent public administrator. The evidence adduced at the hearing is

amply sufficient to justify the findings of the court; and further, the decision of the court is in strict conformity with the law.

The order appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.



29 Cal.App.2d 677

In re WAY'S ESTATE.

LOVE et al. v. JACKSON et al.

Civ. 12013-S.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1938.

Hearing Denied by Supreme Court Feb. 10, 1939.

Descent and distribution ⇐40

An intestate's surviving aunts on her mother's side were related to intestate in the third degree, and hence were "next of kin" entitled to take the whole estate to the exclusion of the children of intestate's predeceased aunts and uncles on her father's side, who were related to intestate in the fourth degree, notwithstanding that the major portion of the estate came to decedent through her father. Probate Code, § 226.

[Ed. Note.—For other definitions of "Next of Kin," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Mary Loy Way, also known as Mary L. Way, deceased, on petition by Jean Jackson and Minnie Jones for determination of interest in the estate, contested by Loy L. Love and others. From a decree for petitioners, the contestants appeal.

Affirmed.

J. L. Smith, of San Francisco, and A. J. Edwards, of Los Angeles, for appellants.

Catlin & Catlin, of Los Angeles, for respondents.

YORK, Presiding Justice.

The respondents, who are sisters of decedent Mary Loy Way's mother, filed a petition for determination of interest in said decedent's estate and claimed the right to succeed to the entire estate as heirs at law of said Mary Loy Way. Several first cousins of decedent, who are the surviving children of the predeceased brother and sisters of decedent's father, filed their answer to said petition alleging that "the legal heirs of the said Mary Loy Way and the legal next of kin entitled to inherit are the brother and sisters of said M. B. Loy (decedent's father), and if any of such brother or sisters of said M. B. Loy are deceased, then said property should go to the children of said deceased brother and/or sister by right of representation." The theory of said contestants, who are appellants herein, is that since decedent's mother predeceased decedent's father, and the bulk of decedent's estate was inherited by her through her father, that her cousins german on her father's side should succeed to her estate to the exclusion of cousins german on her mother's side and to the exclusion of her aunts, who are the surviving sisters of decedent's mother.

Upon the issues so joined, the court found that Mary Loy Way died March 1, 1937, leaving neither issue, spouse, parent, brother, sister nor descendant of a deceased brother or sister and died intestate; that the major portion of the assets of her estate came to her by inheritance through her father, who died January 29, 1932; that decedent's mother died November 19, 1905; that the brother and sisters of decedent's father and all the brothers and sisters of decedent's mother died prior to March 1, 1937, with the exception of respondents Jean Jackson and Minnie Jones, decedent's aunts, who are the surviving sisters of decedent's mother. As conclusions of law, the court found that said respondent aunts are the only heirs at law and take per capita the entire estate of decedent. From the decree thereafter entered pursuant to such findings of fact and conclusions of law, contestants prosecute this appeal.

Appellants apparently rely upon the following points to sustain their contentions upon this appeal:

1. That the major portion of decedent's estate having come to her through her father, the only next of kin entitled to share in her estate are the next of kin who are blood relations of her father, and that the surviving aunts of decedent, respond-

ents here, being sisters of decedent's mother and not blood relations of her father, are barred from participating in her estate.

2. That the surviving aunts of decedent and the children of the uncles and aunts of decedent, which uncles and aunts predeceased the decedent, are all in the same degree of relationship to decedent for the purpose of participation in her estate under section 226 of the Probate Code, and that said children of said predeceased aunts and uncles of decedent take by right of representation the shares their mothers would have taken had they survived decedent.

The principles of law involved in the instant action are identical with those which arose in connection with the main question presented in the case this day decided of Estate of Way, Loy L. Love, Contestant and Appellant, v. Ben H. Brown, Public Administrator, Respondent, Cal. App., 85 P.2d 563.

For the reasons stated in the opinion in that case, the judgment and decree determining heirship herein is hereby affirmed.

We concur: DORAN, J.; WHITE, J.



LESLIE et al. v. FEDERAL FINANCE CO., Inc. *

Civ. 2180.

District Court of Appeal, Fourth District, California.

Dec. 19, 1938.

Rehearing Denied Jan. 17, 1939.

Hearing Granted by Supreme Court Feb. 16, 1939.

1. Mortgages ⇐606

Where purchaser under foreclosure of trust deed was informed that payment for redemption would not be made even on proper tender of instruments for reconveyance, tender, if tender had not been made, would have been excused. Civ.Code, §§ 1440, 1515.

2. Mortgages ⇐617

In suit to secure reconveyance of property which trustee had sold under power of sale in trust deed to creditor for whose benefit deed had been executed, a complaint by holder of sheriff's deed under execution sale wherein debtor and creditor were charged with fraud with respect to the sale under the trust deed, offered on theory that creditor had suffered the title to the property to become clouded by fraud, was properly rejected.

3. Mortgages ⇐611

The mere filing of complaint in action by holder of sheriff's deed, wherein debtor, and creditor for whose benefit trust deed had been executed, were charged with fraud with respect to the sale of property under trust deed, did not constitute a lien "made, done or suffered" by creditor of which debtor could take advantage in her attempt to secure a reconveyance of the property on ground that creditor had suffered the title to the property to become clouded by fraud, particularly where creditor's alleged act of transferring to another after purchase under trust deed was alleged to have been committed for purpose of defrauding judgment creditor of debtor. Civ.Code, § 3517.

[Ed. Note.—For other definitions of "Done," "Made," and "Suffered," see Words & Phrases.]

4. Mortgages ⇐611

In suit to secure a reconveyance of property which trustee had sold under power of sale in trust deed to creditor for whose benefit deed had been executed, debtor was estopped from alleging that by transfer to another after purchasing at sale under trust deed, creditor had "suffered" title to the property to become clouded by fraud, where fraud, if perpetrated, was committed for purpose of defrauding judgment creditor of debtor. Civ.Code, § 3517.

5. Equity ⇐25

Generally, equity will not aid either party to transaction which is illegal or contrary to public policy, where they are equally at fault but will leave them where it finds them to settle their questions without the court's aid.

6. Mortgages ⇐622

Where there was no finding supporting theory of fraud or collusion with respect to sale of property under trust deed on part of creditor in whose favor deed was executed and where fraud, if perpetrated, was committed for purpose of defrauding judgment creditor of debtor, the District Court of Appeal could not presume such fraud or collusion in support of debtor's

*For subsequent opinion see 92 P.2d 906.

attempt to secure a reconveyance of property which trustee had sold to creditor under power of sale in trust deed. Code Civ.Proc. § 1963, subd. 19.

7. Vendor and purchaser ⇐18(3)

Time is of the essence of a contract of option regardless of the words used.

8. Mortgages ⇐621

An interlocutory decree entered by stipulation wherein it was provided that in event debtors failed to make payments therein specified in order to secure a reconveyance of property which trustee had sold under power of sale in trust deed to creditor for whose benefit deed had been executed, then, immediately after the time limited by the decree, the creditor should be entitled to a final decree quieting title to the property in it, by provision relating to time, made time or the essence.

9. Mortgages ⇐621

Where interlocutory decree entered by stipulation required that payment necessary to effectuate a redemption from foreclosure under trust deed be unconditional and within a time specified but escrow agreement required that policy of title insurance showing record title free of incumbrances be produced before payment deposited therewith be delivered, trial court did not abuse its discretion in quieting title to the property in purchaser under foreclosure of the deed, in accordance with provision in the interlocutory decree.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Charles C. L. Leslie and Catherine L. Leslie against the Federal Finance Company, Incorporated, wherein plaintiffs sought to have the defendant declared a trustee of the legal title to certain real and personal property for their use and benefit, for reconveyance of the property to the second-named plaintiff, for an accounting of proceeds derived from operation of the property, and for an injunction pendente lite to restrain the defendant from transferring or conveying title to the property. From an adverse judgment, the second-named plaintiff appeals.

Affirmed.

Olson & Olson, of Los Angeles (Homer N. Boardman and Robert Clifton, both of Los Angeles, of counsel), for appellant.

Forgy, Reinhaus & Forgy (by A. M. Bradley), of Santa Ana, for respondent.

GRIFFIN, Justice.

About January 11, 1932, appellant, Catherine L. Leslie, and Charles C. L. Leslie, executed a deed of trust upon certain real property in Orange county to the Orange County Title Company, as trustee, securing among other obligations a note for $45,870 payable to the respondent, Federal Finance Company, Inc. The note and trust deed were in effect a renewal of a former note and trust deed between the same parties involving the same property.

About September 18, 1931, one H. O. Jones obtained a judgment against the appellant's husband, Charles C. L. Leslie. This judgment was recorded August 2, 1932, in Orange county. The judgment creditor thereafter caused an execution to be levied upon and against all of the interest and estate of Charles C. L. Leslie in and to the real property covered by the trust deed heretofore mentioned, which execution was recorded September 7, 1932.

On or about December 19, 1932, respondent caused its trust deed to be foreclosed and the real property covered thereby sold by the trustee under the power of sale contained therein. At said sale, which was held on July 25, 1933, respondent corporation purchased the real property for the sum of $56,000, and received a trustee's deed of the legal title thereto.

At the time of the trustee's sale appellant and her husband were the owners of certain tools, farm implements and other equipment, of an alleged reasonable value of $10,000, which had been and were being used in connection with the operation and maintenance of the real property, the legal title to which appellant and her husband transferred to the respondent corporation by written assignment, executed and delivered subsequent to the trustee's sale of July 25, 1933, and prior to August 18, 1934.

Plaintiffs herein brought this action, seeking to have the respondent corporation (1) declared a trustee of the legal title to the real and personal property for their use and benefit; (2) reconvey the property to the appellant; (3) account for the proceeds derived from the operation of the real property; (4) enjoined, pendente lite, from transferring or conveying title to the property.

Appellant's claim to such relief, as set out in the complaint, is based upon certain oral agreements between the parties to the trust deed and their conduct with respect thereto. Appellant alleges that immediately prior to the trustee's sale, she and her husband had numerous conversations with one J. A. George, as the active manager of the respondent corporation, and as a result of which an oral agreement was made between the parties to the following effect:

"(a) For the purpose of clearing the title to the real property in order that the respondent corporation's trust deed loan might be refinanced, the respondent corporation would and should foreclose its trust deed and cause the real property covered thereby to be sold.

"(b) At said trust deed foreclosure sale of the real property, the respondent corporation would and should become the purchaser thereof and that appellant and her said husband would and should remain in possession and operation of the property until such time as they should be able to refinance respondent corporation's said trust deed loan.

"(c) For the purpose of protecting appellant's equity in the real property she and her husband would and should make application to the Federal Land Bank of Berkeley, California, for a substantial loan.

"(d) The proceeds of such loan to be made by said Federal Land Bank of Berkeley would and should be received and accepted by the respondent corporation in reduction of appellant's said trust deed indebtedness.

"(e) The loan to be obtained from said Federal Land Bank of Berkeley would and should be secured by a first mortgage on the real property described in the respondent corporation's said trust deed.

"(f) After said trust deed foreclosure and the sale of said real property, the respondent corporation would and should receive the proceeds derived from the operation of said real property and account to appellant and her said husband for all sums received in excess of the necessary operating expense.

"(g) The net proceeds derived and received by the respondent corporation from the operation of the real property during the period in which title to the same was held by it would and should be applied to the payment of appellant's trust deed indebtedness."

Subsequent to the trustee's sale of July 25, 1933, and prior to July 18, 1934, it is alleged that appellant and her husband had certain conversations with J. A. George, as a result of which a further oral agreement was made between the parties, to this effect:

"(1) Appellant and her husband would and should transfer and convey to the respondent corporation all tools, farm implements and other equipment used in the operation and maintenance of said real property, under the same agreement which was then in force by and between the parties with respect to the real property.

"(2) The title to said personal property would and should be reconveyed to appellant and her husband as and when the respondent corporation's said trust deed loan should be refinanced."

In the complaint it is further alleged in substance that on or about August 29, 1933, appellant's husband obtained a tentative commitment from the Federal Land Bank for a loan of $30,000, which commitment the respondent rejected in January, 1934. A similar commitment in the sum of $32,500 was rejected by it in May, 1935.

Respondent corporation in its answer to the complaint specifically denies the allegations with respect to the oral agreement heretofore mentioned and the conduct of the parties relating thereto.

Upon the trial of the case on June 8, 1936, after the appellant and her husband had introduced their proof, a motion for nonsuit was made and denied by the trial court. The parties thereupon stipulated to the entry of an interlocutory judgment in accordance with a written stipulation, which was duly filed. Thereupon judgment was made and entered by the court.

That portion of the interlocutory decree which we deem advisable to relate, in fairly presenting the agreement of the parties, may be recapitulated as follows:

(1) The court on June 11, 1936, decreed that plaintiffs have the right to purchase the real property and also the personal property theretofore described "*at any time on or before the 10th day of December, 1936*", for the sum of $57,821.19, plus interest, cost of operation, etc. This sum was subject to an audit by plaintiffs to be completed within 30 days from the date of

the decree. The net amount of the purchase price was to be determined in accordance with an account furnished by plaintiffs as of June 3, 1936.

(2) It was further ordered that defendant corporation remain in possession of the real property until plaintiffs paid to defendant the purchase price.

(3) Upon payment being thus made the defendant was to execute to the plaintiffs or their nominee, a grant deed to the real property hereinbefore referred to, *free and clear of all liens and encumbrances made, done, or suffered by the defendant* as of the date of the purchase by the defendant of said real property at foreclosure sale of the deed of trust, but without covenant or warranty, expressed or implied, the defendant being only required to convey to the plaintiffs the title to the real property which it acquired as purchaser under the foreclosure of the deed of trust.

(4) That upon the purchase of the property by plaintiffs in accordance with the decree, and at the time of the execution of the deed, the purchase price having been paid to the defendant as therein directed, defendant should also assign to the plaintiffs any moneys, due for crops grown on the land, and any interest that it might then have in revolving funds of marketing associations by reason of crops marketed from the real property, and any interest that it might then have in sums to be paid by any citrus marketing association by reason of unpaid balances for crops harvested from the property. It was ordered that at the time and under the conditions related defendant should further execute to plaintiffs a bill of sale of the personal property remaining on the real property, but without warranty.

(5) That all money to be paid to the defendant by the plaintiffs should be paid to its account at the office of the Orange County Title Company in Santa Ana, to be paid by the title company to the defendant upon receiving from the defendant the instruments required to be executed by the defendant under the decree. The certificate of the title company that the moneys had or had not been paid by the plaintiffs or their assigns was to be sufficient evidence to the court for the entry of the final decree therein. If, however, the defendant should, upon notice of deposit of the moneys with the title company, file with the title company the instruments therein referred to, to be executed by the defendant on or before the 10th day of December, 1936, and the moneys were not received by the title company for the unconditional use of the defendant as provided in the decree on or before the said date, then the court should enter its final decree quieting title in the defendant corporation as thereinabove provided.

(6) That if the payments to be made by the plaintiffs to the defendant for the purchase of the real property were made as therein provided, and within the time therein limited, to wit, on or before the 10th day of December, 1936, then the plaintiffs should be entitled to a final decree confirming title to the real and personal property in the plaintiffs, and the court should, under such circumstances and conditions, enter its final judgment confirming title to the real and personal property in the plaintiffs.

(7) That if plaintiffs failed to make the payments as therein provided to be made then immediately after the time limit set by the interlocutory decree, to wit, the 11th day of December, 1936, the defendant should be entitled to a final decree quieting title to the personal property in the defendant and declaring that neither one of the plaintiffs is entitled to any right, title or interest in any of the real or personal property, and the court should enter its final decree to that effect.

On June 11, 1936, appellant's husband, Charles C. L. Leslie, duly assigned to appellant all his right, title and interest in and to the above-mentioned interlocutory decree and the rights thereby granted to him.

On January 7, 1937, the court gave final judgment in favor of the respondent corporation, quieting its title to the real and personal property hereinbefore mentioned. This decree was made following a hearing upon the motion of respondent corporation to enter a final decree. The motion to enter this decree was filed December 12, 1936.

From the evidence presented at the hearing and the affidavits introduced it appears that the amount necessary to be paid to respondent on December 10, 1936, was the sum of $55,259.28. Counsel for appellant filed an affidavit reciting the fact that he was attorney-in-fact for appellant; that on December 10, 1936, he was in the office of the title company arranging for the deposit of the amount required to be paid to the Federal Finance Company and for the

purchase of the property by J. Roy Smith and wife, as assignees and nominees of Catherine L. Leslie; that he was present on December 10, 1936, when the necessary funds were deposited with the title company in the exercise of plaintiffs' right to purchase the property and that he directed the title company to pay out of such funds to the Federal Finance Company, Inc., the sum of $55,259.28, upon receipt from the finance company of a deed of conveyance of the real property to J. Roy Smith and wife, together with a bill of sale of the personal property and assignments referred to in the interlocutory decree.

The escrow instructions dated December 10, 1936, directed to the title company and given by Catherine L. and Charles C. L. Leslie, through their attorney-in-fact, contained some of the following provisions:

"I will direct the Federal Finance Company, Incorporated, a corporation, to convey to J. Roy Smith and Grace Lee Smith, husband and wife, as joint tenants with the right of survivorship, covering that certain property described as follows: (describing property) upon payment to you for my account as hereinafter provided, the sum of $68,000.00 of which amount $56,000.00 is deposited in escrow this date and balance of $12,000.00 within 30 days from date hereof, from which sum you may deduct your charges and advances and from which you may also pay all encumbrances on said property necessary to issue your Policy of Title Insurance in your usual form, showing the record title to said property vested in said J. Roy Smith and Grace Lee Smith, husband and wife, as joint tenants with the right of survivorship, free of all encumbrances. * * * All funds deposited in this escrow are to be disbursed subject to the order of Culbert L. Olsen, attorney in fact for Cathering L. Leslie, at such time as these instructions can be complied with. Your liability under said policy of title insurance to be limited to $68,000.00. * * *

"Time is declared to be the essence of these instructions and if, within the time specified you are unable to comply with these instructions, then all papers, money or property left with you by me shall be returned to me on my written demand. * * *"

These instructions were approved by J. Roy Smith and the $56,000 was authorized to be deposited in the general escrow account. Smith signed an instrument agreeing to buy the property on the terms above recited. On the same day the Leslies authorized the title company to pay from the funds deposited by J. Roy Smith, to the finance company the sum of $55,259.28 upon the conveyance by the finance company to J. Roy Smith and wife, of the real estate described and the execution of a bill of sale of the personal property. This written instruction was not signed by J. Roy Smith.

It appears from the testimony of the vice-president of the title company that on December 11, 1936, respondent corporation's counsel tendered a deed, bill of sale, and certain assignments, and demanded the $55,259.88 due under the decree. The title company refused payment and assigned as its reason the fact that the escrow instructions called for an additional $12,000 to be paid by Smith and that the deposit made was conditional upon securing clear title to the property. A title search would have to be completed before a policy of insurance could issue as provided in the instructions. The title search was commenced on the 11th day of December, 1936, and completed on December 18th of the same year, by which it was disclosed that to clear the title a quitclaim deed would have to be obtained from E. E. Pellegrin and dismissals filed in the declaratory relief suit and in the present action, as well as the possible necessity of a release by respondent of a crop mortgage.

The affidavit of counsel for respondent which was received in evidence relates in substance that on December 11, 1936, at 9 o'clock a. m., he telephoned to the vice-president of the Orange County Title Company and asked if there was any money on deposit with that company which the company would pay to the Federal Finance Company upon delivery by it to the title company of the instruments required. The vice-president replied that they had no money to pay it upon delivery of the instruments but that he had taken in an escrow about 6 o'clock the evening before and $56,000 was deposited, but that the moneys could not and would not be paid to the finance company unless and until the title had been searched and the title company could deliver to the proposed purchaser its policy of title insurance, insuring title in purchaser in accordance with the terms of the escrow, and that this would take a number of days; that counsel for respondent then stated that the Federal

Finance Company desired to make a tender of the instrument to the title company and was informed that it would be useless because no payment would be made; that on December 11, 1936, a tender of the instruments described in the decree was made and payment was refused; that he requested that he be shown the escrow and was advised that he could not see it because the title company had been instructed by counsel for appellant not to show the escrow nor to disclose its terms to the finance company; that he demanded that the title company issue its certificate in accordance with paragraph VII of the interlocutory decree, stating that the moneys had either been paid or not paid to the title company for the account or unconditional use of the finance company; that if they did not desire to certify to any conclusion that they certify the true facts under which they held the escrow, including the escrow instructions and terms. This demand was refused.

[1] It is apparent from this statement that the respondent used the greatest diligence in making a tender, and that if a tender was required, which we do not hold, it was useless, because respondent was informed in advance that no payment would be made, even upon proper tender. Where a tender is useless, failure to make it is excused. This principle is well established. Pierce v. Lukens, 144 Cal. 397, 77 P. 996; Civ.Code, secs. 1440 and 1515; Hulen v. Stuart, 191 Cal. 562, 217 P. 750; Bell v. Bank of California, 153 Cal. 234, 94 P. 889. The court found that, though it was not required by the terms of the interlocutory decree, the defendant tendered all instruments required by it to be tendered in the event the appellant desired to exercise the option. There is sufficient evidence to support this finding.

[2] It is contended that the trial court erred in sustaining respondent's objection when appellant offered in evidence, at the hearing on the motion to enter final judgment, a complaint entitled E. E. Pellegrin, plaintiff, v. Charles C. L. Leslie, Catherine L. Leslie and Federal Finance Company, Inc., defendants, wherein the plaintiff charges fraud and collusion between the defendants with respect to the sale of the property under the trust deed, and alleges that he was the holder of a sheriff's deed under execution sale upon a judgment formerly rendered in favor of one H. O. Jones and against appellant's husband, Charles C. L. Leslie. This was offered on the theory that respondent suffered the title to the property to become clouded by its fraud and collusion. We are of the opinion that the court properly sustained the objection.

In the case of Osborne v. Winter, 133 Cal.App. 664, 24 P.2d 892, the court, in defining the term "suffer to occur" said [page 893]: "It implies an approval of or acquiescence in an act, and more than nonresistance. Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802, 18 L.R.A.(N.S.) 926. And denotes knowledge and intention. Bunnell v. Commonwealth (Ky.) 99 S.W. 237."

In Crist v. Fife, 41 Cal.App. 509, 183 P. 197, construing section 1113 of the Civil Code, which declares that a grant insures among other things that an estate is at the time of conveyance free from incumbrances done, made or *suffered* by the grantor, the court said " 'Suffered,' as used in the statute, implies reasonable control, and it cannot be held to apply to an incumbrance not caused by the act of the party nor within his power to prevent."

In Block v. Citizens' Trust & Savings Bank, 57 Cal.App. 518, 207 P. 510, it was held that condemnation proceedings could not be said to constitute an incumbrance " 'made, done or suffered' by the vendor". [Page 513.]

[3–6] It cannot be said in the instant case that the mere filing of the complaint in the case of Pellegrin v. Leslie et al., above referred to, by virtue of which the title to the property may have become clouded, constituted a lien or incumbrance made, done or suffered by the respondent, particularly when the claimed act of respondent in transferring the property to J. Roy Smith was, as alleged in the complaint, committed for the purpose of defrauding the judgment creditor of Charles C. L. Leslie. Under these circumstances, appellant would be estopped in an equity proceeding from advancing such a claim, especially where she was to receive all the benefits of such a fraud, if perpetrated, as alleged. Sec. 3517, Civ.Code. As a general rule, equity will not aid one party or another to a transaction which is illegal or contrary to public policy, where they are equally at fault, but will leave them just where it finds them, to settle their questions without the aid of the court. Colby v. Title Ins. & Trust Company, 160

Cal. 632, 117 P. 913, 35 L.R.A.,N.S., 813, Ann.Cas.1913A. 515; 10 Cal.Jur. 518, sec. 57. Respondent has specifically denied all of the allegations of the complaint in this action. There is no finding supporting the theory of fraud or collusion on the part of respondent and we cannot presume such fraud or collusion from the record before us. Sec. 1963, Code Civ.Proc. subd. 19.

It is to be noted further that after the introduction of the evidence to which we have referred, and when the court was about to announce its oral decision, appellant asked for a continuance for several days for the purpose of securing further evidence. Respondent objected to the continuance, but the objection was overruled. On the day to which the hearing was continued, appellant called J. Roy Smith as a witness and asked him if he was willing to change the escrow instructions so as to permit the immediate release of the amount required to pay the Federal Finance Company so that the title company might immediately pay over the money to the finance company on receipt from it of the conveyances and assignments designated. He expressed a willingness so to do. A written authorization to this effect was received in evidence. Respondent refused to accept the offer, whereupon the court rendered final judgment in favor of respondent in accordance with the terms of the interlocutory decree.

[7–9] Appellant in his exhaustive and well-prepared brief strenuously contends that the decree or order being interlocutory, the trial court had the power to extend the time therein provided for the payment of the money by appellant to respondent, and cites the case of Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal.App. 433, 271 P. 363, which involved an interlocutory decree given by the court after trial of the issues, and not one entered by stipulation of the parties. By that interlocutory decree it was adjudged that the plaintiff's title to certain property be quieted against the claims of the defendant Gladiator Manufacturing Company, unless, within thirty days after entry of judgment the company paid to a trustee for the plaintiff $15,500. It was provided that upon payment of said sum by the company to the trustee within said period plaintiff should execute a deed to the company and deliver a certificate of title, and if the company did not pay within the thirty-day period then title should be quieted against defendants by final decree. No payment was made and after the time had expired to make a deposit plaintiff moved for final judgment. The motion was denied on a showing that defendant would be able to comply within a short period of time. No compliance was had and several similar applications were made for final judgment and were, by the court, continued or denied. Plaintiff sought a writ of mandate to compel the court to enter a final decree. The appellate court held that from the language of the interlocutory decree the trial court did not intend that the interlocutory judgment should of itself operate to complete the record of the action and that, therefore, it was subject to amendment by the trial court in the exercise of its discretion. There are many other authorities cited to the same effect. Gerrish v. Black, 109 Mass. 474; 21 Cor.Jur. 703; 10 R.C.L., sec. 350, p. 562; Kelley v. Stanbery, 13 Ohio 408; Dieckhart v. Rutgers, 45 Mo. 132; Lawrence v. Staigg, 10 R.I. 581; Security-First Nat. Bank of Los Angeles v. Superior Court, 132 Cal.App. 683, 23 P.2d 1055.

Respondent does not dispute this general rule, but contends that a different rule applies where the interlocutory judgment is entered as a result of a stipulation and such stipulation specifically recites the terms of and under which the consent judgment may be entered; that such interlocutory judgment is then conclusive upon the consenting parties and cannot be amended or varied without consent. This principle of law receives support in the analogous case of Horning v. Kendrick, Saginaw Circuit Judge, 1910, 161 Mich. 413, 126 N.W. 650. There the defendant was charged with having purchased certain lands as trustee for the complainant. He filed an answer but before proofs were taken the parties agreed upon a settlement of the matters in dispute and a consent decree was entered, by the terms of which the complainant was to pay to the defendant the sum of $6,000 on or before February 15, 1910. Upon the payment of this sum the defendant was to transfer the property in dispute to the complainant. In default of the payment of the said sum on or before the said date, the property in dispute was to become the property of the

defendant. On February 15, 1910, complainant filed a petition for an extension of 60 days in which to pay the $6,000. The additional time was allowed upon the ground that the complainant had acted in good faith but had been disappointed in its efforts to raise money. The defendant asked for a writ of mandamus to compel the elimination of an amended decree granting the additional time.

The writ was denied upon the ground that the order extending the time of payment was a final order and that a review thereof could be had only by appeal. In denying the writ the court said [page 651]:

"It is elementary that a decree by consent cannot, in the absence of fraud or mistake, be set aside by rehearing, or on appeal; nor can it be modified without the consent of the parties. Russell v. White, 63 Mich. 409, 29 N.W. 865; Hodges v. McDuff, 76 Mich. 303, 43 N.W. 428; Enc. of Plea. & Prac. vol. 18, p. 5, and cases cited. This proposition is not denied by the respondent; but it is urged that the amended decree, which provides merely for an extension of time in which the money is to be paid, is not an alteration of the decree.

"We are unable to agree with this contention. * * * If the court below could extend the time once for a month, it could again extend it for a further period, and thus render the decree less valuable, or even useless, to the party not consenting to the change."

It is apparent to us that the element of time was of the essence of the agreement, which ripened into a decree. The court, in Horning v. Kendrick, supra, went on to say: "Having indicated our views upon the merits, however, it is probable that a proper order will be entered by the learned circuit judge, upon the application of relator, without necessitating the delay incident to an appeal."

See, also, Himmelmann v. Sullivan, 40 Cal. 125; Faulkner v. Brooks, 125 Cal.App. 137, 13 P.2d 748; Schmidt v. Oregon Gold Mining Co., 28 Or. 9, 40 P. 406, 1014, 52 Am.St.Rep. 759, 764; Estate of Meredith, 275 Mich. 278, 266 N.W. 351, 104 A.L.R. 348, 352; vol. 3, Freeman on Judgments, sec. 1352, p. 2776; Hyde v. Superior Court, 28 R.I. 204, 66 A. 292. Where the decree contains a provision retaining jurisdiction for the purpose of taking such other action as is necessary the court may, under certain conditions, modify the terms of the decree. United States v. Swift & Co., 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999.

Respondent further argues that the terms of the interlocutory decree only amounted to an option to purchase real property which appellant did not exercise and which option ceased with the passing of time. Citing Brickell v. Atlas Assurance Co., Ltd., 10 Cal.App. 17, 101 P. 16; Johnson v. Clark, 174 Cal. 582, 586, 163 P. 1004; California Land Security Co. v. Ritchie, 40 Cal.App. 246, 255, 180 P. 625.

Considering the last points raised, if we accept the theory that the interlocutory decree amounted to a consent judgment by stipulation and is therefore conclusive upon the consenting parties and cannot be amended or varied without consent, under the evidence in this case the final judgment of the trial court is sufficiently supported. If, on the other hand, we accept the appellant's contention that the interlocutory decree is subject to modification to the extent requested, the only question then presented is this: Did the trial court abuse its discretion in entering the final decree quieting title to the property in respondent corporation, under the evidence related, for failure of appellant to comply with the terms of the option set forth in the interlocutory decree, on or before December 10, 1936? We see in the first place, that the deposit of the sum of $56,000 by Smith was accompanied by a number of conditions, which were departures from the terms of the interlocutory decree.

The escrow instructions under which the sum of $56,000 was deposited on December 10, 1936, by Smith, provided that the property should be conveyed to him upon payment by him of the sum of $68,000, of which amount $56,000 was deposited on December 10, 1936, and the balance of $12,000 was to be deposited by Smith within thirty days.

The appellant in the instructions did not arrange for an unconditional payment on or before December 10, of the required sum, but provided for a conditional payment to be made if the conditions were met within thirty days from the ultimate date. It further appears that although the interlocutory decree required that the payment be unconditional, there was the added condition that before payment be made the title company should issue its policy of

title insurance showing the record title to the property to be in Smith and his wife, free of incumbrances. This requirement was made by appellant and her husband although a sheriff's deed had been recorded showing an execution sale under a judgment against Mr. Leslie. The title company was likewise given power, in the event of any adverse claim, to refuse to comply with the demands of anyone and to make no deliveries to any person.

It is well established that time is of the essence of a contract of option, regardless of the words used. Under any rule, however, it seems to us that the decree contained sufficient language to show that time was an essential element. Paragraph XI of the decree provides that in the event of a failure to make payments, then immediately after the time limited by the decree, to wit, the 11th day of December, 1936, the defendant shall be entitled to a final decree. Williams v. Long, 139 Cal. 186, 189, 72 P. 911; Bennett v. Hyde, 92 Cal. 131, 134, 28 P. 104; Skookum Oil Co. v. Thomas, 162 Cal. 539, 542, 123 P. 363.

The evidence, under either theory discussed, impels the ultimate conclusion that the trial court did not err or abuse the discretion reposed in it by law.

Accordingly the judgment from which this appeal has been perfected, of necessity, must be and is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



29 Cal.App.2d 685

In re MADANSKY'S ESTATE.

MADANSKY v. MADANSKY et al.

Civ. 11847.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1938.

1. Wills ⇐665

A testamentary provision for forfeiture of bequest if beneficiary should contest will, interfere with administration, or "bring suit, action or proceeding against my estate or my executor," or necessitate any suit, action, or proceeding by executor, would not be enforced against beneficiary who presented, as a creditor, a claim which was disallowed.

2. Wills ⇐665

That beneficiary filed claim against estate, and claim was disallowed, was not equivalent to contesting the will, failing to abide by its terms, or interfering with administration of a will so as to incur forfeiture of bequest.

3. Appeal and error ⇐110, 782

An order denying motion for new trial is not appealable, and purported appeal therefrom must be dismissed.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Proceeding in the matter of the estate of Ethel M. Madansky, deceased. From part of a decree establishing heirship and decreeing that Maxwell H. Madansky was entitled to one-fourth of the estate, and from an order denying the motion of Harry Madansky for a new trial, Harry Madansky appeals. Transferred from the Supreme Court.

Decree affirmed, and purported appeal from order denying motion for a new trial dismissed.

Frederick H. Whitfield, of Los Angeles, for appellant.

Eugene L. Wolver, of Los Angeles, for respondents.

McCOMB, Justice.

This appeal transferred from the Supreme Court to this court for decision pursuant to the provisions of article 6, § 4c of the Constitution of the state of California is from the portion of a decree establishing heirship and decreeing that respondent Maxwell H. Madansky is entitled to one-fourth of decedent's estate, and there is a purported appeal from the order denying appellant's motion for a new trial.

These are the essential facts:

Ethel M. Madansky died February 12, 1935, leaving a last will and testament con-

taining among others the following provisions:

"Fifth. I give and bequeath unto my son Maxwell H. Madansky an equal one-fourth of all my said estate of which I shall died seized, after payment of all just debts and costs of administration.

* * * * * *

"Seventh: I particularly provide herein that if either or any of said beneficiaries above mentioned should contest this my last will or interfere in any way with the administration and the carrying out of this my last will and testament, or bring suit, action or proceeding against my estate or my executor; or in case any suit, action or proceeding should be made necessary by my executor to carry out this my last will and testament, that such person bringing said suit or proceeding, or against whom it is brought, shall receive one dollar, and no more, in place and stead of the share and portion of said estate hereinbefore devised to such person."

After decedent's will was admitted to probate and respondent appointed administrator of the estate, he filed as a creditor a claim with the estate in the sum of $3,900. This claim upon being contested by other beneficiaries of decedent was disallowed. Respondent thereafter made two motions, which were denied, to have his claim reinstated.

This is the sole question to be determined:

Will a forfeiture clause reading as set forth above be enforced against a beneficiary who presents a claim against an estate which is disallowed?

[1, 2] This question must be answered in the negative. The filing of a claim by a beneficiary against an estate, which claim is disallowed, is not equivalent to contesting the will of decedent, failing to abide by its terms, or interfering with the administration of the will. Wright v. Cummins, 108 Kan. 667, 196 P. 246, 247, 14 A.L.R. 604. In considering a forfeiture clause in a will our Supreme Court in Lobb v. Brown, 208 Cal. 476, 490, 281 P. 1010, quotes with approval from the decision of the supreme court of Kansas in the case just cited. Therefore, since respondent's act in filing an invalid claim against decedent's estate did not fall within the purview of the forfeiture provisions of the will, the decree determining heirship was correct.

[3] An order denying a motion for a new trial is a nonappealable order. Therefore, the purported appeal from the order denying the motion for a new trial is dismissed. The decree is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



LILIENKAMP et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY. *

Civ. 12028.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1938.

Hearing Granted by Supreme Court Feb. 16, 1939.

1. Certiorari ⇐42(8)

A demurrer to test sufficiency of petition for writ of review may be filed after the writ has been granted.

2. Courts ⇐202(4)

Notice of proceeding to vacate an order of probate court need not be served upon persons who will be affected by the order but who have not appeared in the probate proceeding. Code Civ.Proc. §§ 473, 1010.

3. Motions ⇐22

Notice of a motion or other paper need not be served upon any person who has not appeared in the action or proceeding. Code Civ.Proc. § 1010.

Proceeding on original application by Ida Lilienkamp and another against the Superior Court of Los Angeles County, for a writ of review of a nonappealable order of the respondent court, wherein respondent filed a motion to quash the writ of review and a demurrer to the petition for the writ. Transferred by the Supreme Court.

Demurrer sustained and motion to quash granted.

Freston & Files, of Los Angeles, for petitioner Ida Lilienkamp.

Edgar C. Smith, of Los Angeles, for petitioner Immanuel Presbyterian Church of Los Angeles.

*For subsequent opinion see 93 P.2d 1008.

Cruickshank, Brooke & Dunlap, of Pasadena, for respondent.

McCOMB, Justice.

This is an original application for a writ of review of a nonappealable order of respondent court. Pursuant to the provisions of Article 6, section 4c, of the Constitution of the state of California, the Supreme Court has transferred the matter for decision to this court.

Respondent has filed (a) motion to quash the writ of review and (b) demurrer to the petition for the writ.

The essential facts are:

March 16, 1938, the administratrix of the estate of Louie E. Raymond, deceased, filed a petition with respondent court praying for an order approving an agreement entered into by the sole heirs of deceased, which contained among other provisions that (1) $15,000 and a Buick car, both property of the estate, should be distributed to petitioner Ida Lilienkamp, and (2) $1000 of the estate should be distributed to petitioner Immanuel Presbyterian Church of Los Angeles. May 5, 1938, respondent made an order approving the agreement and authorizing distribution to petitioners as above mentioned.

June 24, 1938, Howard D. Raymond, one of decedent's heirs, filed a motion pursuant to the provisions of section 473 of the Code of Civil Procedure to set aside the order of May 5, 1938. On June 30, 1938, this motion was granted without any notice of the motion having been served upon petitioners here.

These are the questions to be determined:

First. Does a demurrer lie to test the sufficiency of a petition for a writ of review after such writ has issued?

Second. Before a probate court acquires jurisdiction to vacate an order pursuant to the provisions of section 473 of the Code of Civil Procedure, is it necessary that notice be served upon persons who will be affected by the order but who have not appeared in the probate proceeding?

[1] The first question must be answered in the affirmative. The law is established in California that it is proper practice in response to a writ of review to file a demurrer to the petition for the writ for the purpose of testing whether sufficient facts were alleged in the petition to warrant the issuance of the writ of review. Stewart v. Superior Court, 101 Cal. 594, 595, 36 P. 100; Pacific Home B. R. Co. v. Daugherty, 75 Cal.App. 623, 626, 243 P. 473.

[2, 3] The second question must be answered in the negative. The law is settled that notice of a motion or other paper need not be served upon any person who has not appeared in an action or proceeding. Sec. 1010, Code Civ.Proc.; Estate of McDougald, 143 Cal. 476, 480, 77 P. 443; 11B Cal.Jur. [1934] 712. In Estate of Kent, 6 Cal.2d 154, 57 P.2d 901, is a complete discussion of the theory which supports this rule.

Since it was unnecessary that notice be given petitioners of the motion to set aside the order of May 5, 1938, their contention that the trial court was without jurisdiction to make the order which is here questioned is unfounded. The petition for a writ of review thus fails to state facts sufficient to warrant the issuance of a writ.

The demurrer is sustained and the motion to quash is granted.

We concur: CRAIL, P. J.; WOOD, J.

29 Cal.App.2d 650

HAAS v. JONES.

Civ. 6012.

District Court of Appeal, Third District, California.

Dec. 14, 1938.

1. Automobiles ⇐181(1)

The Legislature has limited liability for injuries to an automobile guest to cases where the defendant is intoxicated or guilty of "willful misconduct." St.1935, p. 154, § 403.

2. Automobiles ⇐181(1)

Proof of "willful misconduct" within automobile guest statute depends upon the facts of each particular case. St.1935, p. 154, § 403.

3. Automobiles ⇐181(1)

"Willful misconduct" within automobile guest statute is the intentional doing of something in the operation of a motor vehicle which should not be done, or intentionally failing to do something which should be done under circumstances disclosing knowledge, expressed or to be implied, that an injury to a guest will be a probable result. St.1935, p. 154, § 403.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

4. Automobiles ⇐181(1)

To constitute "willful misconduct" within automobile guest statute, there must be actual knowledge or that which in the law is deemed to be the equivalent of actual knowledge of the peril to be apprehended from the failure to act, coupled with conscious failure to act to the end of averting injury. St.1935, p. 154, § 403.

5. Automobiles ⇐244(37)

In action for injuries to automobile guest, evidence that accident happened on a left-hand curve of 100-foot radius on an 18-foot wide pavement with hard shoulders, that the automobile ran into the left embankment, that prior to the accident the automobile was going 55 to 60 miles an hour, and that the highway was clear and dry was sufficient to justify a finding that the accident was the proximate result of the speed of the automobile. St.1935, p. 154, § 403.

6. Automobiles ⇐181(7)

Where an automobile driver deliberately approached a left curve of which he was aware at 55 to 60 miles an hour, notwithstanding the protests of two of the occupants, jury was justified in finding driver guilty of "willful misconduct" so as to permit recovery by guest for injuries sustained. St.1935, p. 154, § 403.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by Anne Haas against A. J. Jones for injuries sustained while riding as a guest in an automobile. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

Honey & Mayall, of Stockton, for appellant.

C. Ray Robinson, James D. Garibaldi, and Willard B. Treadwell, all of Merced, for respondent.

Mr. Justice pro tem. ROSS delivered the opinion of the court.

Although there is some conflict in the evidence, the following brief statement of facts may be taken as amply supported by proof.

Respondent was a guest in the automobile of appellant at the time she received the injuries for which she was awarded damages of $10,000 in the trial court. Appellant was driving his own car, which was almost new and in good condition. Respondent's husband, Mr. Haas, was in the front seat with the appellant, Mr. Jones, while respondent, Mrs. Haas, with Mrs. Jones and another lady, were in the rear seat at the time of the accident. The party had driven from Oakdale to Niagara, and were returning home. Between Niagara and Sonora Mrs. Haas, once or twice, and Mr. Haas, about four times, remarked or protested about the speed with which appellant was driving. Each time he slowed down some. Between Sonora and Jamestown there was no complaint as to his driving. After leaving Jamestown the speed increased. Mr. Haas made at least one protest then, saying: "Look out, Andy, you are not holding the road good." This was about a mile before the accident happened. Just a few seconds before the accident, as the car started around a curve, another protest was made, but apparently this was too late for the appellant to heed, as the car was already getting out of his control at that time.

The accident happened on a lefthand curve of 100-foot radius, on an 18-foot wide pavement with hard shoulders, and the car ran into the left embankment, which was about 1½ feet high. In other words, the car did not "straighten out the curve", to use a popular phrase, but went even more to the left than the curve did. Prior to the accident the car was on the right side of the highway, going 55 to 60 miles an hour (although appellant puts it at 45 to 50 miles per hour), and the road was clear and dry. It was 4 p. m. of May 30, 1936. The appellant was well acquainted with the road and knew the curve in question.

[1-4] On this appeal there is no complaint made of any rulings of the trial court, nor of any instruction given or refused. The jury was thoroughly and correctly instructed on the law governing wilful misconduct in automobile guest cases. The legislature has limited liability for injuries to an automobile guest to cases where the defendant is intoxicated or guilty of wilful misconduct, and the term "wilful misconduct" has been passed on in a large number of cases, many of which are cited in the various briefs herein. St. 1935, p. 154; Cal.Veh.Code, § 403. Proof of wilful misconduct depends upon the facts of each particular case. Candini v. Hiatt, 9 Cal.App.2d 679, 50 P.2d 843; Hagglund v. Nelson, 23 Cal.App.2d 348, 73 P.2d 265. Wilful misconduct has been defined as intentionally doing something in the operation of a motor vehicle which should not be done, or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result. Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194; Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.2d 988. To constitute wilful misconduct, there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279.

[5] In the instant case the facts are sufficient to justify a finding that the accident was the proximate result of the speed of the car. The question remaining, then, is whether the defendant was guilty of wilful misconduct in driving 55 to 60 miles per hour on the road in question, and particularly at the curve in question, being acquainted with its alignment, and after some protests or warnings.

[6] The cases of Wright v. Sellers, 25 Cal.App.2d 603, 78 P.2d 209, and Chandler v. Quinlan, 25 Cal.App.2d 646, 78 P.2d 235, are similar in their facts, although certainly not identical, with the present case. The reasoning and logic of the decisions in those cases, however, can be applied here. It can justly be said that appellant herein, if he deliberately continued to drive fast on a curved road after warnings had been given him, was guilty of wilful misconduct. Certainly the jury, having the maps and photographs showing the physical facts before them, and hearing the testimony of the witnesses first-hand, was justified in finding such wilful misconduct.

In the case of Sparrer v. Kersgard, Cal. App., 79 P.2d 161, cited by appellant, a hearing has been granted by the Supreme Court. However, that case differs from the instant case in that the driver there did not know the road and did not know he was approaching the curve where his accident occurred.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



30 Cal.App.2d 11

BLUMENTHAL et al. v. DI GIORGIO FRUIT CORPORATION.

Civ. 10917.

District Court of Appeal, First District, Division 2, California.

Dec. 19, 1938.

Rehearing Denied Jan. 18, 1939.

Hearing Denied by Supreme Court Feb. 16, 1939.

1. Contracts ⇐147(3)

A contract must be construed as a whole and the intention of the parties must be determined from the entire instrument.

2. Corporations ⇐71

Where certificate of incorporation provided that cumulative dividends on preferred stock should be paid or set apart before dividend on "any other stock" should be paid or set apart, and that no stock having preference over such preferred stock should

be authorized except with approval of majority of preferred stockholders, quoted phrase meant common stock then outstanding or junior stock subsequently issued, and did not include a new issue of preferred stock to which majority of all stockholders consented and which had preference over the old preferred stock.

[Ed. Note.—For other definitions of "Other Stock," see Words & Phrases.]

3. Injunction ⇐72

Where corporation, to avoid financial disaster, adopted recapitalization plan whereby new stock was issued which was preferred over the old cumulative preferred stock, and plan was approved by majority of stockholders as required by certificate of incorporation, a holder of the old preferred stock who had opposed the plan was not entitled to an injunction against payment of dividends on new stock until all cumulative dividends on old stock were paid, where, to grant such relief, might force corporation into liquidation and would afford no tangible benefits to the objecting stockholder.

4. Injunction ⇐4

An injunction will not issue merely to punish one for some wrongful act, but lies to prevent the doing of some act to the injury of complainant.

5. Injunction ⇐23

Injury and detriment to others may be shown to defeat injunctive relief to the same extent that injury or detriment to a complainant must be shown to support such relief.

6. Injunction ⇐23, 24

Injunctions should not be granted when they will be productive of hardship, oppression, injustice or public mischief.

7. Constitutional law ⇐42

Where corporation, with approval of majority of all stockholders as required by certificate of incorporation, issued new preferred stock which was preferred over old cumulative preferred stock, a holder of old preferred stock who objected to the new issue could not contend that property was taken without due process of law unless he showed that such action was to his detriment.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Charles J. Blumenthal and others against the Di Giorgio Fruit Corporation to restrain payment by defendant of any dividends until accrued dividends are paid upon preferred shares of defendant's stock held by plaintiffs. From an adverse judgment, plaintiffs appeal.

Affirmed.

John A. Sinclair and Charles A. Christin, both of San Francisco, for appellants.

Devlin & Devlin & Diepenbrock and Brobeck, Phleger & Harrison, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action in equity to restrain the payment by defendant of any dividends until the accrued dividends are paid upon preferred shares of defendant's stock held by plaintiffs. The pertinent facts are fairly stated in defendant's brief as found by the trial court, and we quote as follows:

"Respondent, Di Giorgio Fruit Corporation (herein called the Company), was incorporated December 13, 1920, under Delaware law. It had two classes of stock, one called seven per cent cumulative preferred stock (herein called old 7% stock) and common stock. There were outstanding on December 31, 1933, 65,582 shares of old 7% stock and 482,424 shares of old common stock.

"On December 31, 1933, accrued and unpaid dividends on the old 7% stock amounted to $70 per share—an aggregate of $4,590,740. Its actual earned surplus was then $463,305.50."

On February 23, 1934, the directors proposed a plan of recapitalization to its stockholders which provided for "the creation of a new $3, 'cumulative participating preferred stock' (herein called $3 stock) ranking prior to the 7% stock, both as to dividends and assets. It was to be offered for exchange for the 7% stock share for share, at the option of the holders, who, as a condition, were to cancel the arrearage of dividends. The common shares were to be cut to one-third their number, and the new $3 stock was to participate in earnings with the common. * * *

"Holders of 7% preferred who did not wish to make the exchange were to retain their right to receive payment of the arrearage of dividends to June 30, 1934 ($73.50 per share) before any dividend was paid on the common, but dividends were to be non-cumulative after July 1, 1934, and the

stock was renamed '7% preferred stock'. No attempt was made to cancel the accrued dividends.

"On April 24, 1934, the plan was approved at a stockholders' meeting, more than a majority of each class of stock voting for the plan, and the charter was accordingly amended. Only 115 shares of 7% stock voted against the plan.

"Before this suit was filed, 4,902 holders of 59,109 shares (over 90%) of the old 7% stock exchanged their shares for new $3 stock. This carried with it the cancellation of $4,344,511.50 of accrued dividends. The holders of more than 97% of the old common surrendered their shares for one-third the number of new common shares.

"On May 28, 1934, the $3 stock was listed on the San Francisco Stock Exchange. Before this suit was filed, more than 24,000 shares were there bought and sold. On July 10, 1934, the new common stock was listed and more than 43,000 shares have been traded in.

"Dividends have been regularly paid on the $3 preferred since it was issued—four dividends in all, of which three dividends were paid prior to the filing of this suit.

"On eight separate occasions prior to commencement of this action the company communicated with its stockholders, advising them as to the adoption of the plan, the procedure for exchange, the listing of its stock, and the declaration of dividends on the $3 stock.

"On June 9, 1936, more than two years after the adoption of the plan, the plaintiff, Blumenthal, a stock broker, wrote to some 400 stockholders proposing that they join him in a contingent suit to compel the company to pay $73.50 per share in dividends on the 7% stock before any further dividends were paid on the new $3 stock. Thirteen stockholders (including Blumenthal), holding 489 shares, joined. At the trial the holders of 293 additional shares were joined as plaintiffs. Blumenthal had prior to this, through a dummy, exchanged some of his 7% stock for $3 stock and had sold it on the Exchange, after first collecting the new dividend. He also exchanged his old common stock for new common and sold it on the Exchange. As a broker, he had dealt in the $3 stock for clients without any disclosure of the claims here asserted by him. On June 30, 1936, this suit was filed."

The trial court having rendered judgment for the defendant after a fair and full trial, the plaintiffs have appealed, raising only the question whether the judgment is sound in law. The question on the appeal is properly stated by respondent as follows: "Where the charter of a Delaware corporation permits the creation of stock having priority 'either in dividends or as-to assets' over an existing preferred stock, provided the holders of a majority of the existing preferred stock assent thereto, and where such majority assents to an amendment creating a prior preference stock, preferred as to dividends and as to assets, may a non-assenting holder of the original preferred stock, which by the charter was entitled to cumulative dividends and on liquidation to par value plus accrued dividends before payment or distribution to 'any other stock', restrain the payment of current dividends on the newly created prior preferred stock until accrued dividends of $73.50 per share on the original preferred stock shall have been paid?"

The determination of this question depends upon the interpretation to be given to the certificate of incorporation of the company, pertinent provisions of which read: "Dividends on said preferred stock shall be cumulative, and shall be paid or set apart for payment before any dividend on *any other stock* of the Corporation shall be paid or set apart, so that if for any quarterly dividend period dividends at the rate of seven per cent per annum shall not have been paid upon or set apart for said preferred stock, the deficiency shall be fully paid or set apart for payment before any dividends shall be paid upon or set apart for any other stock of the Corporation."

"In the event of the dissolution or liquidation of the corporation, whether voluntary or involuntary, the holders of the said cumulative seven per cent preferred stock then outstanding shall be entitled to receive out of the assets (whether capital or surplus) of the Corporation before any payment shall be made to holders of *any other stock* of the Corporation, both the par value of their respective shares and an amount which shall be equal to the dividends accumulated and unpaid thereon, whether or not earned or declared."

"The *authorized* amount of the said cumulative seven per cent preferred stock shall not be increased or decreased, nor shall the par value thereof be *increased* or *decreased, nor shall any stock* having preference over or equality with said preferred stock either in dividends or as to assets *be authorized except* in each case with the *affirmative vote*

of the holders of not *less than a majority* in amount of the said preferred stock issued and outstanding, cast at an annual or a special meeting duly called and held for such purpose."

"The Corporation reserves the right to amend, alter, change or repeal any provision contained in this certificate of incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred on stockholders herein are granted subject to this reservation." (All italics ours.)

[1, 2] This is the contract of the parties, and conformably with the accepted principle that a contract must be construed as a whole and that the intention of the parties must be determined from the entire instrument, the trial court properly held that since the articles authorized the creation of other preferred stock having preference over the seven per cent stock, the words "any other stock" in the paragraph first quoted above meant the common stock then outstanding "and any other stock which might afterwards be issued, junior to the 7% preferred, but to the issuance of which the 7% stock would not be called upon to consent".

We are in full accord with the written opinion of the trial court on this phase of the case and quote, with our own editing, but with the trial judge's own emphasis, these portions:

"The plaintiffs contend that when the original articles, in defining the preference, say that the 7% cumulative dividends shall be paid *before any dividends on any other stock,* the language is comprehensive enough to put the payment of such accumulated dividends ahead of current dividends on new preferred stock (notwithstanding such new stock otherwise outranks the 7%) as well as on common stock.

"The plaintiffs concede (notwithstanding the same words 'any other stock' appear throughout) that under the reserved powers contained in the articles new stock could be authorized 'having preference over or equality with' their own, by a majority vote of the 7% holders and, therefore, that the $3 stock is senior to their 7% stock as to both dividends and assets, but they make this reservation, viz., that the $73.50 a share dividends accumulated to July 1, 1934, must be paid to the 7% holders before the $3 stock attains its full potency as a prior preference stock, after which payment they admit they fall in behind it. This claim, as indicated at the outset, is based upon the language 'any other stock'.

"The plaintiffs make the further concession that the stripping of the 7% stock of its cumulative attribute (as of July 1, 1934) was legal enough,—this, as well as the creation of the $3 stock, being accomplished by the legal exercise of the reserved powers dealing with a *change in preference* as distinguished from *the destruction of a right.*

"However, in connection with the attempt in the amendment to defer or postpone the payment of the accumulated $73.50 a share the plaintiffs' argument runs thus: the right to these dividends is a vested right (Morris v. American Pub. Utilities Co., 14 Del.Ch. 136, 122 A. 696; Keller v. Wilson & Co., Del.Sup., 190 A. 115) *and* part and parcel thereof is the additional right to receive payment of the $73.50 a share as soon as funds are available for *any* dividend and before payment on 'any other stock' including that which admittedly, in all other respects, outranks theirs.

"The defendant concedes that the right to ultimately receive the accumulated dividends is one of which the 7% holders cannot be deprived, but the concession goes no further than that, the contention being that the amendment,—adopted pursuant to the reservation respecting preferences as well as to the general reservation contained in Article Eighth,—was competent to put dividends on the $3 stock ahead of the *payment* of these accumulated dividends. The amendment itself recognizes the vested character of the accrued dividends, and contemplates their ultimate payment.

"No authority is cited by the plaintiffs holding that the immediate payment of the accumulated dividends is a matter of *right,* or holding that the postponement of their payment until dividends on senior stock are paid is not a proper subject of amendment under the reserved power dealing with preferences, as is the creation of new senior stock, or the shearing of the cumulative features. Nor is any authority cited by the defendant directly on the subject, on the other side."

"The decision of this case must, after all, depend upon the meaning of the language. Does the language which is found in several places in the original articles mean what the plaintiffs claim, or does it mean, as contended by the defendant, *the common stock then outstanding and any other stock which might afterwards be issued, junior to*

the 7% preferred, but to the issuance of which the 7% stock would not be called upon to consent?

"It is pointed out by defendant with a good deal of force that the 7% stock has no voting power unless (as in this case) new stock is proposed equal or senior to it. The voting power under the original articles (and under the amendment as well) resides in the common stock alone except for new preferred, and defendant supposes a case—which might easily occur—of the creation of a new class or new classes of stock junior to the 7% which might well be accomplished without any notice to the 7% stockholders. Indeed, because of their seniority, it would be no concern of theirs. It seems reasonable that the language 'any other stock' was meant to fit such a case. It seems reasonable, moreover, because if given the meaning contended for by plaintiffs it would be utterly inconsistent and at war with other provisions of the articles which use the same language 'any other stock' and which, the plaintiffs admit, contemplate the possibility of the creation of new preferred stock."

[3] The appellants complain of the judgment and of the reasons upon which it was based as a too narrow and technical interpretation of their constitutional rights. But, if this criticism has merit, the judgment must, nevertheless, be affirmed upon another ground. That is, the action being in equity, the appellants have wholly failed to make a case justifying equitable relief. When the recapitalization plan was proposed in February, 1934, the company was in serious financial difficulties. The accrued and unpaid dividends on the 7% stock then amounted to more than four and one-half million dollars. The actual surplus was then approximately $463,000. Neither the available assets nor the outstanding liabilities were found by the trial court, but it is conceded that the company, as owner of large tracts of agricultural properties and engaged in the production and sale of agricultural products, was caught in the whirlpool of the prevailing depression. Facing probable bankruptcy and dissolution, the directors proposed the recapitalization plan as the best method appearing to them at the time of saving the company and of saving the interests of the holders of this 7% stock. Whether some other plan might have been better is a question that is not before us. That the proposed plan has been successful to some extent is shown by the continued operations of the company and the payment of substantial dividends to those who accepted the plan and took the $3 preferred stock, and it is obvious from the record that the acceptance of the plan by more than 90 per cent of the holders of the seven per cent stock and by more than 97 per cent of the holders of the common stock was the one thing which made the company able to operate as it has done and able to pay any dividends.

[4-7] At this point we may well interpolate certain elementary principles which are controlling here. The action being in equity to enjoin payments of dividends on the $3 stock is in effect an action to restrain the operation of the entire recapitalization plan. But an injunction will not issue merely to punish one for some wrongful act; it lies to prevent the doing of some act to the *injury* of the complainant. 14 R.C.L. p. 309. To the same extent that injury or detriment must be proved to support complainant's case, injury and detriment to others may be shown to defeat it. Thus injunctions are seldom granted when they are productive of hardship, oppression, injustice, or public mischief. 14 R.C.L. p. 310. Here the record discloses that if the appellants should be given the relief they seek, the company may be forced into liquidation causing great loss to all the consenting stockholders, both common and preferred, and it fails to disclose that appellants would obtain any tangible benefit from such an injunction if granted. They cannot contend that their property has been taken without due process unless they show that the action complained of was to their detriment. Here the record discloses the contrary.

In this respect the case is similar to Neblett v. Carpenter, 59 S.Ct. 170, 83 L.Ed. —, decided by the United States Supreme Court on December 5th of this year. There several nonconsenting stockholders and policy holders in the Pacific Mutual Life Insurance Company sought to restrain the operation of a rehabilitation and liquidation plan proposed by the state insurance commissioner. The Supreme Court there used this pertinent language [page 174]: "The petitioners have no constitutional right to a particular form of remedy. [Gibbes v. Zimmerman, 290 U.S. 326, 332, 54 S.Ct. 140, 78 L.Ed. 342; Doty v. Love, 295 U.S. 64, 70, 55 S.Ct. 558, 79 L.Ed. 1303, 96 A.L.R. 1438.] They are not entitled as against their fellows who prefer to come under the plan and accept its benefits, to force, at their own wish or whim, a liquidation which

under the findings *will not advantage them and may seriously injure those who accept the benefit of the plan.* They are not bound, as were the dissenting creditors in Doty v. Love, 295 U.S. 64, 55 S.Ct. 558, 79 L.Ed. 1303, 96 A.L.R. 1438, to accept the obligation of the new company but are afforded an alternative whereby they will receive damages for breach of their contracts. They have failed to show that the plan takes their property without due process." (Italics ours.)

Here the appellants have failed to show that liquidation would advantage them, but they have shown that it would seriously injure those who have accepted the plan of recapitalization. They cannot under any theory of equity take advantage of those who, by their acceptance of this plan, have saved the company from liquidation and thus made it possible for the company at some future time to pay these dividends.

For the reasons given, the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



TURNER et al. v. LINER et al. *

Civ. 10623.

District Court of Appeal, First District, Division 1, California.

Nov. 28, 1938.

Rehearing Granted Dec. 17, 1938.

Limitation of actions ⇐179(2)

In action against brokers to recover damages and secret profits made in transaction in which brokers, while acting as plaintiffs' agents in exchange of realty, were in fact the owners of realty, which was represented as belonging to third person, complaint was insufficient to toll the statute of limitations on ground that plaintiffs could not have discovered brokers' fraud any sooner in exercise of due diligence, where land was located in county, plaintiffs had been in brokers' office divers times after the exchange, and no fiduciary relationship was shown.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Walter Turner and Margaret Turner against Irving M. Liner and others to recover damages and secret profits made by defendants in transaction in which defendants, while acting as plaintiffs' agents in exchange of realty, were in fact the owners of the realty, which was represented as belonging to third person. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment affirmed.

Leo A. Sullivan, John G. Robertson, A. K. Whitton, and Charles H. Frost, Jr., all of Oakland, for appellants.

Irving M. Liner, of Oakland, for respondents.

CONLAN, Justice pro tem.

This action was brought by the plaintiffs for the recovery of damages and secret profits in a real estate trade, resulting from the possession by the defendants, who were the plaintiffs' agents, of individual interests in the real estate traded which were adverse to those of the plaintiffs in the course of the transaction, without any knowledge thereof or consent thereto on the part of the plaintiffs.

A demurrer was interposed to plaintiffs' complaint which was sustained. The plaintiffs filed an amended complaint to which another demurrer was addressed and which was likewise sustained. The plaintiffs then filed their second amended complaint and the defendants again demurred thereto. This demurrer was also sustained. Upon failure of the plaintiffs to amend the third time, judgment was thereupon entered in favor of the defendants on May 19, 1937.

Plaintiffs allege in their second amended complaint that on or about August 22, 1928, they employed the defendants to act as their brokers and agents in the matter of an exchange of a certain parcel of real property then owned by plaintiffs (therein referred to as parcel I) for another certain parcel of real property (therein referred to as parcel II); that the defendants accepted this employment; that the defendants represented to them that parcel II was owned by one Annah L. Wood; that thereupon an "Exchange Agreement" was entered into and executed whereby Annah L. Wood deeded parcel II to plaintiffs and plaintiffs deeded parcel I to Annah L. Wood, paid her

*For subsequent opinion see 87 P.2d 740.

the sum of five thousand dollars ($5,000) and executed their promissory note to Annah L. Wood in the sum of five thousand dollars ($5,000); that on or about February 1, 1934, an action was brought to collect the balance due upon the above mentioned promissory note by the holder in due course thereof; that in said action and on or about February 16, 1934, the plaintiffs herein, through their attorneys, took the deposition of Annah L. Wood and from said deposition ascertained for the first time that Annah L. Wood was not and never had been the true owner of parcel II, but that the defendants themselves were in truth and in fact the owners thereof; that the defendants themselves took and obtained for their own use the above mentioned sum of five thousand dollars ($5,000) and the above mentioned promissory note; that plaintiffs did not sooner discover that Annah L. Wood was not the owner of said property, but that said property was in fact owned by the defendants, by reason of the following facts: That at all of the times herein mentioned up to the 18th day of February, 1934, plaintiffs reposed great trust and confidence in the defendants and in reliance upon that trust believed and trusted that defendants had acted in the transaction only in the capacity of plaintiffs' agents and brokers; that the defendants have, at all of the times mentioned, held themselves out to be and represented that they acted as the plaintiffs' agents and brokers; that in the "Exchange Agreement" referred to it was provided as follows: "Morris N. Schneider Co. of Oakland, California, is hereby authorized to act as agent for all parties hereto and may accept commission therefrom and should this offer be accepted by the second party the undersigned agrees to pay said agent $500.00 commission for services rendered to become due on the execution of this agreement by all parties hereto. Dated: August 22, 1928. Signed Margaret Turner"; that pursuant to said provision and in reliance upon the representation therein made plaintiffs believed that defendants acted only as their agents and brokers and paid said $500 commission to the said defendants; that in said "Exchange Agreement" wherein and whereby the proposed exchange was set forth, the said Annah L. Wood was described and named as "second party" and owner of the property to be acquired by the plaintiffs; that on several occasions between August 23, 1928, and February 16, 1934, plaintiffs made visits to the offices of Morris N. Schneider Co. and there spoke and conversed with defendants, but at no time did defendants claim to plaintiffs to have any interest in said property; that at no time did defendants claim to have any interest in said property to any persons from whom plaintiffs might have ascertained such fact; that on or about the 23rd day of August, 1928, at the time of the exchange of the properties hereinabove referred to, the real property (parcel II) stood in the name of Annah L. Wood on the official records of Alameda county at the office of the recorder of the county of Alameda, state of California; that plaintiffs made visits on several occasions between August 23, 1928, and February 16, 1934, to the offices of Morris N. Schneider Co., but were never apprised of the fact nor did they discover or have knowledge that Annah L. Wood was in the employ of defendants, and it was not until the time of the taking of the deposition of Annah L. Wood, on February 16, 1934, that such fact came to the knowledge of the plaintiffs; that no cause or reason existed for the taking of said deposition until the action of Spencer v. Turner above referred to was brought, and said deposition was then duly, regularly and timely taken to aid these plaintiffs in preparing their defense to said action; that at no time until the taking of said deposition of Annah L. Wood did any facts at all exist which would indicate to the plaintiffs or give them knowledge, grounds for believing, or reasons to believe that defendants were the owners of said property and that Annah L. Wood was not the owner thereof.

In their demurrer to this second amended complaint the defendants urged the bar of the statute of limitations claiming, more specifically, that said amended complaint did not allege sufficient facts to show a justification on the part of the plaintiffs for not discovering the fraud sooner than they did, so as to bring the action within the rules of pleading laid down by the case of Lady Washington C. Co. v. Wood, 1896, 113 Cal. 482, 45 P. 809, and the more recent case of Haley v. Santa Fe Land Imp. Co., 1935, 5 Cal.App.2d 415, 42 P.2d 1078. The defendants' contention was upheld by the trial court and the demurrer was sustained. Upon the plaintiffs' failure to amend, judgment was entered for defendants and it is upon that judgment that plaintiffs prosecute this appeal.

Appellants state in their opening brief: "Appellants concede as established law in this state the soundness of the rules laid

down in the cases of Lady Washington Company v. Wood, 1896, 113 Cal. 482, 45 P. 809, and Haley v. Santa Fe Land Company, 1935, 5 Cal.App.2d 415, 42 P.2d 1078, to the effect that in cases where relief is sought from fraud by action commenced more than three years after the perpetration of the fraud the complaint must contain allegations as to the time when the fraud was discovered, how the discovery was made and why it was not made sooner. The controversy upon this appeal is whether the second amended complaint meets all the requirements (particularly the latter one) of this rule."

The respondents contend that: "The complaint falls very short of stating any fraud, or deceit or damage. Plaintiffs do not plead any misrepresentation or inducement by defendants to plaintiffs to make the purchase or any fraud or deceit in any form. It seems to be the theory upon which the complaint is drafted that defendants owed to plaintiffs the disclosure of their ownership of the property. However, plaintiffs make no allegation that in the event of such disclosure they would not have purchased the property. It is defendants' contention that, assuming the agency relationship for the purpose of this argument, their only duty was to refrain from misrepresenting the property or using any fraud or deceit to carry the deal through. From the facts alleged in the complaint there is nothing which would show that the actual ownership had a bearing upon the transaction. Plaintiffs by their own admission exercised their own judgment and do not allege that they were influenced by any word or conduct of defendants." Plaintiffs further alleged on information and belief "that the cost to defendants of the property exchanged by them for the property of plaintiffs was $10,000.00 less than the amount for which they sold it to the plaintiffs".

On oral argument the appellants withdrew the point urged by them on appeal that the defendants' demurrer to plaintiffs' second amended complaint did not properly raise the question of the statute of limitations. The plaintiffs did not abandon their contention that the complaint stated facts sufficient to constitute a cause of action to toll the statute of limitations.

In Lady Washington C. Co. v. Wood, supra, 45 P. 810, it is stated: "'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them, —as that they were done in secret, or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged, and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts. These principles are so fully recognized that mere reference to some of the cases in which they have been enforced will be sufficient. Martin v. Smith, Fed.Cas.No. 9,164, 1 Dill. 85; Wood v. Carpenter, 101 U.S. 135, [25 L. Ed. 807]; Hecht v. Slaney, 72 Cal. 363, 14 P. 88; Moore v. Boyd, 74 Cal. 167, 15 P. 670; Lataillade v. Orena, 91 Cal. 565, 27 P. 924, [25 Am.St.Rep. 219]."

In the case of Rutherford v. Rideout Bank, Cal.App., 75 P.2d 101, the rule with reference to misrepresentation as to the value of land is stated as follows [page 105]: "While a confidential relationship may excuse a failure to use diligence in discovering a fraud, it does not give the right to shut one's eyes and do nothing, and particularly as here, where the fraud was in persuading plaintiff by false representation to sell her property below its fair price. The facts constituting this fraud were that Taylor induced plaintiff to sell her ranch at less than its real value. The payment of the commission to Finney was a motive for the fraud, but was not the fraud itself. * * * In the case at bar plaintiff claims she had such confi-

dence in the bank and its officers that she did not suspect Taylor; but that was the claim in the Simpson Case [Simpson v. Dalziel, 135 Cal. 599, 67 P. 1080], supra. The slightest inquiry on the part of plaintiff would have disclosed the true value of the lands, and an inquiry of the holders of the liens on her land would have informed her as to their intentions. Natural curiosity as well as business prudence should have compelled her to make the inquiry, and her failure to make some investigation was, as said in the Simpson Case, supra, inexcusable negligence."

In the case of Phelps v. Grady, 168 Cal. 73, 141 P. 926, the interveners alleged that Mrs. Phelps was the widow of their mother's brother and because of this relationship they believed she would deal with them in all respects fairly and justly, and that so believing they relied upon these representations and parted with their interest to her. The interveners lived outside of the state of California. The land purchased was situated in San Mateo county, California. The court states, in part, in upholding the contention that the statute of limitations applied and the cause of action was barred, on page 80, 141 P. on page 928: "There is an absolute failure to show not only due diligence but any diligence in seeking to discover during all this intervening time whether or not they had parted with their property at a fair valuation. The fact that they lived at a distance is, of course, no excuse. They were under no other disability."

In the instant case it will be noted that the parcels of land exchanged were in the county of Alameda and that the complaint alleges the plaintiffs were in the office of the defendants divers times after the exchange. In the case of Phelps v. Grady, supra, the relationship of the parties was closer than that of the parties in the instant case, for the agency of the defendants in the instant case was at an end upon the consummation of the exchange.

The case of Lady Washington C. Co. v. Wood, supra, is quoted with approval in Haley v. Santa Fe Land Imp. Co., supra.

In the case of Bennett v. Lane Mortgage Company, a corporation, 19 Cal.App.2d 515, 65 P.2d 953, cited by appellants, the transaction took place in 1928 and the interest payments were kept up until April, 1932. The fraud was not discovered until 1935. It appears from the facts in this case that for twenty years the plaintiff had trusted the defendant Lane with her investments; that "the defendants, who, because of their long years of dealings with the plaintiff, enjoyed her confidence, told her repeatedly to rely on them; that she had only to wait; they would protect her interests; she need not investigate". Defendant Lane was the plaintiff's investment advisor. A fiduciary relation existed. In the instant case no such relation continued to exist after the exchange. The complaint in the instant case does not show that during the several visits between August 23, 1928, and February 16, 1934, made by the plaintiffs to the office of Morris N. Schneider Co., that any person connected with that company acted as an investment advisor for the plaintiffs, or that the plaintiffs were in any infirm, mental or physical condition which would necessitate the advice of the defendants. The allegations of the complaint do show that the plaintiffs were in Alameda county at divers times and were in a position to inquire into the value of this real estate had they chosen to do so.

In the case of Monmouth College v. Dockery, 241 Mo. 522, 145 S.W. 785, cited by appellants, the facts show that the firm of Dockery and Hilbert were investment agents or brokers for the plaintiff; that the notes given in the transaction, as well as notes given in other transactions, were made payable at the office of Dockery and Hilbert; that the plaintiff investigated the reputation of the firm of Dockery and Hilbert and was informed that this firm had an excellent reputation; that plaintiff made Dockery and Hilbert their exclusive agents; and that Dockery and Hilbert collected the interest on the notes and remitted the same to the plaintiff. This case holds that a relation of trust and confidence existed which the defendant could not take advantage of by pleading the five year statute of limitations.

In the instant case the facts as pleaded show no connection of the defendants with the plaintiffs even so far as collecting rents, but on the contrary the facts as alleged show an isolated exchange transaction thereafter accompanied by frequent visits by the plaintiffs to the office of the defendants.

An examination of the case of Victor Oil Co. v. Drum, 184 Cal. 226, 240, 193 P. 243, 249, cited by appellants, shows that at the time of the discovery of the fraud the "defendants were still, if not in complete

control of the corporation, at least the most important factors in it, and were its managing officers". This case is not in point.

In the case of Teague v. Hall, 171 Cal. 668, 671, 154 P. 851, 852, cited by appellants, the statute of limitations was not involved. The court states the general rule applicable to fraud where there exists opportunities for examination, or of sources of information, and states that "the doctrine of constructive notice does not apply where there has been such a representation of fact".

The case of Edwards v. Sergi, 137 Cal. App. 369, 30 P.2d 541, cited by appellants, holds that the particular facts in that case, with reference to the statement of Joseph Sergi that a thickly wooded part of the tract was a part of the land for which she was negotiating, were not such as would reasonably put upon inquiry a prospective purchaser. This case states, on page 371, 30 P.2d on page 542, as follows: "Similarly, in Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809; Bancroft v. Woodward, 183 Cal. 99, 190 P. 445; Redpath v. Aagaard, 217 Cal. 63, 16 P.2d 998; Consolidated, etc., Power Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268, the court was dealing with situations where a party had knowledge of facts of a character which would reasonably put upon inquiry a prospective purchaser. This is not the situation here confronting us. Appellants knew of the nature of the tract desired by respondent and that she wanted wooded land for summer homes. Appellant Joseph Sergi took plaintiff upon the land and there pointed out a tract thickly wooded and told her it was part of the land for which she was negotiating. It is well established that a person selling his own land is presumed to know the area and boundaries thereof, and, if the purchaser suffers damage by reason of any misrepresentation on the part of the owner as to the extent or boundaries thereof, the purchaser may recover damages. Eichelberger v. Mills Land & Water Co., 9 Cal.App. 628, 100 P. 117; Del Grande v. Castelhun, 56 Cal.App. 366, 205 P. 18; Harder v. Allred, 61 Cal.App. 394, 214 P. 1017. So, too, while the record of an instrument is constructive notice of its contents, it is not constructive notice of any mistake contained therein. Davis v. Ward, 109 Cal. 186, 41 P. 1010, 50 Am. St.Rep. 29; Anderson v. Willson, 48 Cal. App. 289, 191 P. 1016."

We are of the opinion that the rules laid down in Rutherford v. Rideout Bank, supra; Phelps v. Grady, supra, and Lady Washington C. Co. v. Wood, supra, are applicable to the facts as alleged in the instant case. Both parcels of land were situate in Alameda county and there are no allegations in the second amended complaint showing any fiduciary or confidential relation between the parties.

The facts in the case of Edwards v. Sergi, cited by appellants, are distinguishable from the facts in the instant case.

The judgment in favor of the defendants entered on May 19, 1937, upon failure of the plaintiffs to amend is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

12 Cal.2d 450

ST. CLAIR v. BULLOCK, Judge.

L. A. 16615.

Supreme Court of California.

Dec. 22, 1938.

1. Exceptions, bill of ⇐45

It is the duty of trial court to see that a correct bill of exceptions is prepared and then to sign it, although court may not be called upon to prepare one.

2. Exceptions, bill of ⇐51

The trial court is not justified in refusing to settle bill of exceptions, apparently prepared in good faith, merely because it is but skeleton in form, inaccurate in many respects, meager and partial.

3. Exceptions, bill of ⇐60(1)

Where petitioner's proposed bill of exceptions was in the usual form and petitioner had not declined to include therein extensive amendments offered by defendant nor to revise it in other particulars, trial judge was not justified in striking bill from files on ground that it was inadequate, but should have allowed amendments and directed bill to be rewritten, or required other changes necessary to make it conform to facts.

4. Exceptions, bill of ⇐53(5)

Although petitioner's proposed bill of exceptions may have been inadequate, petitioner was entitled to writ of mandate compelling trial judge to settle the bill, subject to judge's right to direct petitioner to present a correct bill.

In Bank.

Petition by Cordelia St. Clair for a writ of mandate to compel Georgia P. Bullock, Judge of the Superior Court of the State of California, in and for the County of Los Angeles, to settle a proposed bill of exceptions which was presented in connection with the petitioner's appeal from an order made after final judgment in a divorce action.

Writ granted.

Prior opinion, 77 P.2d 248.

Henry E. Phister, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, and W. I. Gilbert, all of Los Angeles, for respondent.

EDMONDS, Justice.

The petitioner in this original proceeding seeks a writ of mandate to compel the respondent Judge of the Superior Court of Los Angeles County to settle a proposed bill of exceptions which was presented in connection with her appeal from an order made after final judgment in a divorce action. The judge refused to settle the bill and, upon motion of the defendant, made an order striking it from the files.

In 1934, Cordelia St. Clair sued her husband for divorce and thereafter secured a final decree in her favor which ordered the defendant to pay to her "as and for alimony and for the support and maintenance of the plaintiff, one-half of the earnings of the defendant during the period of five years beginning on the 20th day of July, 1934, and ending on the 30th day of July, 1939". By an affidavit filed in January, 1937, Mrs. St. Clair alleged that her former husband was then indebted to her in the sum of $10,200 which had accrued under the terms of the interlocutory and final decrees of divorce and the court made an order directing him to appear and show cause why he should not be punished for contempt of court in not complying with the terms of the decrees previously made. Later she filed an affidavit reciting that Mr. St. Clair owed her $9,012.50 for alimony. Upon this affidavit execution issued pursuant to an order of court therefor.

Mr. St. Clair appeared in the contempt proceeding and denied that he was indebted to the petitioner in any amount. He also moved to recall the execution. After various hearings the court, on September 8, 1937, made an order that "Malcolm St. Clair is not guilty of contempt of court, and that he was not on the 15th day of June, 1937, or at any time prior thereto, indebted to the plaintiff, Cordelia St. Clair". A separate provision of the order is "that the executions heretofore levied * * * are hereby recalled and quashed, and the Sheriff is directed to release any and all levies made thereunder and to return all property held thereunder * * * to the defendant Malcolm St. Clair". On October 11, 1937, Mrs. St. Clair filed a notice of appeal from the order adjudging the defendant "not guilty of contempt of court, and that the said defendant was indebted to plaintiff, that executions levied * * * should be recalled and quashed and directing the Sheriff to release any and all levies made thereunder and adjudging that plain-

tiff is not entitled to any attorney's fees or court costs". The proposed bill of exceptions was presented as the record for that appeal.

In her petition for the writ of mandate the petitioner alleges: "That said proposed bill of exceptions was prepared, served and filed within the time allowed by law and contained all evidence that your petitioner honestly believed a bill of exceptions should contain in order to make it a fair and proper draft of a bill of exceptions. Such draft contained all of the exceptions and proceedings taken before the respondent upon which petitioner, appellant in said action, relies and included and contained all matters reviewable on the same appeal, all as required by section 650 of the Code of Civil Procedure. That said bill of exceptions specified the particulars therein in which the evidence is insufficient to justify said decision and error of law and sets forth substantially all the evidence given upon the trial relating to said specified particulars." To this petition the respondent filed a general demurrer and an answer.

A copy of the proposed bill, containing what purports to be copies of the pleadings in the divorce action, and also of many notices of motion, affidavits and orders, as well as a transcript of the testimony of witnesses, about 150 pages in all, is presented to this court as an exhibit to the petition. The respondent judge's answer "denies that said proposed bill of exceptions was prepared, served and filed within the time allowed by law". She also "denies that said proposed bill of exceptions contained all evidence that a bill of exceptions should contain in order to make it a fair and proper draft of a bill of exceptions. Respondent denies that said bill of exceptions sets forth substantially, or even a fair portion of, all of the evidence given upon the trial and relating to the particulars in which the evidence is specified to be insufficient to justify the decision of respondent." As justification for the order striking the proposed bill of exceptions from the files the respondent alleges that "after considering all of said motions, the proposed amendments to said proposed bill of exceptions, and the stenographic report of said proceedings, together with the numerous exhibits submitted to respondent at the trial, she concluded that said proposed bill of exceptions did not contain a full and fair presentation of the evidence relating to the matters specified in said proposed bill of exceptions as errors, and that said proposed bill of exceptions was partial, meager, unfair, and a pretense and a sham, and that in order to present a fair bill of exceptions, it is the belief of respondent that either respondent or the defendant therein would be required to rewrite said bill of exceptions".

The only points presented by the respondent as grounds for denying the relief sought by the petitioner are that (1) an order striking a proposed bill of particulars is properly made where the proposed bill is lacking in the essentials of such a document; (2) that the writ should not issue where the proposed bill is merely a sham or pretense and the court or the defendant would be required to prepare an entirely new bill in order to provide one which will fairly reflect the evidence relating to the errors assigned by the appellant; (3) it is the duty of the superior court to settle bills of exception, not to make them; and (4) a bill of exceptions must state so much of the evidence or other matter as is necessary to explain it. However, in so far as these statements are correct principles of law, they are inapplicable to the facts as alleged in the respondent's answer.

[1, 2] As early as 1889 this court required a trial judge to settle a bill of exceptions which he certified was "inaccurate, and, in many respects, untrue, and contains but a meagre and partial statement of the facts and proceedings leading up to, and connected with, and upon which the rulings of the court therein were had that are complained of, and, also, a mere defective skeleton of the testimony and evidence submitted to the jury, and upon which they rendered their verdict of guilty". Sansome v. Myers, 80 Cal. 483, 485, 22 P. 212, 213. In this case the court said that if anything was omitted from the proposed bill of exceptions or any matter was incorrectly stated, opposing counsel should offer such amendments as would correct the omissions or errors. It is the duty of the trial judge, said this court, to see that a correct bill of exceptions is prepared and then to sign it, although he may not be called upon to prepare one. Later the District Court of Appeal held on the authority of the Sansome Case "that although a proposed bill of exceptions, apparently prepared in good faith, may be but 'skeleton' in form, and even inaccurate in many respects, meager and partial", nevertheless the trial judge is not justified in refusing to settle it because of

these imperfections. Kouts v. Superior Court, 135 Cal.App. 699, 27 P.2d 788, 789. And in Clough v. Superior Court, 17 Cal. App.2d 14, 61 P.2d 375, the doctrine of the Sansome Case was again stated to be controlling and the respondent court directed to settle a bill.

[3] Under the law as stated and applied in these cases, the facts alleged by the respondent in her answer so far as they apply to the points relied upon, do not justify the order striking the proposed bill of exceptions from the files. The record presented by the petitioner shows that the bill of exceptions proposed by her is in the usual form. The defendant offered extensive amendments to it. So far as is shown, the petitioner did not decline to include these in the bill nor to revise it in other particulars. Under these circumstances the trial judge should either have allowed the amendments and directed the bill to be rewritten accordingly, or required such other changes as would make it conform to the facts. The petitioner is entitled to a record upon the appeal noticed by her.

The case of Dainty Pretzel Co. v. Superior Court, 7 Cal.App.2d 437, 45 P.2d 817, is not at variance with these conclusions. It came before the appellate court upon an order made by the trial judge striking the proposed bill of exceptions from the files upon the grounds, among others, "that it does not contain any of the essentials of a proposed bill of exceptions, and cannot be regarded as such; that it is not even a skeleton bill of exceptions; * * * and that a true bill could not be settled merely by suggestion of any amount of amendments to the proposed bill short of preparing an entirely new bill; * * *." [page 818.] In declining to issue the writ, the District Court of Appeal, upon an examination of the proposed bill, held that it was deficient in the particulars specified by the trial judge and that it did not show any attempt to present such a fair and bona fide statement of the case as such an instrument should contain. However, in the present case an entirely different situation is shown.

[4] Accordingly, the writ is granted and it is ordered that, subject to the right of the respondent judge to direct the petitioner to make and present a correct bill of exceptions to the order from which the appeal has been taken, that she proceed in due course to the settlement thereof, either as already presented, or as hereafter to be presented pursuant to amendments which may be made thereto in accordance with the order of the court.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.



12 Cal.2d 461

FEINSTEIN v. STATE BAR OF CALIFORNIA.

L. A. 16813.

Supreme Court of California.

Dec. 29, 1938.

Attorney and client ⇐57

Where attorney had been ordered disbarred by Supreme Court pending a hearing on petition and order granting review of a recommendation of the State Bar, the proceeding to review such recommendation was dismissed since questions sought to be reviewed had become moot.

In Bank.

Proceeding by Louis Feinstein to review a recommendation of the State Bar of California.

Proceeding dismissed.

L. E. Dadmun, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Whereas this proceeding was instituted by the filing of a petition to review the proceedings and recommendation of the State Bar, record of which was filed herein April 21, 1938, under Bar Misc. 1541, and since the filing of said petition and the order granting a review, the petitioner has been ordered disbarred by order of this court dated November 9, 1938, under No. Bar Misc. 1527, and by reason of such order of disbarment, the above-entitled proceeding has become moot.

It is hereby ordered that the same be and it is dismissed.

12 Cal.2d 462

HALL v. STATE BAR OF CALIFORNIA.

L. A. 16811.

Supreme Court of California.

Dec. 29, 1938.

As Amended Jan. 4, 1939.

Rehearing Denied Jan. 26, 1939.

1. Attorney and client ⇐58

Where penalty of disbarment is invoked, the Supreme Court may properly take into consideration the youth of the attorney and surrounding circumstances under which the improper acts were committed.

2. Attorney and client ⇐46

That a young attorney engaged in practice less than three years followed suggestions of an older attorney who had befriended him for several years in preparing fraudulent checks, while distinguishing him in some degree from an experienced and calculating offender, was not a defense to a proceeding of disbarment.

3. Attorney and client ⇐58

Conduct of youthful attorney in knowingly writing fraudulent checks on his own trust account and unauthorized checks on the account of a client and entering fictitious transactions on the face of the checks in order to facilitate their discount by the payee, an acquaintance, being acts involving moral turpitude, warranted greater punishment than a mere reprimand and justified suspension for three years although such acts appeared to have been performed in reliance upon advice of an older attorney.

In Bank.

Proceeding by Richard H. Hall to review a recommendation of the Board of Governors of the State Bar that he be disbarred from the practice of law.

Petitioner suspended for the period of three years.

Benjamin W. Shipman, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is an application to review a recommendation of the board of governors of the State Bar that petitioner be disbarred.

The record shows that in 1936 Benjamin Zimmer, the owner of a cafe in Hollywood, consulted his attorney, Louis Feinstein, to obtain legal services and a loan of money. Feinstein lent him about $300 and incorporated the business. In return for this assistance he was to receive a share in the net profits.

In January, 1937, Zimmer came to Feinstein for further aid, and a plan was devised and carried out whereby Feinstein drew checks to third parties, which Zimmer discounted to obtain money. Feinstein had no sufficient funds to cover such checks, and Zimmer undertook to cover them with cash deposits at the time they cleared. Later Feinstein gave Zimmer the names of Morgan, a former client, and petitioner Hall, Feinstein's office assistant, as other prospects for these "loans", and Zimmer was successful in inducing them to go through the same procedure, for a money consideration.

Hall wrote five checks, two on his own "trust account" for a total of $950, and three on the account of Acme Collectors, a client, for a total of $975. The first two were made payable to Feinstein and the other three to Zimmer. Hall owed nothing to either payee and fully understood that the checks were to be used by Zimmer to obtain money from third persons. The accounts on which the checks were drawn contained only a few dollars, and of course Hall had no authority from his client to use its account for this purpose. Hall, following Feinstein's procedure, struck the word "order" from the checks, to destroy their negotiability. At Zimmer's suggestion, Hall dressed up the checks to make them look legitimate by making fictitious notations in the upper left-hand corner, such as "% collection $325.00", "½ fee $475.00", and "Hamel & Jordan, ½ fee $475.00". For his efforts Hall was to receive $50, and Zimmer gave him a check for that sum, which was never paid.

Ultimately the Hollywood State Bank suffered a substantial loss. Zimmer's fraudulent practices were discovered, and he and certain other persons were prosecuted and convicted. See People v. Zimmer, 23 Cal.App.2d 581, 73 P.2d 923. Feinstein was also prosecuted, and coincidentally orders to show cause were issued by the local administrative committee of the State Bar directed against Feinstein and Hall. The cases were consolidated for hearing, and the committee recommended disbarment for Feinstein and a public

reprimand for Hall. The board of governors adopted the findings with certain amendment, but recommended disbarment for both. Meanwhile the prosecution of Feinstein resulted in his conviction (see People v. Humphrey, Cal.App., 81 P.2d 588) and disbarment followed automatically. See Feinstein v. State Bar, Cal.Sup., 85 P.2d 869, this day filed.

We are therefore presented with the petition of Hall alone.

From the foregoing review of the facts it is clear that Hall was guilty of the same fraudulent practices as Feinstein, and the local administrative committee found that both were guilty of acts involving moral turpitude. Moreover, the entry of the fictitious transactions on the face of the checks shows a full knowledge of their intended fraudulent use, and a deliberate purpose to aid in the deception of the contemplated victims. And it should further be remembered that Hall was to receive payment for these "loans", and did get the one check of $50 for Zimmer.

Hall does not deny the substance of the charges against him, and frankly admits that his conduct was "foolish and unwise" and that he is "ashamed" of his part in the transaction. But he asserts that he had no intention of injuring anyone, and that he honestly believed, from the statements of Feinstein and Zimmer, that the checks would be paid. In brief, his main defense is his youth, inexperience, and faith in his friend and employer, Feinstein. This defense is well stated in the following findings of the local administrative committee:

"After January 29, 1937, which was the date of the last of the aforesaid five checks given by Morgan to Zimmer, Zimmer again called upon Feinstein to inquire if he, Feinstein, knew of any other person that would be willing to enter into similar check transactions; Feinstein then introduced Zimmer to respondent Hall. For several years prior thereto Hall had been acquainted with Feinstein, who had befriended Hall personally by advancing him money for the necessities of life and professionally by giving Hall legal employment as process server while Hall was studying law, and later by giving him office space in Feinstein's law suite; for these favors Hall had a deep and genuine sense of obligation to Feinstein, which Feinstein knew. Moreover, Hall was immature in judgment and inexperienced in the practice of law, having then practiced less than three years, and of this Feinstein was likewise aware. In fact, the combination of Hall's immaturity, inexperience and his sense of obligation, made Hall a tool in the hands of Feinstein; consequently, Feinstein's introduction of Zimmer to Hall made Hall pliant and acquiescent to Zimmer's request for checks to be used in transactions similar to the ones previously had between Zimmer and Feinstein and Zimmer and Morgan."

[1,2] Our problem is therefore not one of law; we are called upon to determine what is the proper measure of punishment for a clearly improper act. Whatever the motives may have been, the acts were not slight infractions of rules of ethics, but were deliberate and intentionally fraudulent acts involving moral turpitude. This being so, we cannot agree with the local committee that a reprimand is a sufficient punishment. But where the extreme penalty of disbarment is invoked, we think it proper to take into consideration the youth of petitioner and the circumstances in which he was placed by his close association with Feinstein. Hall was but 33 years of age, and in practice less than three years. It is no excuse that he followed the suggestions of Feinstein, but this fact distinguished him in some degree from an experienced and calculating offender.

[3] In short, we believe that it is still possible for Hall to redeem himself if permitted to return to practice, and that disbarment is not the appropriate penalty under all the circumstances. In this view we are supported by the local committee and by four members of the board of governors who felt that the punishment was too severe. After careful deliberation we have concluded that a substantial period of suspension is adequate punishment for petitioner's offense.

It is therefore ordered that petitioner be and he is hereby suspended from the practice of the law in this state for a period of three years commencing February 1, 1939.

VOTAW v. FARMERS AUTOMOBILE INTER-INSURANCE EXCHANGE et al.*

Sac. 5143.

Supreme Court of California.

Dec. 30, 1938.

Rehearing Granted Jan. 27, 1939.

1. Automobiles ⇐19

The statutory provision that "title" to automobile shall not be deemed to have passed or "transfer" thereof be deemed complete until certificates of registration and ownership are issued deals only with "title" and "transfer," and does not affect right of ownership or interest in automobile. St.1931, p. 2105, § 45¾.

2. Automobiles ⇐19

As quoted words are used in statutory provision that "title" to automobile shall not pass or "transfer" be complete until certificates of registration and ownership are issued, one may have "title" and not be owner, and one having naked title may "transfer" the property without ownership being affected, or equitable owner may convey his rights without any effect on legal title. St.1931, p. 2105, § 45¾.

3. Sales ⇐201(1)

Under statutory provision that goods sold are at the buyer's risk after delivery, equitable title to goods is in buyer. Civ. Code, § 1742, as added by St.1931, p. 2242.

4. Insurance ⇐332¼

Where automobile is sold under conditional sales contract, seller does not have "sole and unconditional ownership" required as condition of recovery on automobile liability policy, since buyer and seller each have mere qualified contingent interest. Civ. Code, § 1742, as added by St.1931, p. 2242; St. 1931, p. 2105, § 45¾.

[Ed. Note.—For other definitions of "Sale and Unconditional Ownership," see Words & Phrases.]

5. Insurance ⇐332¼

A seller of automobiles who committed misdemeanor by failing to comply with statutes concerning registration of sale and delivery of certificate of ownership to purchaser could not rely on such failure as basis for contending that he retained "sole and unconditional ownership" so as to remain within coverage of automobile liability policy. St.1925, p. 414, § 153; St.1927, p. 1424, § 45½.

6. Insurance ⇐309

A violation of policy provision by which insurer's risk is not increased or rights are not substantially prejudiced is no defense to an action on automobile liability policy.

7. Insurance ⇐435

Where automobile was sold under conditional sales contract, though seller did not register sale or obtain issuance of certificates of registration and ownership, and seller was held liable for damages caused by buyer's negligent operation of automobile, liability insurer was liable under indorsement to seller's policy whereby coverage was extended to person in possession of automobile with the "permission of the named assured," irrespective of seller's lack of "sole and unconditional ownership" required by policy. St.1929, p. 514, § 45(e); St.1931, p. 2105, § 45¾; Civ.Code, § 1742, as added by St.1931, p. 2242.

[Ed. Note.—For other definitions of "Permission of Assured," see Words & Phrases.]

EDMONDS and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Amador County; A. Caminetti, Jr., Judge.

Action on an automobile liability policy by J. E. Votaw against the Farmers Automobile Inter-Insurance Exchange and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Prior opinion, 76 P.2d 1174.

James W. Hughes, of Los Angeles, for appellants.

J. Calvert Snyder, of Stockton, Ralph McGee, of Jackson, and Harold Raines, of Oakland, for respondent.

W. H. Stammer and Galen McKnight, both of Fresno, Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, Morgan J. Doyle and J. Joseph Sullivan, both of San Francisco, and Lasher B. Gallagher, of Los Angeles, amici curiæ.

PER CURIAM.

Following a decision of this appeal that was filed some months ago, a petition for rehearing of the cause was granted. After reconsideration of the several points that originally were suggested by the appellants as affording impelling reasons for a rever-

*For subsequent opinion see 97 P.2d 958.

sal of the judgment, and which again have been urged by them, this court adheres to, and adopts as representing its present views and decision, the opinion and order which formerly was prepared by Mr. Justice Houser of this court and which thereupon was filed herein, as follows:

"The pertinent facts which relate to the instant appeal appear to be that, although plaintiff was the owner of an automobile which was insured by the defendants against so-called "public liability",—by the terms of the contract or policy of the said insurance, the defendants were exempted from such liability if it should appear that the interest of plaintiff in the automobile 'was at any time other than sole and unconditional ownership'; that thereafter, under the terms of an oral conditional sale contract, plaintiff sold the automobile to one Kin, who paid a portion of the purchase price, and to whom possession of the automobile was delivered; but that notwithstanding that fact, plaintiff expressly reserved title to the automobile in himself until after the full remainder of the purchase price thereof had been paid to him; that with reference to such sale, neither plaintiff nor Kin complied with the provisions of section 45¾ of the California Motor Vehicle Act as it then was in force [St.1931, p. 2105], in that no certificate of ownership was delivered to Kin, nor was a certificate of ownership or a notice of sale given to the division of motor vehicles of this state; that at a time when, in such circumstances, the automobile was in the possession of Kin, arising from his alleged negligent operation of said automobile, an accident occurred, as a result of which a third person was injured,—on account of which a judgment was rendered against both plaintiff and Kin; and that on appeal, that judgment was affirmed;—as a result of which plaintiff was compelled to and did pay the amount therein adjudged against him. Thereupon, in reliance on the terms of the insurance policy to which reference hereinbefore has been had, plaintiff instituted the instant action against the defendants for the purpose of recovering the pecuniary loss which theretofore he had thus sustained. A judgment was rendered in favor of plaintiff and the defendants have appealed therefrom.

"On the date when the conditional sale contract which was entered into between plaintiff and Kin became effective, subdivision (e) of section 45 of the California Motor Vehicle Act [St.1929, p. 514] contained the following provision: 'Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose.'

"It is with respect to, and by reason of the language of the statute to which reference just has been had, that respondent asserts that the complete title to the automobile remained in the vendor.

"From an examination of the several briefs that have been filed herein, it appears that ordinarily, a determination of the rights of the respective parties to a great extent would depend upon the effect which now is to be given to the reasoning which heretofore has been presented by this court in the leading case of Wyman v. Security Ins. Co. of California, 202 Cal. 743, 262 P. 329. For an understanding of the issue here under consideration, it is sufficient that attention be directed to that part of the syllabus of that case which contains not only a statement of the pertinent facts upon which the decision therein depended, but also the law which was applicable thereto, as follows: 'Where the owner of personal property [an automobile truck] enters into a contract to sell it and gives the purchaser the possession thereof but retains the title to the property until final payment of the purchase price, the loss, in case of loss or destruction of the property, falls upon the vendor; and the latter is not precluded from recovering upon a policy of fire insurance [which contains a requirement of "sole and unconditional" ownership of the truck in the vendor] by reason of the fact that he had entered into such an agreement prior to the issuance of the policy of insurance.'

"It is unquestioned that the decision thus rendered was supported in principle, not only by precedents of cases which theretofore had been adjudicated by the courts of this state, but as well by those of other jurisdictions. See, also, Kelly v. Smith, 218 Cal. 543, 24 P.2d 471, where many authorities are reviewed. Notwithstanding that fact, appellants contend that because of the provisions of section 1742 of the Civil Code, as amended since the decision in the Wyman Case was rendered

[St.1931, p. 2242], the reasoning upon which that decision was made dependable, no longer has application to a statement of facts such as here is presented. A part of the language of the statute to which appellants have referred is as follows: 'Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.'

"However, as is illustrated in each of several former adjudications in analogous cases, the conclusion that was reached in the Wyman Case does not conform to some earlier decisions which were rendered by this court. In the case of McCollough v. Home Ins. Co., 155 Cal. 659, 102 P. 814, 18 Ann.Cas. 862, it was held that a 'conditional' vendee of real property was the 'sole and unconditional owner' [page 815] thereof within the terms of an insurance policy which provided that in order that it be binding upon the insurance company, the assured was required to be the 'sole and unconditional' owner of the insured property. In part it was there said: 'The clause of the policy providing that it shall be void if the insured's interest is other than sole and unconditional ownership, or the subject be a building on ground not owned by the insured in fee simple, is designed to remove from him the temptation to profit by the willful destruction of property not entirely owned by him. Imperial Fire Ins. Co. v. Dunham, 117 Pa. 460, 12 A. 668, 2 Am.St.Rep. 686. "It therefore follows that the clause is in most cases held to refer to the character and quality of the title—to the actual and substantial ownership, rather than to the strictly legal title." 2 Cooley, Ins. 1369. An equitable title in the insured is a sufficient compliance with the condition in question. A vendee in possession of property under a valid contract of purchase which he is entitled to enforce specifically is the holder of such equitable title. Id. 1376. And the great weight of authority supports the proposition that such vendee is the "sole and unconditional owner" within the meaning of the policy, even though a portion of the purchase price may yet remain unpaid.' To the same effect, in similar cases, see Ramirez v. United Firemen's Ins. Co., 46 Cal.App. 451, 189 P. 309, and Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 197 P. 99. And in the case of Savage v. Norwich U. F. Ins. Soc., 125 Cal.App. 330, 13 P.2d 955, the same rule was applied where the subject-matter of a fire insurance policy was personal property.

"But it should be noted that the Wyman Case is supported by the case of Cocores v. Assimopoulos, 4 Cal.2d 82, 47 P.2d 699, which involved an issue similar to that here under consideration, and which was decided after the amendment to the original provisions of section 1742 became effective. However, for the reason that, as amended, the statute was not in force at the time when the contract there under consideration was asserted to have been breached, it was held that the provisions of the statute as hereinbefore have been set forth, could not be made applicable to the facts in that case. But in addition to the authorities hereinbefore cited, which are to the effect that the vendee was the 'sole and unconditional' owner of property which theretofore had been sold to him on a conditional sale contract, in the case of Sharman v. Continental Ins. Co., 167 Cal. 117, 138 P. 708, 52 L.R.A.,N.S., 670, it was ruled that (syllabus), 'One who has entered into, though not recorded, an agreement to convey property, received installments of the purchase price, and placed the vendee in possession, is not the sole and unconditional owner of the property within the meaning of a provision in a policy of insurance thereon that the policy shall be void "if the interest of the assured be other than unconditional and sole ownership."'

"To the same effect see Brickell v. Atlas A. Co., 10 Cal.App. 17, 101 P. 16.

[1, 2] "But with reference to the language that is contained in subdivision (e) of section 45 of the California Motor Vehicle Act, to which reference hereinbefore has been had, it should be noted that instead of containing any attempted restriction or limitation upon the right of ownership or interest in an automobile that has been the subject of sale and purchase by respective parties to an agreement, in that regard the only attempt to fix the status of either the seller or the buyer relates to matter of 'title' and to 'transfer'. That is to say, that should the parties fail to comply with the statutory requirements, the 'title' to the automobile should be deemed 'not to have passed'; nor shall the 'transfer' be deemed complete or valid for any

purpose. It is apparent that one may have 'title' to a thing and not be its owner; likewise, would it be possible for one who holds the naked title, to 'transfer' the property to another without the ownership therein being at all affected. On the other hand, one who is the equitable owner of property may convey his rights therein without any effect being produced in the legal title thereof. For example, had one purchased an article of personal property, but had had it delivered into the possession of another to whom a bill of sale or other evidence of ownership had been given, there could be no doubt that the one who had furnished the money for such purchase at least would be the equitable owner of such property. It therefore would seem not impossible that the language of the statute to which attention hereinbefore has been directed may affect the legal title, as distinguished from equitable ownership of or interest in an automobile. See Sly v. American Ind. Co., 127 Cal.App. 202, 207, 15 P.2d 522; Swing v. Lingo, 129 Cal.App. 518, 19 P.2d 56; Kenny v. Christianson, 200 Cal. 419, 253 P. 715, 50 A.L.R. 1297; Pendell v. Thomas, 95 Cal.App. 33, 272 P. 306; Goodman v. Anglo-Cal. T. Co., 62 Cal.App. 702, 217 P. 1078. For note, with appropriate authorities with respect to the general situation, see 23 California Law Review, 562.

[3] "But to reiterate the legal principle applicable to the situation only as here presented: By the Wyman Case, it was decided that 'the loss falls upon the vendor'; whereas, by the provisions of section 1742, Civil Code, 'the goods are at the buyer's risk * * *'. In other words, although by virtue of the decision in the cited case, the title to the property remains in the seller; nevertheless, in accordance not only with the express terms of the statute as amended, but also as interpreted by other California cases hereinbefore cited, as well as by the courts of other jurisdictions, the equitable title to such property is in the buyer.

[4] "In reaching a conclusion with regard to the binding force of a provision in an insurance contract like that here involved, especially in the absence of some qualifying agreement between or among the interested parties, the test that frequently has been applied has been related to a determination of the question upon whom the loss would fall. And without reference to the desirability of such a rule, in consideration of our statutory provision that 'the goods are at the buyer's risk', it would seem conclusive that if such test be here applied, the necessary result will be not only that the vendee of the automobile had at least an equitable title therein, and that he held it at his risk, but also that the seller was not the 'sole and unconditional' owner thereof, within the meaning of that phrase, as expressed in the policy of insurance which is here under consideration. Otherwise stated, if the case is determinable by a solution of the question: 'Upon whom would the loss fall?' it becomes apparent that by the terms of the statute to the effect that the goods are at the buyer's risk, no answer is permissible other than that because the vendee must suffer the loss, necessarily the vendor is not the 'sole and unconditional' owner of the automobile.

"Again, it may be noted that although the validity of the insurance policy is made to depend upon the provision which requires in the assured sole and unconditional ownership of the insured property, and consequently that the question of ownership of the assured in the subject-matter of the policy necessarily is involved in the determination of liability of the insurance company, nevertheless, neither in the Wyman Case nor in the language of the pertinent statute is the question of ownership directly made a special subject of consideration. However, in the cited case, notwithstanding the requirement in the insurance policy regarding the necessity of sole and unconditional ownership in the vendor, together with the apparent fact that after a sale of the property had been made, the vendor no longer was the possessor of the equitable title thereto—from the ultimate conclusion therein expressed, to-wit, that 'in case of the loss or destruction of the property involved, the loss falls upon the vendor'—it becomes clear that the implied question of whether the vendor was the sole and unconditional owner of the property, was substantially answered to the effect that the ownership was in the vendor. But with respect to the pertinent terms of the statute, to-wit, that 'the goods are at the buyer's risk', in opposition to the ruling in the Wyman Case, the implication is that the vendee has acquired an interest in the property, with the result that the insurance contract or policy has been breached, in that at the time the loss was sustained, the vendor no longer was the

sole and unconditional owner of the insured property.

"It is obvious that upon the execution of a conditional sale agreement, followed by a delivery of the subject-matter of the contract to the vendee,—neither of the parties to the agreement has an absolute ownership in the property, but that the ownership of each is subject to certain provisions or stipulations that are contained within the terms of the contract. Each of the parties has a qualified interest in the property which, on the one hand, as far as the vendee is concerned, contingent upon the happening of defeasance conditions, may be entirely lost to him, or, on the other, likewise contingently, may develop or ripen into his unqualified ownership therein. In other words, the absolute ownership is perfect in neither of the parties; nor may it become perfect in either of them except, as far as the vendee is concerned, upon the happening or the performance by him of some specified act or acts; or in the vendor, except upon the failure on the part of the vendee to perform some designated act or acts.

[5] "But in the instant case a separate reason exists for refusing recognition of plaintiff as the 'sole and unconditional' owner of the automobile which he sold on a conditional sale contract. By the provisions of section 45½ and 153 of the California Motor Vehicle Act then in force [St.1927, p. 1424; St.1925, p. 414], a violation by plaintiff of other provisions of the statute relative to the registration of the sale of the automobile and a delivery of a certificate of ownership thereof to the purchaser, constituted a misdemeanor. Had plaintiff complied with the requirements of the statute with reference to such matters, it is probable that the necessity for his present contention that after the oral conditional sale contract had been entered into he remained the 'sole and unconditional owner' of the automobile, would not have arisen. His assertion at this time, in effect that because he violated such statutory requirements he should be permitted to profit by such wrongdoing should not, in equity, be available to him.

"The ruling in the case of Schmidt v. C. I. T. Corp., 14 Cal.App.2d 92, 57 P.2d 1016, is in point. It was there held (syllabus): 'Where the registered owner of a motor vehicle sells it and delivers to the vendee the certificate of ownership duly endorsed by him, and the vendee, without forwarding the certificate to the division of motor vehicles as required by subdivision (b) of section 45 of the Motor Vehicle Act, sells the car to a third person under a contract of conditional sale, and an action is subsequently brought for damages arising from the operation of the car by said third party, the vendee cannot take advantage of its own wrong in failing to comply with said subdivision (b), but must bear the burden of ownership under section 1714¼ of the Civil Code in the same manner as if it had complied with said subdivision upon its purchase of the car; and it is immaterial that said vendee was never the registered owner of said vehicle.'

"However, a final question of vital importance remains for consideration: Preceding the date on which the accident which gave rise to the question of the liability of the defendants occurred, the defendants wrote a letter to plaintiff of which the following is a copy of the essential part of the body thereof, to-wit:

"'We are enclosing an endorsement form which you will please attach to your policy. It is for the purpose of broadening the terms of the same to meet present automobile driving conditions. This endorsement provides for the extension of insurance under your policy to others who may be driving your car (with your permission), and gives to them all the protection afforded you by your policy. It also provides for compliance with the Owner's Responsibility Laws of the various states in which the Exchange operates, or in which you may be traveling at the time of an accident involving your insured car. There will be no additional charge for the extension of this coverage. In granting the extension of this coverage the Governing Board of the Exchange is keeping to the policy of furnishing its members with adequate coverage to meet the various changes in laws and conditions affecting the driving of automobiles * * *.'

"The 'extension of the insurance', to which reference was made in that letter, was as follows:

"'It is made a condition of the policy to which this endorsement is attached that, beginning at noon, standard time, January 1, 1933, at the address of the named insured stated herein, the insurance granted to the named insured under Part II relating to Property Damage and Public Liability and subject to all the terms, conditions

and limitations of the policy, shall also inure to the benefit of any person or persons while riding in or legally operating the automobile described herein and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named Insured, or, if the named Insured is an individual with the permission of an adult member of the named Insured's household other than a chauffeur or domestic servant; provided that the insurance so granted and extended shall not be available to any public carrier, public automobile garage, automobile repair shop, automobile sales agency, automobile service station, or the agents or employees thereof while in the course of such agency or employment.'

"With reference to such 'extended coverage', at the outset respondent directs attention to the 'words' which occur therein, to-wit, 'broadening the terms', 'extension of insurance', 'extension of coverage', 'extended coverage', 'omnibus clause' and 'any person or persons'.

[6] "From the general tenor of the language contained in such letter, as well as from a consideration of such several phrases to which reference just has been had, respondent asserts that 'beyond any doubt an intention on the part of appellants that the insurance provided by the endorsement shall be not restrictive but increased or more extensive than that provided in the body of the policy', is clearly indicated. In that connection, it first should be noted that in situations similar to that which is presented herein, the general trend of authority is to the effect that the violation of a provision in an insurance policy by which the risk of the insurer is not increased or its rights substantially prejudiced, does not constitute a valid defense in an action on the policy. Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13, and Sly v. American Indemnity Co., 127 Cal.App. 202, 15 P.2d 522.

"In the case of Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 752, 7 P.2d 999, 1002, 85 A.L.R. 13, it was said: '* * * the violation of the condition by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby' (citing cases). And in the case of Sly v. American Indemnity Co., 127 Cal.App. 202, 208, 15 P.2d 522, the identical thought is expressed. But as regards the instant case, although of great consequence, the question for determination is not so much whether the risk of the defendants in any manner was increased, or whether its rights were substantially prejudiced, but rather is,—What construction fairly and reasonably may be placed upon the pertinent language of the contract of insurance, as modified (if at all) by the so-called 'extended coverage'? And that question, or one analogous to it, has been definitely answered by at least one decision by an appellate tribunal of this state. We refer particularly to the case of Sly v. American Indemnity Co., which was decided in the Fourth Appellate District, and is reported in 127 Cal.App. 202, 15 P.2d 522. In that case it appeared that under the terms of a conditional sale contract, one Krause had purchased an automobile. Thereafter he had some negotiations with one Mills, which related to a proposed transfer to him of Krause's interest in the automobile, in consequence of which, possession of the automobile was delivered to Mills. In such circumstances, while the automobile was being operated by the latter, an accident occurred by which the plaintiff Sly was injured, by reason of which she thereafter recovered a judgment against Krause. On the return, unsatisfied, of a writ of execution on said judgment, the plaintiff in said action instituted an action against Krause's insurer. The contract of insurance therein, which resembled that in the instant case, contained a provision to the effect that the insurance company would be relieved from liability if thereafter it should appear that 'the interest of the assured in the subject of this insurance be or become other than unconditional and sole lawful ownership'. However, by the express terms of the policy of insurance, it was provided that the insurance of Krause was extended so that the coverage of liability became available to any person who, with Krause's permission, might operate the insured automobile.

"Although a finding of fact that was made by the lower court to the effect that Krause had not transferred his interest to Mills was not disturbed on the appeal from the judgment, nevertheless the reviewing tribunal also declared not only that 'under the circumstances' there was no 'increase of risk' to the insurer by reason of Krause's 'attempted transfer of in-

terest in the automobile', but also that there could be no doubt that at the time when the accident occurred, Mills was operating the automobile with the permission of the assured. In part, the language which was used by the court was as follows [page 524]: 'In an action by such [third] person against the insurer violation by the assured of some condition in the policy is a valid defense only when it appears that by reason of such violation the insurer was substantially prejudiced. Hynding v. Home Acc. Ins. Co. [214 Cal. 743], 7 P.2d 999 [85 A.L.R. 13]. In the present action the insurer was not prejudiced by the attempted transfer of interest in the automobile by the insured. It is true that possession of the automobile was transferred to Mills, who was operating the machine at the time respondent was injured. But it is expressly stated in the policy of insurance that insurance provided by the liability peril clause is so extended as to be available to any person lawfully operating the insured automobile provided such operation is with the permission of the assured named in the policy. There can be no doubt that the operation of the automobile at the time respondent was injured was with the permission of the assured. It is therefore apparent that no increase in risk to appellant occurred by reason of the attempted transfer of interest in the automobile by its insured.'

"The case of Firkins v. Zurich General A. & L. Ins. Co., which was decided in the Third Appellate District, and reported in 111 Cal.App. 655, 295 P. 1051, provides another illustration of the same principle. That was an action based on a 'public liability' indemnity policy of insurance, which contained a provision that the policy should not cover 'in respect of any automobile * * * while driven or manipulated by any person * * * under sixteen years of age in any event'. However, an amendment or rider was attached to the policy, as follows:

"'The policy to which this endorsement is attached is hereby extended to apply to any person * * * legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured, or if the named assured is (an) individual, with the permission of an adult member of the named assured's household. * * *' Thus situated, the insurance company denied liability for damages which resulted from an accident which had occurred through the alleged negligent operation of the automobile by a fourteen-year-old son of the insured. In passing upon the question that was thus presented, in part, the court said:

"'There appears to be no difficulty in reconciling the language of the policy with that of the rider on the subject of liability on account of the age of the chauffeur. It may be reasonably construed to mean that the surety company shall not be liable upon the policy "while [the machine was] driven or manipulated by any person * * * under sixteen years of age" unless such minor was operating the car "with the permission of an adult member of the named assured's household," in which event the company is liable. To construe the language of this instrument otherwise would defeat the apparent intent of the parties and render the quoted language of the rider valueless.' (An application for hearing of the cause by this court was denied.)

"A nearly identical situation was presented in the case of Swift v. Zurich General A. & L. Ins. Co., which was decided in the First Appellate District, and reported in 112 Cal.App. 709, 297 P. 578. For all practical purposes here involved, the syllabus thereto contains a sufficient resume of both the facts and the law as therein decided: 'A proviso in the body of an automobile indemnity insurance policy to the effect that the policy should not cover when the car was operated by one under sixteen years of age was superseded by a rider attached to the policy, where such rider was entitled "Omnibus Coverage Endorsement" and provided that the coverage of the policy was extended to apply to any person or persons legally operating the car with the consent of the assured, and further provided in effect that it was a substitute for any inconsistent provision in the body of the policy.' (A hearing was also denied by this court in that case.)

[7] "On a comparison of the facts of the instant case with those which were present in each of the cases to which attention just has been directed, it is deemed sufficient to observe that, in principle, no substantial difference may be discovered. Irrespective of the conclusion herein reached with regard to whether plaintiff was the 'sole and unconditional owner' of the automobile, in any event, in accordance with the terms of the conditional sale con-

tract, his proposed vendee was in possession of the automobile 'with the (implied) permission' of plaintiff and was operating it at the time when liability of the defendants attached. Without doing violence to the judgment of each of three separate courts of appeal of this state, in which respectively, as hereinbefore has been noted, in principle, it was decided that the special provision of the 'extended coverage' endorsement on the policy of insurance superseded the general provision with respect to the limitation of liability unless at all times within the life of the policy the assured was the 'sole and unconditional owner' of the automobile—this court is constrained to affirm the judgment that was rendered by the lower court."

The judgment is affirmed.

EDMONDS, Justice (dissenting).

In my judgment, the decision holding the insurer liable is based upon an erroneous construction of the contract between the parties. It is held that because Votaw, the plaintiff, was not the sole and unconditional owner of the automobile at the time of the accident, as the policy required him to be, the insurer's defense to his claim as the named insured in the policy must be upheld. But he is allowed to recover upon, what appears to me to be, an entirely erroneous construction of the endorsement providing additional coverage.

By this provision, known as "extended coverage", the insurance granted by the policy "shall also inure to the benefit of any person or persons while riding in or legally operating the automobile * * * with the permission of the named insured". Votaw is the named insured. The endorsement did not increase his coverage, but extended it to cover the liability of any person driving the automobile with his consent.

When the accident happened, Votaw was not riding in or legally operating the automobile with the consent of the named insured; it was Kin who was doing this. Under these circumstances, if the policy was then in effect Votaw was covered as the insured named in it and the extended coverage protected Kin, the driver of the car. The two insuring agreements are separate and distinct. Each provides insurance for a designated person; that stated in the policy as originally written is solely for the benefit of the named insured, whereas the one added by the endorsement granted protection to any unnamed person who used the automobile under specified conditions. Reading the policy of insurance and the endorsement together, it seems obvious that the same person could not be the insured under both agreements, nor could a person insured under one claim the protection afforded by the other. Therefore, the rule that "violation of a provision in an insurance policy by which the risk of the insurer is not increased or its right substantially prejudiced, does not constitute a valid defense to an action on the policy" has no application to this case. It has never been used to give one who was not the person insured by a policy the benefits provided by it.

None of the cases cited and relied upon as authority for the conclusion reached by the majority of the court was decided upon similar facts in three of them the injured person, not the insured was the plaintiff. This was the situation in Hynding v. Home Accident Insurance Co., 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13. In that case the insurer denied liability for the reason that the insured did not comply with the terms of the policy requiring him to attend the trial as a witness. It was held that this prejudiced the insurer and a judgment for the plaintiff was reversed.

The case of Sly v. American Indemnity Co., 127 Cal.App. 202, 15 P.2d 522, presented primarily a question of ownership within the meaning of the insurance policy. The plaintiff was the person injured. The named insured had negotiated a sale of his automobile and had surrendered possession of it to the purchaser who was operating it at the time of the accident. The insurer contended that by this transfer the policy had become void. The evidence concerning transfer of ownership was conflicting and it was held that [page 524] "considering the equivocal circumstances presented by the testimony, we cannot say that the inference drawn by the [trial] court, that it was not the intention to transfer the interest of the insured automobile, was not reasonably supported." However, after reaching that conclusion the court considered the situation of the parties if the interest of the insured in the automobile had been transferred, and decided that the insurer was liable, because in an action brought by one who is not a party to the insurance contract, "violation by the assured of some condition in

the policy is a valid defense only when it appears that by reason of such violation the insurer was substantially prejudiced". This latter statement is dicta because the finding of the trial court that Krause had not transferred the automobile was upheld. If he had not made a transfer he was entitled to recover and the insurer had no defense. But even aside from this observation, the decision is not authority for allowing Votaw, the insured, to recover against the insurer.

A question of construction arising because of inconsistent provisions of a policy and an endorsement attached to it was presented in Firkins v. Zurich General A. & L. Ins. Co., 111 Cal.App. 655, 295 P. 1051. There was no dispute presented by that case concerning who was insured at the time of the accident, but the controversy was whether the judgment creditor of the named insured could recover against the insurer because of an accident which occurred when the insured's automobile was driven by a 14-year-old boy. The policy excluded coverage when the automobile was driven by any person under 16 years of age. By the endorsement coverage was extended to "any person" using it with the permission of the named insured. It was held that this provision made the insurer liable to the plaintiff because at the time of the accident the automobile was being operated with the insured's consent.

The case of Swift v. Zurich General A. & L. Ins. Co., 112 Cal.App. 709, 297 P. 578, has no application to the question now before this court. It was brought by a named insured, against whom judgment had been rendered, against the insurer. The policy included an endorsement identical with the one before the court in the Firkins Case. It was held that the insured might recover the amount of the judgment which was awarded because of an accident in which a minor was driving the automobile with her consent, notwithstanding the age limitation. The recovery was not upon the extended coverage agreement but under the ordinary policy terms. Because of statutory provisions, the insured was liable for the damages resulting from a collision which occurred while the automobile was driven by a minor with her consent, and the court held that the provision limiting coverage to persons under 16 years of age had been superseded by the endorsement which extended insurance to any person without restriction.

It is difficult to see the logic of this reasoning. Had the judgment been against the minor driver, as the endorsement applied to "any person" without limitation as to age, then he could recover against the insurer. But the court measured the liability of the insurer to the insured by reading into the terms of the contract under which it agreed to protect him, provisions concerning insurance granted to a third person, one driving the automobile with the consent of the insured. However, that presents a situation entirely different from that of the plaintiff in the present case who must recover if at all as a person insured by the omnibus clause but not by the policy.

In the case now before the court Votaw is the named insured; the court holds that the insurer is not liable to him because he was not the sole and unconditional owner of the car. That conclusion, in my opinion, requires a reversal of the judgment, because the insurer is not liable to him upon insurance granted by the policy solely and exclusively to some one else, that is to anyone "riding in or legally operating the automobile with the permission of the named insured".

I concur: CURTIS, J.



12 Cal.2d 466

PEOPLE v. MARTIN et al.

Cr. 4175.

Supreme Court of California.

Dec. 31, 1938.

1. Criminal law ⇐778(1)
Homicide ⇐311

In murder prosecution, defendant was not entitled to instructions that there were no presumptions in favor of the death penalty, that extenuating or mitigating circumstances need not exist to authorize recommendation of life imprisonment, or that jury should resolve any doubt in favor of defendant and fix the lesser penalty. Pen. Code, § 190.

2. Homicide ⇐311

In murder prosecution, instruction that if defendant was guilty of first degree mur-

der, jury must determine whether penalty should be death or life imprisonment, indicating penalty as life imprisonment if so fixed but saying nothing on the subject if death penalty is fixed, and that jury were "entirely free to act according to your own judgment" in exercising discretion concerning penalty, was proper. Pen. Code, § 190.

3. Homicide ⇐18(5)

Where a human being is killed by any one of several persons jointly engaged at the time of the killing in perpetrating or attempting to perpetrate robbery, each of such persons is guilty of first degree murder, whether such killing is intentional, unintentional, or accidental.

4. Homicide ⇐235

In order to impose criminal responsibility for homicide committed in perpetration of robbery, guilty knowledge of attempt to commit robbery, or intent to participate, need not be directly and positively proven, but may be inferred from circumstances.

5. Criminal law ⇐78

Whether an alleged aider and abettor knew and shared the principal's criminal intent is a fact question for the jury, to be inferred from circumstances.

6. Homicide ⇐249

In prosecution of two defendants for murder committed during robbery, evidence *held* to authorize jury's conclusion that defendant who waited in automobile during the robbery was engaged in a joint enterprise with defendant who actually committed the robbery and killing, and intended to participate in the robbery.

7. Criminal law ⇐1159(2), 1160

The finding of the jury by its verdict, and of the trial court in its refusal of new trial, are conclusive upon reviewing court unless it can be said as a matter of law that there is no evidence to support it.

8. Criminal law ⇐780(1)

In prosecution of two defendants for murder, wherein principal did not testify and principal's confession was read in evidence with an admonition that it should be considered only with reference to principal's guilt, aider and abettor who himself furnished evidence from which jury deduced his guilty knowledge of the crime was not entitled to instruction requiring corroboration of accomplice testimony.

9. Homicide ⇐312

In murder prosecution, alleged error in jury's special verdict that aider and abettor was armed with a deadly weapon at time of commission of the crime was immaterial where aider and abettor was guilty by virtue of his participation, irrespective of whether he was armed.

HOUSER and LANGDON, JJ., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

William Martin and Edwin Spotts were convicted of murder, and they appeal.

Affirmed.

Roland T. Williams, of Los Angeles, for appellant Edwin Spotts.

Frederic H. Vercoe, Public Defender, and John J. Hill, Deputy Public Defender, both of Los Angeles, for appellant William Martin.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

CURTIS, Justice.

The defendants William Martin and Edwin W. Spotts, were jointly accused by information filed in the superior court of Los Angeles county of having murdered Sam Tanner, on or about January 8, 1938, in the city of Los Angeles. They were tried together and convicted of murder of the first degree without any recommendation by the jury that a lesser punishment than the extreme penalty should be imposed. Accordingly judgments imposing the death penalty upon each were pronounced by the court. Separate appeals were taken by each defendant from the judgments of conviction and from the orders denying motions for new trials.

The main facts with reference to the crime are undisputed and disclose that the homicide was committed in an attempted holdup of a grocery store, during which the proprietor was shot down in cold blood, without even the semblance of any resistance on his part. Moreover, not the slightest extenuating or mitigating circumstance appears in the record. On the evening of January 8, 1938, about the hour of 8 p. m., Martin in company with Spotts drove up to Tanner's Food Center, located at 1603 Grand avenue in the city of Los Angeles. Spotts, who was driving his

Chevrolet roadster, stopped the car facing west on Venice boulevard, about forty yards from Grand avenue. Spotts remained outside in the car while Martin entered the store through the Grand avenue entrance. When he entered the store there were only two persons in the store, a meat cutter by the name of Charles Read, and Sam Tanner, the proprietor, who was seated on some milk crates in front of the cash register. Martin, holding a Colt automatic in his right hand approached Tanner, saying at the same time, "This is a holdup. I want your money." Tanner continued facing Martin without moving, and Martin repeated, "I want your money." Read, who had taken a couple of steps back when he saw Martin with the gun, told Mr. Tanner to hand over the money, the man "meant business". As Tanner started to get up from the milk crates, Martin fired point blank at him, then turned and fled. Tanner was immediately taken to the hospital in an ambulance, where he died some twenty-four hours later. The bullet which had been fired from the Colt automatic was found on the floor close to where Tanner had been sitting, and the exploded shell was found under the cigarette counter. Martin was arrested on the morning of January 14, 1938, by three police officers. A police officer, who was a ballistic expert, made tests with the bullet found in Tanner's store, and stated positively that the markings on it showed that it had been fired from the .32 Colt automatic which was found in the flat of Martin when arrested, hidden under a cushion of the divan, fully loaded and with the safety catch off. Martin, upon being informed that the gun in his flat had been tested by a ballistic expert and found to be the gun used in the murder of Tanner, admitted that he was the person who had fired the fatal shot. His statement was taken down in shorthand, and after being transcribed was signed by Martin. In this statement, he said he had gone over to the house of his friend, Spotts, earlier in the evening and drank some beer, that he told Spotts he "was going to look over a place and would he drive". He stated that he had Spotts park on Venice boulevard while he entered the store. Towards the end of his statement he said, "He [Spotts] did not know I was going to do that job." He further said that after the shooting he and Spotts drove to a beer parlor where they had some beer before separating and going home. It was at the beer parlor that he told Spotts he had shot a man. Spotts was arrested, and likewise made a statement. In this statement he did not deny that he knew of the proposed holdup, but stated that all he knew was that, "I drove the car and Martin went in and held up the grocery store." At the trial Martin did not take the stand, but his statement was read in evidence accompanied by an admonition by the trial court to the jury that said statement should be considered only with reference to the guilt of the defendant Martin, and should be eliminated from consideration in determining the guilt or innocence of Spotts. Spotts took the stand and denied guilty knowledge of the holdup, claiming that when Martin left him and entered the store, he was under the impression that Martin was going into the store to get some beer, and that he did not know that Martin at the time was carrying a loaded gun.

As different grounds for a reversal of the judgments are presented by each of the defendants, we shall consider their appeals separately, and shall first discuss the contentions advanced by defendant Martin.

No question is raised as to the guilt of the defendant Martin. Indeed, in view of the record, such a contention could not be seriously made. All the efforts of defendant Martin are directed toward an attempt to secure a reduction in the penalty imposed to imprisonment for life. Defendant claims that the trial court committed prejudicial error in refusing to give three instructions requested by him regarding the discretion of the jury in a case of first degree murder, and hopes by establishing error on the part of the trial court to secure a new trial with the possibility that upon a new trial the jury will bring in a recommendation for life imprisonment instead of a verdict which requires the death penalty.

[1] There is no merit whatever in the contention of the defendant. The three instructions requested by defendant Martin all referred to the discretion of the jury in determining the penalty in a first degree murder case, and were to the effect that there are no presumptions or intendments of the law in favor of the death penalty in such cases; that it was not necessary for extenuating or mitigating circumstances to exist to authorize the jury to bring in a recommendation for life imprisonment; and that if the jury should be in doubt as to the proper penalty to inflict, the jury should resolve that doubt in favor of the

defendant and fix the lesser penalty. The defendant was not entitled to have such instructions given to the jury. The authority relied upon by defendant not only does not support his contention, but directly holds that the proper practice for the trial court is to refrain from giving any instructions which might have a tendency in the slightest degree to influence or control the discretion of the jury in its determination of the proper penalty in a case where the defendant is charged with murder in the first degree. People v. Bollinger, 196 Cal. 191, 237 P. 25. Indeed, that case went so far as to hold that the giving of an instruction by the trial court was not prejudicial error which told the jury that [page 30], "If the jury in this case should find the defendant guilty of murder in the first degree, and they also shall find the further fact that there is some extenuating fact or circumstance in the case, it is within their discretion to pronounce such a sentence as will relieve the defendant from the extreme penalty of the law. The jury in a criminal case for murder is vested with a discretion, but the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of affixing the punishment." The court then made a detailed analysis of the authorities upon the subject and concluded its discussion with the following language: "We have, however, gone into the subject in the hope, if not the expectation, that the practice of giving such instructions may be abated, thus giving assurance that the penalty reflects the decision of the jury alone, and at the same time sparing this court the necessity of repeatedly passing on such assignments of error. And considering the numerous occasions this court has held that section 190 of the Penal Code confers on the jury alone the discretion of determining the punishment in cases of guilt of murder in the first degree, trial courts, especially where a human life is at stake, should not interfere with the discharge of that solemn duty by the jury." It is obvious that if the discretion of the jury is to remain uninfluenced by the trial court, instructions favorable to the defendant are as objectionable as instructions unfavorable to defendant. Therefore the defendant here, in asking the trial court to give the three requested instructions, was simply asking the trial court to violate the rule announced in the decision just cited.

[2] We agree with the pronouncement of the court in that case (People v. Bollinger, supra) as to the proper practice of the trial court, and recommend for future use to trial courts in similar cases the instruction on this subject given by the trial court in the instant case. It is as follows: "The law of this state provides that every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury. If you find that the defendant is guilty of murder in the first degree it will be your duty to fix the penalty. It is entirely for the jury to determine which of two penalties is to be inflicted in case of murder in the first degree, the death penalty or confinement in the state prison for life. If the jury should fix the penalty as confinement in the state prison for life, you will so indicate in your verdict. If, however, you fix the penalty at death, you will say nothing on this subject in your verdict, nor will you specify the death penalty in your verdict. In the exercise of your discretion as to which punishment shall be inflicted you are entirely free to act according to your own judgment."

[3-6] The defendant Edwin W. Spotts seeks to avoid the results of his admitted participation in the affair and his presence at the scene of the crime by claiming that while he did aid Martin by driving him to and from the scene of the crime in his Chevrolet roadster, he did so, not knowing that Martin was planning to rob the store, and that he did not abet Martin in the commission of the felony by reason of the fact that at the time of its commission he had no guilty knowledge of it. It is, of course, the well-settled law in California that if a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery, whether such killing is intentional or unintentional, or accidental, each and all of such persons so jointly engaged in the perpetration of, or attempt to perpetrate, such crime of robbery, are guilty of murder of the first degree. People v. Perry, 195 Cal. 623, 234 P. 890. Specifically stated, defendant Spotts' contention is that the evidence adduced at the trial is insufficient to sus-

tain his conviction for the reason that there is no evidence which establishes his guilty knowledge of the robbery. It is obvious that the only evidence which would prove conclusively, beyond the shadow of a doubt, the existence of guilty knowledge on the part of the defendant Spotts would be his own statement or confession to that effect. And it must be conceded that in his statement to the police officers after his apprehension he did not directly admit that he knew the robbery was to be committed, his language in this respect being, "I drove the car, and Martin went in and held up the grocery store; that's as far as I know". However, the existence of such knowledge or intent need not be directly and positively proven, but may be inferred from circumstances. And whether or not the alleged aider and abettor knew and shared the principal's criminal intent is a question of fact for the jury to be inferred from circumstances. State v. Ochoa, 41 N.M. 589, 72 P.2d 609. In the instant case there are certain facts and circumstances which tend quite convincingly to prove a guilty knowledge on the part of the defendant. The fact that Spotts failed to immediately deny, both vigorously and vehemently, that he had any knowledge that a robbery was in contemplation when Tanner was shot, is indicative of the fact that he did share Martin's guilty knowledge. For an innocent man to fail to protest his innocence when questioned upon his arrest and to merely say, "I drove the car and Martin went in and held up the grocery store; that's as far as I know," is scarcely conceivable. There are also other facts admitted by Spotts which are indicative of guilt; the fact that he had known Martin intimately for over five months; that a month before he had given Martin the Colt automatic with which the fatal shot was fired; the fact that he admitted that he himself had been carrying a gun, although at the time he was unarmed; the fact that he knew Martin had been carrying a gun on other occasions, although denying that on this particular occasion he knew that Martin was armed; the fact that he stopped the car around the corner about forty yards from the grocery store where the license plates would not be noticed by anyone who might view the crime; the fact that in his statement he said that he drove around in front of the market twice before Martin attempted the robbery, whereas on the stand he testified that he had driven in front only once; the fact that just previous to the attempted robbery Martin and Spotts took a circuitous drive, strongly indicative of a reconnoitering expedition, Spotts testified that after leaving his house earlier in the evening and stopping at a dance hall where Martin did not get out and he merely glanced in, "I drove south on Flower to 18th Street, went west to Figueroa and went back up Figueroa to Venice. I went east on Venice to Hope, south on Hope to 17th, east on 17th to Grand, went north on Grand to Venice and then I went west on Venice." These facts and circumstances were sufficient to justify the conclusion of the jury that Martin and Spotts were engaged in a joint enterprise and that Spotts, when they started out that evening, intentionally embarked with Martin on a deliberately planned crime.

[7] It may be conceded that there are some other facts which tend to exonerate the defendant Spotts, as for instance, the fact that he did not park directly in front of the entrance of the store where Martin could make a quicker getaway, as well as the fact that he stopped the motor of his car while waiting for Martin. This latter fact, if true, would be strongly indicative of his innocence, but the truth of the fact depends solely on the statement of Spotts and may well have been discounted by the jury. Considerable emphasis is placed by counsel for the defendant upon the fact that the automobile used was a 1931 Chevrolet roadster which was very noisy, and it is implied that if Martin and Spotts had planned the robbery, they would have used a less conspicuous car. Inasmuch as the car used belonged to the defendant Spotts, and he and Martin apparently had no other car at their disposal, this argument seems to be entitled to little weight. The jury evidently weighed all of the evidence, as it was their function to do, and found against the contention of the defendant Spotts that he had no intimation that Martin intended to hold up the store when he drove him to the store and waiting outside for his return. The finding of the jury by its verdict, and the trial court in its refusal of a new trial, are conclusive upon this court unless it can be said as a matter of law there is no evidence to support it. People v. Tedesco, 1 Cal.2d 211, 219, 34 P. 2d 467. After a careful examination of all the evidence, we cannot so conclude.

[8] Defendant Spotts also claims that the court committed prejudicial error in refusing to give two instructions to the ef-

fect that a conviction cannot be had upon the testimony of an accomplice unless corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. We are satisfied that the trial court properly refused to give such instructions. In the first place, defendant Martin did not take the stand, and consequently, so far as Spotts is concerned, there was no testimony of an accomplice introduced. And although the confession of Martin was read in evidence, it was accompanied by the admonition of the court that it should be considered only with reference to the guilt of the defendant Martin. Moreover, aside from the testimony of the autopsy doctor and Mrs. Tanner, which established the death of Tanner, and the testimony of the ballistic expert which proved the fatal bullet had been fired from the gun of Martin, it was Spotts himself who freely admitted being at the scene of the crime and who furnished the evidence with reference to the particular circumstances from which the jury deduced the fact of his guilty knowledge.

[9] Defendant Spotts also predicates error upon the fact that the jury found by a special verdict that he was armed with a deadly weapon at the time of the commission of the crime. While it is true that there is no evidence that Spotts was in fact armed, and he denied that he was armed on this occasion, it is apparent from the fact that the information charged that, "at the time of the commission of the offense said defendants were armed with a deadly weapon, to-wit, a .32 automatic pistol", that the jury were under the impression that the possession of the pistol by Martin was possession by Spotts. In some instances, the question of whether or not the defendant was actually armed would be a question of vital importance, but in the instant case it is absolutely immaterial for the reason that the defendant Spotts is guilty of murder in the first degree, regardless of whether he was or was not armed, by virtue of his participation in the commission of the crime of robbery during which a homicide was committed by another person.

We are satisfied that no errors were committed by the trial court, and that the verdicts of the jury were amply supported by the evidence.

The judgments and the orders denying new trials are affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; EDMONDS, J.

HOUSER, Justice (dissenting).

I dissent.

In my opinion, as to defendant Martin, the judgment should be affirmed. But as to defendant Spotts, I am unwilling to concur in a judgment, by reason of which, —founded as it is upon such equivocal and unsatisfactory evidence of his guilt as appears in the record of the case,—he shall suffer the penalty of death.

I concur: LANGDON, J.



12 Cal.2d 482

FECKENSCHER v. GAMBLE et al.

L. A. 16823.

Supreme Court of California.

Dec. 30, 1938.

Rehearing Denied Jan. 26, 1939.

1. Fraud ⇐58(2)

In action for fraud inducing an exchange of realty, evidence supported finding that the statements made by defendants to plaintiff were false and known by the defendants to be false.

2. Appeal and error ⇐931(1)

All intendments are in favor of the trial court's judgment, and the Supreme Court must accept as true all evidence tending to establish the correctness of the findings as made by the trial court, taking into account as well all inferences which might reasonably have been thought by the trial court to lead to the same conclusion.

3. Contracts ⇐94(1)
Fraud ⇐20

One false representation of a material fact is sufficient either for an action for rescission of contract or to sustain an action for damages for fraud, provided the representation be such that the court can say that without it the contract would not have been entered into.

4. Fraud ⇐58(2)

Where two unusually well qualified real estate experts testified in action for fraud

and false representations inducing an exchange of realty, that realty, which plaintiff received, had a value of $25,000 or $26,000, rather than a value of $40,000, as represented to plaintiff, trial court was justified in concluding that defendants could not honestly have believed that property was of the reasonable value of $40,000.

5. Fraud ⇐20

The statement that all fixtures in building were the property of the building was not notice to layman, who thereafter sought to recover for fraud inducing her to exchange property for the building, that those fixtures were subject to the incumbrance on the building.

6. Brokers ⇐34

The failure of broker, from whom client sought to recover damages for fraud inducing client to exchange her property for a building, to bring knowledge to client that a new building was to be erected nearby, and broker's representation to client that the building would continue to bring in the income that it had been bringing, authorized a recovery by client on ground of a complete disregard of broker's duty to properly represent client.

7. Fraud ⇐20

That plaintiff in action for fraud inducing an exchange of realty had consulted her lawyer and banker did not require finding that she did not in fact rely on defendants' representations, where plaintiff's lawyer and banker had not given her any advice.

8. Fraud ⇐23

That plaintiff in action for fraud inducing her to exchange her property for a building, visited the building before completion of the exchange, would not preclude her from holding defendants liable for any of their misrepresentations, where defendants had reassured plaintiff as to the condition and age of the building.

9. Fraud ⇐23

In determining whether misrepresentations allegedly made to plaintiff in action for fraud inducing exchange of realty were in fact made to plaintiff, considerable weight would be given to plaintiff's admitted ignorance of business matters and total inexperience in business deals, where that fact was well known to defendants.

10. Fraud ⇐35

Where realty exchange, which plaintiff claimed was induced by fraud of defendants, was made up of a series of contracts, plaintiff, who was unaware, during the entire course of the transaction, of the fraud which was being perpetrated on her, did not waive the fraud of the original representations by entering into the final contract.

11. Brokers ⇐106

In action for fraud inducing plaintiff to exchange her property for a building, evidence sustained finding that representations of broker were also the representations of the agent of the owner of the building, where building had been listed by agent with broker, broker was designated in exchange agreement as acting for agent as well as plaintiff, and agent paid broker a commission.

12. Appeal and error ⇐1061(3)

The trial judge's analysis, on defendants' motion for nonsuit, analyzing the evidence and setting forth his reactions thereto, after which he denied the motion for nonsuit, was not prejudicial error, on ground that defendants were misled to their detriment and failed to introduce in evidence pertinent testimony.

13. Appeal and error ⇐1047(1)

Where objection to evidence as to individual defendant was sustained with express provision that if relation of agency of defendant company for individual should be established, evidence could be reoffered without recalling witnesses, and trial court thereafter refused to grant plaintiff's blanket motion for admission of all excluded evidence as well as papers and documents, and did not specifically grant the motion as to excluded testimony, and it was obvious that had trial judge's attention been called to the discrepancy, he would have remedied the situation, judgment against individual would not be reversed on ground that there was not sufficient evidence to support the judgment.

14. Damages ⇐1

Where the measure of damages was changed by the Legislature after the cause of action arose but before the trial of the case, the new measure of damages was applicable. Civ.Code, § 3343.

15. Fraud ⇐59(1)

In action for fraud inducing an exchange of realty, damages suffered by plaintiff were value of the property given by plaintiff in the exchange, where, by reason of defendants' misrepresentations made to

plaintiff to effect that trust deed was not immediately due, she lost, by a sale under the trust deed the entire property received by her in the exchange. Civ.Code, § 3343.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Rosa Dell Feckenscher against Louis S. Gamble and others for damages for alleged fraud and false representations on the part of the defendants inducing the plaintiff to enter into and consummate an exchange of realty. From an adverse judgment, certain of the defendants appeal.

Judgment modified and, as modified, affirmed.

Prior opinion, 79 P.2d 132.

Chambers & Lyman and Robert Chambers, all of Hollywood, for appellants Gamble, Pringle and Parker & Gamble, Ltd.

Gordon W. Levoy, A. Edward Nichols, and Clarence Stephens Brooks, all of Hollywood, for appellant Kleeman.

John Dean Barrick and William B. Etheridge, both of Pasadena, for respondent Rosa Dell Feckenscher.

CURTIS, Justice.

This is an appeal from a judgment for damages in an action for fraud. The complaint charged fraud and false representations on the part of the defendants inducing the plaintiff to enter upon and consummate an exchange of three parcels of property owned by her in Detroit, Michigan, and Pasadena, California, for a lot at the corner of Third street and Hobart avenue in the city of Los Angeles, on which was erected a building consisting of seven stores on the first floor and three apartments of five rooms each on the second floor. The action was tried by the court sitting without a jury, and resulted in a judgment in favor of the plaintiff in the sum of $17,760 against all of the defendants with the exception of Charles Wagner and Ruth Kleeman. Ruth Kleeman, who held title to the property at Third street and Hobart avenue, was not served with summons, and did not appear herein. The court found that Charles Wagner was merely an employee of defendant S. C. Kleeman, acting under his directions, and was not legally liable for the loss suffered by plaintiff. The property which plaintiff received by the exchange transaction had been acquired by S. C. Kleeman, a dealer in real estate and a licensed real estate broker, a few months prior to the transaction involved in the present litigation, and title had been taken in his daughter's name, as he stated because he owed her some money and desired to protect her. S. C. Kleeman held a power of attorney from his daughter, and conducted all of the negotiations involved in the transaction, she taking no part in the transaction herein involved. The property owned by plaintiff which was exchanged by her in the deal, consisted of a residence at 1711 East Maple street, Pasadena, California, which was found by the trial court to be of the value of $2,400, over and above the encumbrance of a trust deed in the amount of $2,000; a brick store building consisting of six stores at Twelfth and Highland streets, Detroit, Michigan, which was of the value, as found by the trial court, of $5,800, over and above all taxes, indebtedness and encumbrances thereon; and a land contract, similar to a deed of trust, on property located at 74 Hazlewood avenue, Detroit, Michigan, in the face amount of $7,000, payable at the rate of $50 per month, which was of the reasonable value, as found by the trial court, of $5,500, over and above all encumbrances, taxes and indebtedness. The total market value of the property owned by plaintiff was, therefore, the sum of $13,700. The property at Third street and Hobart avenue, which had been acquired by Kleeman on an exchange transaction, was stated by him to be worth $40,000, subject to a trust deed in the sum of $25,500, street bonds in the sum of $1,023, payable $200 per year, and a balance of $330 on the refrigerator equipment. This property which had been built in 1917 and had been remodeled in 1931 contained market fixtures and equipment represented to be worth $7,000.

Defendant Gamble was the president of Parker & Gamble, Ltd., a real estate firm, and personally participated in the carrying through of the exchange transaction. Defendant Pringle was a salesman in the employ of Parker & Gamble, Ltd., and also actively participated in the negotiations during the course of the exchange transaction. The plaintiff, Mrs. Feckenscher, a widow, was a client of the firm of Parker & Gamble, Ltd., Mr. Gamble having acted in real estate transactions for her and her husband during her husband's lifetime.

The deal originated in the furnishing by Kleeman to a number of real estate brokers,

including defendant Parker & Gamble, Ltd., of a set-up or prospectus of the Third street and Hobart avenue property, setting forth the income derived from said property, the expenses, showing a net income of $231 a month above expenses, the trust deed of $25,000, 1 year at 7 per cent, and containing the statement, "all fixtures in the market are the property of the building". Upon receipt of this set-up from Kleeman, an almost identical set-up on the stationery of Parker & Gamble was prepared, and Gamble presented to plaintiff a proposition for the exchange of plaintiff's properties for the Third street and Hobart avenue property, representing to her that it was a wonderful deal, that it would bring in at the very lowest possible figure, $125 per month, and that if she could acquire this property in exchange, "she would be on Easy Street".

Plaintiff, who previous to her marriage had been a musician and singer, was wholly unversed in business matters and had practically no knowledge of the intricacies of real estate deals. She placed herself entirely in Mr. Gamble's hands, informing him that she knew nothing about business but that she was willing to rely upon his honesty and business judgment in the matter. She followed without question or suspicion the advice and counsel given to her by Mr. Gamble and on his advice and persuasion signed the papers and documents presented by him or Mr. Pringle without reading them. During the course of the transaction, the terms of the deal were frequently changed, always to the disadvantage of Mrs. Feckenscher, and upon the continued representation by the real estate firm that it was a wonderful deal and that she would be lucky if she could secure the Third street and Hobart avenue property. A written exchange agreement was entered into on March 21, 1935, in which the property held by Kleeman was stated to be subject to a trust deed of $25,500 at 7 per cent, due March, 1938. By this agreement, plaintiff agreed to exchange two pieces of property in Pasadena and the land contract in Michigan, omitting the store property in Michigan. This agreement, as well as the subsequent agreements, contained the provision that Parker & Gamble, Ltd., was authorized to act as agents for both parties and to accept a commission from each of them. A commission of $750 to be paid by Kleeman, and a commission of $750 to be paid by plaintiff was separately agreed upon by both parties. On March 23, 1935, another exchange agreement was entered into, in which the store property in Michigan was substituted for the two pieces of Pasadena property on the part of the plaintiff, and which contained the same statement on the part of Kleeman that the Third street and Hobart avenue property was subject to an encumbrance of a trust deed for $25,500, at 7 per cent, due March, 1938. In March 29, 1935, another exchange agreement was entered into between the parties. In this agreement, plaintiff agreed to exchange for the Third street and Hobart avenue property, the properties hereinbefore described, namely, the 1711 East Maple street property in Pasadena, the brick store property at the corner of 12th avenue and Highland street in Detroit, Michigan, and the land contract on the property located at 74 Hazelwood avenue, Detroit, Michigan. This exchange agreement contained the same statement as the former agreements with reference to the trust deed on the Third street and Hobart avenue property, that it was in the amount of $25,500, rate of interest 7 per cent, due March, 1938. The transaction was then put in escrow. In the first escrow instructions, dated April 4, 1935, Kleeman agreed to deliver seven leases on the stores in the building at Third street and Hobart avenue. Mrs. Feckenscher had no idea of the status of her Detroit property, and she had previously so informed Mr. Gamble who had told her he would investigate. Either before this last exchange agreement or shortly thereafter word was received from Detroit that the financial status of the property of the plaintiff in Detroit was not as good as had been contemplated by the defendants. It appeared that the amount due on the land contract was $6,425, rather than $7,000, that there were taxes due on the store property of some $1,200, and that this property which was subject to an encumbrance of $1,000 was in the process of being foreclosed with six or seven more months to go. Upon Kleeman's insistence, considerable modifications were made in the escrow instructions, the plaintiff signing them without reading them upon the assurance that this was advisable, and after being informed by Mr. Pringle that she would not understand them if she did. By these new instructions, plaintiff agreed to accept the Third street and Hobart avenue property, subject to the encumbrance of $25,510, to be payable at $200 per month, interest at 8 per cent, and due February, 1936, provided the monthly payments of $200 were

kept up. She also agreed to accept instead of the seven leases on the stores located on the property received by her, three of said leases. She also authorized Kleeman to go back to Detroit and sell her properties there at whatever price he could receive for them. This he did, making a sacrifice sale of the properties, and depositing the money in escrow. The final modifications of the escrow instructions were made on April 22, 1935, and the escrow was closed on July 16, 1935. Previous to the close of the escrow Kleeman withdrew from the escrow the sum of $1,000 to clear up a lien which appeared in the title to the Third street and Hobart avenue property. After Mrs. Feckenscher received title to the Third street and Hobart avenue property, the income therefrom failed to measure up to the income set forth in the set-up and prospectus, and she was unable to keep up the payment of $200 on the encumbrance. She also discovered that the fixtures in the building were subject to the encumbrance as additional securities and that the rents also had been assigned as additional securities. Having no other independent means to meet this obligation, and being refused a Reconstruction Finance Corporation loan of $26,000 on the ground that the security offered was insufficient and the income not sufficient to meet all the necessary expenses of taxes, interest, amortization, etc., on the loan, plaintiff was unable to prevent the loss of the property, and on November 29, 1935, the holder of said trust deed caused a declaration of default and election to sell under the terms of the trust deed to be recorded. The property was sold pursuant thereto by the trustee on April 7, 1936. After the completion of the transaction in which the plaintiff had lost her entire capital Mr. Gamble called upon her to urge her to bring suit against Kleeman, claiming that he had accepted the representations of Kleeman as true and that Kleeman was responsible. Kleeman placed the blame upon Gamble claiming that he had failed to properly represent her, and informing her that she should have known better than to go into the deal since neither he nor Gamble wanted the property, and ending with the statement, "We handed you a lemon". Plaintiff thereafter consulted her attorney and commenced this action, naming as defendants all those who had participated in the transaction, and including Ruth Kleeman as title holder of the property. As before noted, judgment went against all the defendants with the exception of Ruth Kleeman and Charles Wagner.

The main defense of defendants at the time of the trial was that the representations claimed by plaintiff to be false and fraudulent were in the main true, and that if some of the original representations were not true, yet the plaintiff, after the inception of the original deal, thereafter willingly entered into new contracts based upon later representations which were true. They claim that they honestly believed the truth of the representations made to plaintiff, and cannot, therefore, be held liable for fraud and deceit. Defendant Kleeman claimed that he personally made no representations to plaintiff and that Parker & Gamble, Ltd., real estate broker, although designated as his agent in the three separate exchange agreements, nevertheless was an agent simply to accept a commission for the attending to the details of the transaction and was not authorized to make any representations to the plaintiff, and that he cannot be held liable as principal by virtue of any misrepresentations made to plaintiff by said real estate firm which induced her to enter into the exchange transaction which culminated in the loss of her entire capital.

[1, 2] Upon appeal, appellants challenge the sufficiency of the evidence to support the finding of the trial court to the effect that the statements made by defendants to plaintiff were false, and known by the defendants to be false, and insist that the evidence shows that such statements were true. We cannot agree with this contention. Having in mind the general rule that all intendments are in favor of the judgment and that this court must accept as true all evidence tending to establish the correctness of the findings as made, taking into account as well all inferences which might reasonably have been thought by the trial court to lead to the same conclusion, we are satisfied that there is sufficient evidence to uphold the conclusions of the trial court.

[3, 4] Having in mind also the rule that one false representation of a material fact is sufficient either for an action for rescission of contract or to sustain an action for damages for fraud, provided the representation be such that the court can say that without it the contract would not have been entered into, we shall discuss very briefly the misrepresentations alleged,

and the evidence upon which the trial court was justified in finding that the representations were falsely and fraudulently made. There is no denial that the representation was made to the plaintiff by Pringle that the Third street and Hobart avenue property was worth $40,000. There is in the record the testimony of two unusually well qualified real estate experts, one of whom testified that the total value of said property was $25,000 and the other that it was $26,000. We feel that the trial court in view of the discrepancy of $14,000 or $15,000, and in view of the extended experience of all of the defendants as real estate dealers and brokers was justified in concluding that the defendants could not honestly have believed that the property was of the reasonable value of $40,000 when the representation that it was worth this amount was made to the plaintiff. The fact that Kleeman placed that arbitrary valuation upon it, after having received it in an exchange agreement, likewise does not prove conclusively that either he or Parker & Gamble, Ltd., believed this to be the true valuation. Had he paid this amount in cash, such evidence would have been entitled to more weight. This conclusion as to the state of mind of the defendant Kleeman relative to the value of the property is fortified by plaintiff's testimony of the statement by Kleeman that, "We handed you a lemon".

[5] The same reasoning applies to the representation as to the value of the fixtures which were represented to the plaintiff as being of the reasonable value of $7,000 and Pringle's statement that he could go out any day and sell them for that price. The trial court found on the evidence of an expert witness that the reasonable value of said fixtures was $3,240. Moreover, these fixtures were subject to the encumbrance upon the real property as a whole in the sum of $25,500, which fact was unknown to the plaintiff and was not brought to her knowledge, with the result that she was unable to salvage anything from the fixtures, but lost them with the real property. The statement in the set-ups that "all fixtures in the market are the property of the building", was no notice to the plaintiff who was a layman with reference to legal rules, that said fixtures were subject to the encumbrance on the building. Moreover, the fact that the fixtures were transferred by the bill of sale would tend to negative the idea that they were real property and lead the plaintiff to believe that they were not subject to the encumbrance on the building. Pringle's statement that he could go out and sell them for $7,000, may have been quite a strong inducement for her to consider the exchange transaction a desirable one.

With reference to the trust deed and the representation that it was not due until March, 1938, although it was then past due and no absolute extension had been secured, defendants rely upon the fact that Kleeman was released from the furnishing of the three-year extension by subsequent modifications of the escrow instructions. Defendants claim that this modification was made necessary by the fact that the plaintiff's Michigan property turned out not to be as desirable as had been contemplated at the beginning of the deal. Had plaintiff been an astute business woman who realized the effect of granting such a modification, and had defendants been dealing at arm's length when they secured such a concession, they might have been justified in carrying through the deal on the revised basis. However, in view of the plaintiff's woeful ignorance of business practices, and in view of the fact that she was without other means to meet the obligation of the $25,500 encumbrance as it became due, it is patent that defendants, in securing the modification from plaintiff who acted blindly, relying on the honesty and integrity of her agents, acted solely for their own interests and in utter disregard of the interests of the plaintiff. It is intimated that the consideration for such modification was the detriment suffered by Kleeman by the discovery that the Michigan property of the plaintiff was not as valuable as at first contemplated. An analysis of the three exchange agreements shows that in the third exchange agreement the addition of the East Maple street property in Pasadena, if not made to take care of the depreciated value of the Michigan properties of the plaintiff, was gratuitously made for the benefit of Kleeman. The value of this East Maple street property would have been sufficient to have enabled Kleeman to have made a down payment of $2,000 on the encumbrance of $25,500, and to have secured the three-year extension called for originally. The representations with reference to the Michigan property were not made by plaintiff personally and she was not responsible for the misunderstanding as to their value. It is apparent that the defendants simply

arranged the deal to their own satisfaction and upon their own terms, using the fact that the value of the Michigan property turned out to be less than originally contemplated as an excuse for so doing.

[6] It may possibly be true that the representation that the property at Third street and Hobart avenue was bringing in a net income of $231 per month at the beginning of the deal was not false, but even before the close of the transaction, the income failed to attain that amount. In any event, defendants knew at the inception of the deal and at the times these representations were made, that a large, modern market with adequate parking facilities was very soon to be erected at the corner of Third street and Oxford avenue, which location was but a short distance from the property which plaintiff received in exchange for her property, and that the erection of such modern market would be detrimental both to the value and to the rental income to be derived from said property. As the property received by plaintiff in exchange was not modern, but was obsolete without any parking facilities except at the curb of the street, the failure of the defendants to bring this knowledge home to plaintiff and their representation to her that the property would continue to bring in an income of at least $125 a month, showed a complete disregard of their duty to properly represent her.

[7,8] Some point is made by defendants that the plaintiff did not in fact rely upon the representations made to her by Gamble and Pringle, but that she had the independent advice of her lawyer and banker. It is undisputed that the lawyer whom she consulted refused to give her any advice as to the desirability of the deal and even refused to advise her as to the form of the contract of exchange furnished by Parker & Gamble, Ltd., upon the ground that the deal was being put through in too big of a hurry and that he could not advise her even as to the form of the contract unless he had time to go over the contract. Her banker likewise refused to give her any advice and suggested to her that since she relied upon Mr. Gamble she should follow his advice. Neither can it be said, we think, that because she visited the market after the signing of the third exchange agreement but before the final completion of the escrow she was not entitled to hold defendants liable for any of their misrepresentations. When she called the attention of Mr. Gamble to the fact that the building did not appear to her to be new, she having been told that it was only three years old, she was reassured by Mr. Gamble as to the condition of the building. We find nothing in the record in this regard which relieved the defendants from their duty of exercising the highest good faith in their dealings with the plaintiff.

We also fail to find any real justification for the claim of defendants that plaintiff herself admitted that she had been advised by Gamble to withdraw from the deal and accept the money in escrow which had been obtained by the sacrifice sale of her property. There is one ambiguous sentence in her testimony which if taken from its context is susceptible of such inference. But taken in conjunction with her entire testimony on this phase of the situation, we think the trial court was well justified in resolving the ambiguity against such interpretation.

[9] We are of the opinion in determining the question of whether misrepresentations were in fact made to plaintiff that considerable weight should be given to plaintiff's admitted ignorance of business matters and her total inexperience in business deals, a fact well known to the real estate agents. It is apparent on the face of the record that throughout the entire transaction she acted simply as an automaton under the direction of the defendant Gamble, signing at his behest without reading them, the separate exchange agreement and the continuous modifications of the escrow instructions. The misrepresentations of the defendant real estate agents consisted not only of the statements with reference to the individual factors making up the deal, such as the value of the property, the value of the fixtures, the due date of the trust deed, but also in the glowing description as to the advantage of the deal and what it would do financially for the plaintiff. Throughout the transaction it was reiterated to her that it was a wonderful deal, that she would be lucky if it went through, that if it did her worries would be over, and she "would be on Easy Street". In view of the fact that the plaintiff frankly confessed her business ignorance to the real estate firm, and let them know that she was relying on their sound advice and business acumen to protect her from her own ignorance, such statements were in fact

actual misrepresentations. The fact that a shrewd business man would not have relied upon such statements, did not justify them in making them to a trusting client, nor relieve them from liability for so doing. As has been said, "That plaintiff is too credulous is not generally a defense. 'The test of the representation is its actual effect on the particular mind, whether it is a strong and circumspect mind, or one weak and too relying.'" Neff v. Engler, 205 Cal. 484, 489, 271 P. 744, 746.

[10] It should also be borne in mind that while the deal was made up of a series of contracts, consisting of three exchange agreements and numerous escrow instructions, plaintiff did not waive the fraud of the original representations by entering into the later contracts by reason of the fact that during the entire course of the transaction she remained unaware of the fraud which was being perpetrated upon her. Had she become aware of the false and fraudulent representations during the course of the negotiations, and thereafter with this knowledge have entered into a subsequent contract, she could not thereafter complain of the original fraud, but in the instant case, plaintiff relied so blindly and confidently upon the good faith of the real estate firm who were acting as her agent, that it was not until the completion of the transaction when she was informed by Mr. Gamble that there was no money coming to her as income from the Third street and Hobart avenue property, that she woke up to the true state of affairs and found in the language of the trial judge, that "she had been taken to the cleaners".

It is apparent from the foregoing discussion that the findings with reference to the real estate firm of Parker & Gamble, Ltd., and the individual defendants, Gamble and Pringle, were sufficiently supported by the evidence.

[11] The evidence with reference to Kleeman requires separate consideration by reason of the fact that he did not meet or talk with plaintiff until after the completion of the deal. He earnestly contends that he himself was a licensed real estate broker, having no need of the services of any other real estate broker, and that Parker & Gamble, Ltd., was not his agent. However, we think there was sufficient evidence for the trial court to arrive at the conclusion embodied in the findings to the effect that, "at all the times mentioned herein the defendant, Parker & Gamble, Ltd., as a real estate broker, and Louis S. Gamble and William Pringle, as the agents, servants and employees of said corporation defendant, Parker & Gamble, Ltd., and also in their individual capacity were the duly authorized and acting agents and representatives of the defendant, S. C. Kleeman, and at all of the times and under all of the circumstances mentioned herein were acting and did act within the scope of and in pursuance of their said employment and authority with respect to the defendant, S. C. Kleeman". In the first place there is the written exchange agreements wherein Parker & Gamble, Ltd., is designated as the agents of both parties. There is the fact that Kleeman listed the property with Parker & Gamble, Ltd., prior to the time Gamble solicited plaintiff to make the exchange. There is the fact that a commission of $715 was actually paid by Kleeman to said firm. There is also the statement of Kleeman to the plaintiff that, "We handed you a lemon". This being so, the representations of the firm of Parker & Gamble, Ltd., and Gamble and Pringle were the representations of Kleeman and he having secured the fruits of the fraud, is liable for the damages suffered by plaintiff by reason of said false and fraudulent representations.

[12] The defendants make the further contention that by reason of the fact that the trial judge upon the motion for a nonsuit made by them at the trial, analyzed the evidence setting forth in some detail his reactions thereto, after which he denied the motion for a nonsuit as to all of the defendants, they were misled to their detriment and failed to introduce in evidence pertinent testimony which would have disproved the contentions of plaintiff. We are unable to conceive how attorneys for the defendants could have confidently relied upon such analysis of the evidence in view of the trial judge's denial of their motion for a nonsuit. This denial should have been sufficient to put them on notice that evidence offered by plaintiff required rebuttal, and no prejudicial error can be predicated upon their unjustified reliance as to the state of mind of the trial judge.

[13] The attorneys for defendant Kleeman specifically claim that much of the evidence introduced by plaintiff, and particularly that of the expert witnesses relative to the value of the various properties, was objected to and the objection sus-

tained, and therefore, there is not in the record as to defendant Kleeman sufficient evidence to support the judgment. The objection to the introduction of evidence was sustained with the express provision that if the relation of agency on the part of the defendant Parker & Gamble, Ltd., for the defendant Kleeman should be established, the evidence which had been excluded as to defendant Kleeman could be reoffered without the recalling of the witnesses. Subsequently the attorney for the plaintiff made the motion to introduce all the excluded evidence, as well as all the papers and documents previously offered. The court refused to grant the blanket motion as to the papers and documents, and did not specifically grant the motion as to the excluded testimony. It is, however, obvious, that the objection as to the absence from the record of the excluded evidence is a purely technical one, and that had the attention of the trial judge been called to the discrepancy, he would have remedied the situation. Under these circumstances we do not feel justified in reversing the judgment as to defendant Kleeman upon such a pretext.

[14] Objection is further made by the defendants as to the measure of damages applied by the trial judge in arriving at the judgment. The judgment of $17,760 represents the difference between the actual value of the Third street and Hobart avenue property and the fixtures as found by the trial court, and the valuation of $40,000 for the real estate and the $7,000 value of the fixtures as represented. After the completion of the transaction and before the trial of the case, the measure of damages was changed by the legislature by an amendment and the new measure was in effect at the date of the trial. The case of Tulley v. Tranor, 53 Cal. 274, holds unequivocally that no one has a vested right in a measure of damages. The court there said: "We can conceive of no principle of constitutional law which is violated by a change in this rule, unless, at least, the new rule on its face deprives the party of every reasonable method of securing just compensation. No case has been referred to in which it has been held that to change an arbitrary and statutory rule of damages in cases of tort was a deprivation of any vested right of one who had previously suffered the wrong, and we can see no reason why it should be so held, even if it should be made to appear in a particular case that the plaintiff would not recover as much as he would have done had the former rule been continued." While this is an early case, decided in 1878, the U. S. District Court, Southern Division, Northern District, in the case of United States v. Standard Oil Company of California, 21 F.Supp. 645, has recently quoted said rule with approval.

The second paragraph of section 3343 of the Civil Code, which is the measure of damages in the instant case, cannot in our opinion be legitimately interpreted as requiring the application of the measure of damages in existence at the time of the accrual of the cause of action.

[15] The measure of damages set forth in section 3343 of the Civil Code is as follows: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." The reasonable value of plaintiff's property which was transferred by her in exchange for the Third street and Hobart avenue property was $13,700. Although there was some equity in the property which plaintiff acquired in the trade at the time she actually acquired it, yet by reason of one of the misrepresentations made to her to the effect that the trust deed was not immediately due, she lost the entire property by a sale under the trust deed, so that it can reasonably be said that she actually received nothing of value from the transaction. The damages suffered by the plaintiff, therefore, in our opinion, can readily be computed at the sum of $13,700 and we hereby find that plaintiff suffered damage in that amount.

The judgment is therefore modified by striking therefrom the following portion thereof: "Rosa Dell Feckenscher do have and recover from the defendants, Louis S. Gamble, William Pringle, Parker & Gamble, Ltd., a corporation, and S. C. Kleeman, and each of them the sum of Seventeen Thousand, Seven Hundred and Sixty Dollars ($17,760.00)" and inserting in lieu thereof the following: "Rosa Dell Feckenscher do have and recover from the defendants, Louis S. Gamble, William Pringle, Parker & Gamble, Ltd., a corporation, and S. C. Kleeman, and each of them the sum of Thirteen Thousand, Seven Hundred Dollars ($13,700.00)", and as so modified said judgment is affirmed. Ap-

pellants and respondent each to bear their own costs on appeal.

We concur: SHENK, J.; SEAWELL, J.; LANGDON, J.



12 Cal.2d 455

IVORY v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

S. F. 16008.

Supreme Court of California.

Dec. 28, 1938.

As Modified Jan. 12, 1939.

1. Certiorari ⇐5(1)

Where the law allows an appeal from an order or judgment, a writ of review may not be granted even if the tribunal making the order or rendering the judgment exceeded its authority in so doing. Code Civ.Proc. § 1068, as amended by St.1935, p. 386.

2. Wills ⇐356

An order dismissing a probate proceeding for lack of jurisdiction was appealable under statute and could not be reviewed by writ of certiorari. Probate Code, § 1240.

3. Wills ⇐356

An order setting aside a prior order admitting a will to probate was appealable under statute and was not reviewable by writ of certiorari even if time for appeal may have expired, since fact that order was appealable was determinative. Probate Code, § 1240.

4. Appeal and error ⇐112

An appeal may be taken from an order so long as it is one of those enumerated in the code as appealable even if the order is void.

5. Motions ⇐61

An order void on its face is a nullity and is assailable wherever and whenever it may be produced, whether attack is direct or collateral.

6. Wills ⇐356

The validity of an order setting aside a prior order admitting a will to probate could be made the subject of inquiry on appeal from order dismissing probate proceeding for lack of jurisdiction, and neither order was reviewable by writ of certiorari, since full relief could be accorded on that appeal. Probate Code, § 1240.

In Bank.

Petition by Emma G. Ivory, individually, and as executrix of the will of John Ivory, deceased, for a writ of certiorari against the Superior Court of the State of California in and for the City and County of San Francisco to review and annul two orders of that court sitting in probate.

Writ discharged.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for petitioner.

Robert R. Moody, of San Francisco, for respondent.

WASTE, Chief Justice.

By this proceeding for certiorari petitioner seeks a review and annulment of two orders of the San Francisco Superior Court sitting in probate, to-wit: an order made on May 14, 1937, setting aside a prior order admitting to probate the last will of John Ivory, deceased, and an order made on March 1, 1938, dismissing the probate proceeding for lack of jurisdiction.

Petitioner is the widow of the decedent and sole devisee and executrix under his will. She petitioned in San Francisco for probate of the will averring that decedent was a resident of that city and that she was his sole surviving next of kin. Notice of hearing of the petition was duly published, and a copy thereof was mailed to petitioner. This latter act purported to be a due compliance with section 328 of the Probate Code, which requires that the notice be served, personally or by mail, upon the heirs of the testator. However, decedent's mother received no notice, nor was she mentioned in the petition for probate, notwithstanding that she would, with the widow, have been an heir to decedent's separate property if he had died intestate. On May 8, 1936, the will was admitted to probate by an order which recited that "notice had been given according to law" and that the testator had died a resident of San Francisco. No appeal was taken from this order, nor was application made under section 473 of the Code of Civil Procedure to set it aside. The probate of the estate was continued, and it proceeded to the point where, on January 25, 1937, a minute or-

der was entered granting a petition of the widow for final distribution. But no decree of distribution was actually filed, and so far as appears, the estate has never been distributed.

On May 1, 1937, the mother of decedent, by the guardian of her person and estate, filed a notice of motion to set aside the order of May 8, 1936, admitting the will to probate, upon the ground, first, that the San Francisco court was without jurisdiction of the estate because decedent at the time of his death was an actual bona fide resident of Modoc county, and second, that extrinsic fraud had been practiced by the widow upon the court and the mother by the failure to name her as an heir and give her due notice of the probate proceeding. This motion was never heard, but instead counsel stipulated that the probate order might be set aside solely because of the failure to name the mother as an heir and give her the required notice, and that the widow might have ten days within which to file an amended petition for probate. Pursuant to this stipulation, and on May 14, 1937, the court made an order vacating the probate order of May 8, 1936. No appeal was taken from the order of May 14th, nor was relief from it sought within the period prescribed by section 473 of the Code of Civil Procedure. The widow almost immediately filed an amended petition for probate, listing both herself and the mother as heirs. And the mother, by her guardian, then answered the amended petition, attacking the jurisdiction of the San Francisco court because of the alleged nonresidence of decedent.

Issues being joined upon the amended petition and the answer thereto, a hearing was had. The Superior Court expressed the opinion, upon the testimony, that John Ivory was a resident of Modoc County at the time of his death and that the San Francisco court could not entertain a petition for the probate of his will. Counsel for the guardian of the mother then proposed findings of fact and conclusions of law and served the opposing party with a copy thereof. After this was done, and before the findings of fact and conclusions of law were signed, the widow then changed to her present counsel and moved to set aside the order of May 14, 1937, and objected to any further proceedings upon the amended petition. At this time she assumed the position that the probate order of May 8, 1936, was a conclusive adjudication on the questions of residence of the decedent and due notice to heirs (Holabird v. Superior Court, 101 Cal.App. 49, 281 P. 108); that it was subject to review only upon appeal or by a timely proceeding under section 473 of the Code of Civil Procedure; that as the mother failed to avail herself of either procedure, she was without right to relief in the probate proceeding, and the court was without jurisdiction to entertain the motion which led by stipulation, to entry of the order of May 14, 1937, vacating the probate order. She urged that the fact that the order of May 14th was entered upon stipulation did not give it validity, as jurisdiction could not be conferred by consent. Tinn v. U. S. District Attorney, 148 Cal. 773, 84 P. 152, 113 Am.St.Rep. 354. She claimed, however, that the stipulation precluded any charge of fraud in the procurement at the probate order. At the same time she conceded that if fraud in fact existed, it was extrinsic fraud, relief from which could be had only by an independent action in equity (Security-First Nat. Bank v. Superior Court, 1 Cal.2d 749, 757, 758, 37 P.2d 69), and not by application to the probate court.

In answer to these claims the mother asserted that the effect of the stipulation was to establish absence of notice to heirs on the face of the record, thus rendering the probate order of May 8, 1936, void on its face and subject to attack by the proceeding which led to entry of the vacating order of May 14, 1937. She contended that the latter order was a proper exercise by the probate court of its equitable powers. It was also urged that as the widow had sought and acted upon the stipulation, she should be estopped to deny it. Extrinsic fraud in procurement of the probate order was charged (Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230), and it was urged that such fraud entitled the mother to relief upon application to the probate court, without necessarily resorting to an independent action in equity. Estate of Seaman, 51 Cal.App. 409, 196 P. 928.

For the purposes of this opinion, as will hereafter appear, it is unnecessary to detail these respective contentions more fully because the questions will not be disposed of in this proceeding. The probate court, after a full hearing, denied the widow's motion to set aside the order of May 14, 1937, overruled her objections, entertained the amended petition for probate, and on the issue of residence found that the decedent was in fact a resident of Modoc county at the time of his death and left estate there-

in. Upon these findings, on March 1, 1938, an order was entered decreeing that the San Francisco court was without jurisdiction over the estate of decedent or to admit the will to probate, dismissing the amended petition for probate, and awarding the mother her costs. This application for writ of review followed. Petitioner, the widow, asks that the orders of May 14, 1937, and March 1, 1938, be vacated, and that the San Francisco court be restrained from sending the will to the superior court of Modoc county. By demurrer respondent court challenges petitioner's right to such relief in this proceeding.

Both of the orders sought to be annulled were appealable orders. Prob.Code, § 1240. No appeal was taken from the order of May 14, 1937, but an appeal to this court from the order of March 1, 1938, has been noticed.

[1] It is the general rule that "where the law allows an appeal from an order or judgment, even when the tribunal making such order or rendering such judgment exceeded its authority in so doing, a writ of review may not be granted. Code Civ. Proc., § 1068 (as amended by St.1935, p. 386); Hildebrand v. Superior Court, 173 Cal. 86, 159 P. 147; Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Anglo-Californian Bank v. Superior Court, 153 Cal. 753, 96 P. 803. Many more cases might be cited to the same effect. See 4 Cal.Jur. Certiorari, § 24, p. 1052." Casner v. Superior Court, 23 Cal.App.2d 730, 732, 733, 74 P.2d 298, 300. See, also, Casner v. Daily News Co., Cal.Sup., 84 P.2d 1032; Hughson v. Superior Court, 120 Cal.App. 658, 8 P.2d 227; Helbush v. Superior Court, 99 Cal.App. 501, 278 P. 1062; Erickson v. Municipal Court, 219 Cal. 737, 29 P.2d 192; Stoddard v. Superior Court, 108 Cal. 303, 41 P. 278; Christie v. Superior Court, 218 Cal. 423, 23 P.2d 757.

[2-4] The rule has application to both of the orders here in question. So far as the order of March 1, 1938, is concerned its applicability is obvious. But some additional comment should be made with reference to the order of May 14, 1937. Even though the time for appeal from the order may have expired, the rule applies; the fact that the order is appealable is determinative. State Board of Equalization v. Superior Court, 9 Cal.2d 252, 70 P.2d 482, and cases there cited. Furthermore, so long as the order is one of those enumerated in the code as appealable, an appeal may be taken from it, even if it is void. Dunsmuir v. Coffey, 148 Cal. 137, 82 P. 682; Estate of Dunsmuir, 149 Cal. 67, 84 P. 657; Luckenbach v. Krempel, 188 Cal. 175, 204 P. 591; 2 Cal.Jur., p. 184, sec. 40. Thus the order of May 14, 1937, being an appealable order, is not subject to review in this proceeding.

[5, 6] Petitioner cites in support of her claim to relief by certiorari, a line of cases headed by Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001. In each of those cases, however, where an attack on a void order or judgment was sustained in a proceeding for writ of review, the purported order or judgment was of such a nature that it might be denominated a "hybrid", which so failed to conform to any rule of procedure that it could not be said to be appealable or that there was any plain, speedy, or adequate remedy at law by appeal. The orders in the present case do not fall within that category. Petitioner has an adequate remedy by her appeal from the order of March 1, 1938. Every issue which she might hope to litigate in this proceeding may be heard upon that appeal. It is true that the validity of the order of March 1, 1938, appears to depend entirely upon the validity of the order of May 14, 1937. However, since an order void upon its face is a nullity, assailable wherever and whenever it may be produced, and whether the attack upon it be direct or collateral (Texas Co. v. Bank of America, etc., 5 Cal.2d 35, 41, 53 P.2d 127, and cases there cited), the validity of the latter order may be made the subject of inquiry upon appeal from the former. In short, the full scope of relief which petitioner might obtain in this proceeding, may, in so far as she is found to be entitled to it, be accorded her upon the appeal from the order of March first. To review either that order or the order of May 14, 1937, in this proceeding would be to substitute certiorari for appeal. This can not be done.

The writ heretofore issued in this cause is discharged.

We concur: EDMONDS, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; HOUSER, J.; LANGDON, J.

DAVIS et ux. v. SOUTHERN ARIZONA FREIGHT LINES, Limited, et al.

Civ. 2195.

District Court of Appeal, Fourth District, California.

Dec. 20, 1938.

Hearing Denied by Supreme Court Feb. 16, 1939.

1. Death ⇐49(1)

In action for wrongful death of deceased who was struck by truck, complaint which failed to allege that the deceased left heirs at law surviving him did not state cause of action. Code Civ.Proc. §§ 376, 377.

2. Death ⇐11

An action for damages resulting from wrongful death was unknown at common law and is a creature of statute. Code Civ.Proc. §§ 376, 377.

3. Death ⇐31(3, 5)

In California, only the surviving heirs at law or the personal representative of the deceased can maintain an action for wrongful death. Code Civ.Proc. §§ 376, 377.

4. Death ⇐11

Lord Campbell's Act was not a part of the common law and was not adopted as a part of California jurisprudence, which adopted the English common law as part of jurisprudence of the state after the passage of Lord Campbell's Act.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by George E. Davis and wife against the Southern Arizona Freight Lines, Limited, and another for the death of the plaintiffs' son, who was struck by a truck belonging to the named defendant and driven by defendant Neil Day, the named defendant's employee. From an adverse judgment following the sustaining of a demurrer to plaintiffs' amended complaint, the plaintiffs appeal. On motion to affirm the judgment or dismiss the appeal.

Motion granted, and judgment affirmed.

Harry W. Horton, of El Centro, for appellants.

Robert R. Ashton, of Los Angeles, for respondents.

MARKS, Justice.

This is a motion to affirm the judgment or dismiss the appeal on the ground that the question presented for decision is too unsubstantial to need further argument.

A demurrer to plaintiff's amended complaint was sustained without leave to amend. This appeal is from the judgment which followed.

Plaintiffs were the father and mother of Edward S. Davis and had been supported by him. Edward S. Davis was killed on a public street by a truck belonging to the Southern Arizona Freight Lines, Ltd., which was being driven by Neil Day, its employee. The action is for damages resulting from his death.

Nowhere is it alleged in the amended complaint that plaintiffs are heirs at law of the deceased. The pleading fails to allege that any heirs at law survived him though it was stated during the argument that he left a widow and two minor children.

[1] A complaint in an action for damages resulting from wrongful death which fails to allege that the deceased left heirs at law surviving him does not state a cause of action. Webster v. Norwegian Mining Co., 137 Cal. 399, 70 P. 276, 92 Am.St.Rep. 181; Slaughter v. Goldberg, Bowen & Co., 26 Cal.App. 318, 147 P. 90.

[2, 3] An action for damages resulting from wrongful death was unknown at the common law and is a creature of statute. (Code Civ.Proc. §§ 376 and 377) In California only the surviving heirs at law or the personal representative of the deceased can maintain such an action. Kramer v. San Francisco Market St. R. Co., 25 Cal. 434, 435; Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L.R.A.,N.S., 687, Ann.Cas. 1912C, 50; McLaughlin v. United Railroads, 169 Cal. 494, 147 P. 149, L.R.A.1915E, 1205, Ann.Cas.1916D, 337; Clark v. Goodwin, 170 Cal. 527, 150 P. 357, L.R.A.1916A, 1142; Evans v. Shanklin, 16 Cal.App.2d 358, 60 P.2d 554; Treat v. Los Angeles Gas, etc., Corp., 82 Cal.App. 610, 256 P. 447.

Plaintiffs base their argument on what is clearly dicta in Martin v. Superior Court, 176 Cal. 289, 168 P. 135, L.R.A.1918B, 313. They urge that as we adopted the English common law as a part of our jurisprudence in 1850, we adopted the common law as it then existed and as modified by statutes passed prior to that date. They further argue that as Lord Campbell's Act (Stats. 9 and 10, Vic. Ch. 93) was passed in Eng-

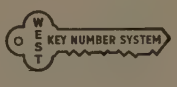
land before 1850 and as that act created a right of action for damages for wrongful death, we, by adopting the common law in 1850, included among the various causes of action permitted in this state, the action for damages resulting from wrongful death.

[4] The effect of Lord Campbell's act was considered in McLaughlin v. United Railroads, supra, where it was held that it was not a part of the common law and was not adopted as a part of our jurisprudence.

It has always been the rule in California that such an action cannot be maintained by persons not the heirs at law or the personal representative of a deceased. That being the only question presented on this appeal, it follows that no further argument is needed.

The motion to affirm is granted. The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



30 Cal.App.2d 154

AGRICULTURAL PRORATE COMMISSION et al. v. SUPERIOR COURT IN AND FOR RIVERSIDE COUNTY et al.

Civ. 2410.

District Court of Appeal, Fourth District, California.

Dec. 22, 1938.

Injunction ⇐150, 160

A temporary restraining order made returnable more than ten days after issuance thereof was void, and court exceeded its authority in thereafter making orders continuing the restraining order over objection of defendants. Code Civ.Proc. § 527.

Original prohibition proceeding by the Agricultural Prorate Commission of the state of California and others against the Superior Court of the state of California, in and for Riverside County, and another to prohibit the respondent court from enforcing, and requiring it to dissolve, a temporary restraining order.

Writ of prohibition issued.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for applicants.

MARKS, Justice.

This is an original proceeding for a writ of prohibition seeking to prohibit the respondent court from enforcing, and requiring it to dissolve a temporary restraining order issued in a case pending in the respondent court entitled, V. R. Smith and others v. Agricultural Prorate Commission, Edson Abel, secretary of such commission, and A. H. Harrison, Zone Agent of the Olive Proration Zone Number One. We will refer to this case as the superior court action. No appearance has been made by or on behalf of respondent.

The superior court action sought to enjoin petitioners from, in any manner, interfering with plaintiffs' activities in harvesting, preparing for market and selling, or marketing, their crops of olives.

On November 9, 1938, on ex parte application of plaintiffs in the superior court action a temporary restraining order was issued returnable on November 21, 1938, restraining defendants in that action from doing any act sought to be enjoined in the complaint. We are informed that on November 21, 1938, over the objection of defendants in that action, and without their consent, the restraining order was continued to December 5, 1938, and on that date, again over the objection and without the consent of defendants, was continued to December 19, 1938.

Section 527 of the Code of Civil Procedure contains the following:

"In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than ten days from the date of such order.

"*Party obtaining order must be ready. Service of complaint, affidavits and points and authorities.* When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he

shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order."

In McDonald v. Superior Court, 18 Cal. App.2d 652, 64 P.2d 738, the court said [page 740]:

"The original order to show cause was void. The court was without jurisdiction to hear or determine that application for injunction for the reason that the order to show cause was set for hearing for a time beyond ten days from the date thereof, contrary to the requirements of section 527 of the Code of Civil Procedure."

From what we have already said it is evident that the temporary restraining order was void and that the respondent exceeded its authority in making the orders of continuance.

The writ of prohibition will issue as prayed for.

We concur: BARNARD, P. J.; GRIFFIN, J.



30 Cal.App.2d 156

AGRICULTURAL PRORATE COMMISSION et al. v. SUPERIOR COURT IN AND FOR RIVERSIDE COUNTY et al.

Civ. 2414.

District Court of Appeal, Fourth District, California.

Dec. 22, 1938.

Injunction ⇐160

The superior court, upon day for hearing of order to show cause issued at time of issuance of temporary restraining order, improperly continued hearing of order to show cause to date more than ten days from date of order. Code Civ.Proc. § 527.

Original prohibition proceeding by the Agricultural Prorate Commission of the state of California and others against the Superior Court of the state of California, in and for Riverside County, and another.

Writ of prohibition issued.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for applicants.

MARKS, Justice.

This is a companion case to 85 P.2d 898, bearing the same title, the opinion in which case is this day filed. That opinion contains facts material to this proceeding. Those facts will not be repeated here.

On November 28, 1938, the respondent court, on the ex parte application of the plaintiffs in the superior court action, issued a second temporary restraining order and order to show cause returnable on December 5, 1938. Except as to dates it was identical with the order described in the other opinion.

On December 5, 1938, over the objection and without the consent of defendants in the superior court action, the respondent court continued the hearing of the order to show cause to December 19, 1938. The order continued the restraining order in force until that date. This was contrary to the express provisions of section 527 of the Code of Civil Procedure quoted in our other opinion.

The writ of prohibition will issue as prayed for.

We concur: BARNARD, P. J.; GRIFFIN, J.



30 Cal.App.2d 107

SANTA ANA MORTGAGE & INVESTMENT CO. v. KINSLOW et al.

Civ. 2187.

District Court of Appeal, Fourth District, California.

Dec. 21, 1938.

Hearing Denied by Supreme Court Feb. 16, 1939.

1. Jury ⇐14(6, 9)

An action to quiet title and an action to cancel an instrument are equitable actions in which a trial by jury is not a matter of right.

2. Jury ⇐14(9)

In action to quiet title, the inclusion of the words "that plaintiff was entitled to possession" in the complaint did not change na-

ture of action to one for possession of real property and thereby entitle defendant to trial by jury where counsel for plaintiff announced in open court that question of possession was not involved and the prayer of complaint contained no request for possession.

3. Quieting title ⇐44(1)

Where both parties in an action to quiet title claim under a common source of title, it is sufficient for plaintiff to show a conveyance of title from that source without further establishing that grantor had title.

4. Pleading ⇐406(1)

Where complaint in action to quiet title contained two causes of action, defendant by failure to attack one of the causes of action which was in usual form of action to quiet title admitted its sufficiency, and it was unnecessary for plaintiff to add any further cause of action to quiet its title.

5. Fraudulent conveyances ⇐263(2)

In action to quiet title, in which plaintiff claimed under certificate of sale issued on execution sale, complaint which alleged that a prior conveyance to defendants was voluntarily given without consideration and rendered grantor insolvent, and was fraudulent and void as against creditors, was sufficient without allegation of actual intent to defraud, since such intent would be implied from facts alleged. Civ.Code, § 3442.

6. Fraudulent conveyances ⇐225

In action to quiet title, where plaintiff claimed under certificate of sale, issued on execution sale, and alleged that prior conveyance to defendants was in fraud of creditors, evidence that an officer of the bank which levied the execution under which plaintiff's certificate of sale was issued, prepared the deed in which property was conveyed to defendants, and that the bank made an additional loan to grantor after the deed had been prepared, did not estop plaintiff from attacking conveyance as fraudulent, where the officer was led to believe that the deed would not be delivered during lifetime of grantor. Civ.Code, § 3442.

7. Appeal and error ⇐1039(2)

In action to quiet title, where plaintiff claimed under certificate of sale issued on execution sale and alleged that prior conveyance to defendants was in fraud of creditors, error, if any, in alleging amount of grantor's indebtedness at time of conveyance to defendants was harmless, since it was not the amount of indebtedness which made conveyance fraudulent, but fact that property was voluntarily conveyed without consideration, and that conveyance left grantor insolvent. Civ.Code, § 3442.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Santa Ana Mortgage & Investment Company against Henry M. Kinslow and Walter T. Kinslow to quiet title. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Arthur E. Koepsel, of Santa Ana, for appellants.

Forgy, Reinhaus & Forgy and A. M. Bradley, all of Santa Ana, for respondent.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiff's title to real estate in the city of Santa Ana in Orange county.

Prior to May 17, 1933, John T. Kinslow and Leona E. Kinslow were husband and wife. John T. Kinslow died prior to that date. He left a deed conveying the property involved here to his widow. It was recorded on May 17, 1933. On June 1, 1933, Mrs. Kinslow signed and acknowledged a deed conveying the same property to her two sons, the defendants, Henry M. and Walter T. Kinslow. This deed was delivered in August, 1933, and recorded on December 18, 1933. She received no compensation for this deed and the transfer left her insolvent.

On December 22, 1931, Mrs. Kinslow signed a note in the principal sum of $5,500, payable to the First National Bank of Santa Ana. On May 23, 1933, she executed a second note in the principal sum of $900, and on October 11, 1933, a third note in the principal sum of $475. Principal payments were made on account of the first note but none were made on the others.

On February 17, 1934, the First National Bank of Santa Ana recovered a judgment against Mrs. Kinslow on these notes in the sum of $5,255.83, besides costs. Execution was issued on this judgment and on May 21, 1934, the property here involved was sold to the plaintiff in that action and a certificate of sale was issued. On November 1, 1935, the First National Bank of Santa Ana sold, assigned and

granted the certificate of sale and the property to the plaintiff in this action.

This action was commenced on May 25, 1936. The complaint contains two causes of action. The first is in the usual form of an action to quiet title. The second pleads the facts we have outlined. The trial court found these facts to be true; that the deed from Mrs. Kinslow to defendants was voluntarily made without consideration and rendered Mrs. Kinslow insolvent and was fraudulent and void as against her creditor, the First National Bank of Santa Ana, and plaintiff, its successor in interest. Judgment was entered quieting plaintiff's title to the property and cancelling the deed from Mrs. Kinslow to defendants.

[1] Defendants demanded a jury trial. This demand was refused by the trial court. This is now assigned as error. An action to quiet title and an action to cancel an instrument are equitable actions in which a trial by jury is not a matter of right. Butler v. San Francisco, etc., Co., 168 Cal. 32, 141 P. 818; Kemp v. Enemark, 194 Cal. 748, 230 P. 441; Wangenheim v. Garner, 42 Cal.App. 332, 183 P. 670; Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App. 2d 170, 66 P.2d 1215.

[2] Defendants base their argument that they should have been allowed a trial by jury upon the allegation "that the plaintiff is the owner and entitled to the possession" of the property in question which appears in the first cause of action of the complaint. It is urged that this allegation makes the action one for possession of real property. Counsel for plaintiff announced in open court that the question of possession was not involved in the action. The prayer of the complaint did not include a request for possession. The case was not tried on the theory of possession. No judgment for possession was given. The inclusion of the words, "and entitled to the possession", in the quoted phrase, did not change the nature of the action. It remained one in equity.

[3] Defendants next urge that plaintiff did not prove title in Mrs. Kinslow. She was the common source of the titles of the parties. In Denning v. Green, 88 Cal. App. 379, 263 P. 819, the court said [page 820]:

"Both parties therefore claim under a common source of title. Under these circumstances it was sufficient for plaintiff to show a conveyance of title from that source without further establishing that the grantor herself had title. McGorray v. Robinson, 135 Cal. 312, 67 P. 279; Phillips v. Menotti, 167 Cal. 328, 139 P. 796; Rockey v. Vieux, 179 Cal. 681, 178 P. 712; Jeffers v. Hulen, 52 Cal.App. 590, 199 P. 350." See, also, Fleishman v. Davis, 128 Cal.App. 174, 16 P.2d 776.

[4, 5] It is next contended that the complaint fails to state a cause of action. As we have observed, the first cause of action is in the time-honored form of an action to quiet title. That it states a cause of action is admitted by the failure to attack it. It was unnecessary for plaintiff to add any further cause of action in order to quiet its title. The second cause of action also alleged the ultimate facts necessary to state a cause of action. It was not necessary to allege an actual intent to defraud, where the conveyance which was under attack was made by her voluntarily, without consideration, and rendered Mrs. Kinslow insolvent. Sec. 3442, Civ.Code; Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947. The failure to allege such intent did not make the pleading defective as such an intent is implied from the facts alleged.

[6] Defendants argue that plaintiff is estopped from attacking the conveyance from Mrs. Kinslow to defendants because the deed was prepared by and acknowledged in the trust department of the First National Bank of Santa Ana, and an officer of the bank knew that the deed was to be prepared. While both these facts appear in the record, it also appears from the testimony of Mrs. Kinslow that these representatives of the bank believed that the deed would not be delivered during the lifetime of Mrs. Kinslow. The trust officer wrote on the envelope containing the deed: "Not to be opened until my death", and told Mrs. Kinslow "to seal it and put it in the deposit box and not let the boys get a hold of it". If this advice had been followed, no present interest could have been conveyed to defendants.

Estoppel is further urged because the bank loaned Mrs. Kinslow $475 on October 11, 1933, after its officers knew the deed had been prepared. What we have already said answers this argument. The deed was not recorded until December 18, 1933, at which time the bank received its first intimation of its delivery.

[7] It is urged that the finding that Mrs. Kinslow was indebted to the bank on

June 1, 1933, in the sum of $4,656.56, besides interest, is contrary to the evidence because that sum included the amount of the third loan which was not made until October 11, 1933. We may assume that this argument is factually correct without being required to reverse the judgment. Deducting the principal amount of the third note from $4,656.56 would still leave her indebted on June 1, 1933, in the sum of $4,181.56. It is not the amount of the indebtedness that made the conveyance fraudulent, but the fact that the property was voluntarily conveyed without consideration and that the conveyance left Mrs. Kinslow insolvent. Atkinson v. Western Dev. Syndicate, 170 Cal. 503, 150 P. 360. The error in the finding, if error there be, is harmless.

Judgment affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



30 Cal.App.2d 228

SCHOLZ et al. v. HILBERT.

Civ. 10610.

District Court of Appeal, First District, Division 1, California.

Dec. 30, 1938.

1. Appeal and error ⇐931(1), 1010(1)

Where trial court is called upon to determine questions of negligence and contributory negligence, all intendments are in favor of trial court's findings and they will not be overthrown on appeal unless it is manifest that the trial court's conclusions cannot be sustained on any rational view of the testimony.

2. Municipal corporations ⇐819(1)

In pedestrian's action against storekeeper for injuries sustained when pedestrian fell on sidewalk in front of store, evidence supported trial court's finding that storekeeper was not negligent in attempting to remove whatever water there was on the sidewalk as result of storekeeper's removal of offensive condition of walk.

3. Municipal corporations ⇐819(7)

In pedestrian's action against storekeeper for injuries sustained when pedestrian fell on sidewalk in front of store, evidence sustained trial court's finding that pedestrian was not exercising ordinary care for her own safety while walking hurriedly along the sidewalk and in not seeing water spots.

4. Municipal corporations ⇐806(1)

Although a pedestrian using a city sidewalk is not required to keep his eyes fastened constantly on the ground before him, he must exercise ordinary care in observing where he is going so as to avoid any perils which ordinary prudence and reasonable use of his eyes would disclose.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Margaret Scholz and her husband against J. W. Hilbert to recover for injuries sustained by the named plaintiff in falling on a concrete sidewalk in front of defendant's store. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Charles F. Schroth and Rudolph J. Scholz, both of San Francisco, for appellants.

J. A. Bardin and J. T. Harrington, both of Salinas, for respondent.

KNIGHT, Justice.

Plaintiffs appeal from a judgment in favor of defendant after trial before the court without a jury, in an action for damages for personal injuries which the plaintiff Mrs. Margaret Scholz claimed to have sustained in falling on a concrete sidewalk in front of defendant's shoe store on the main street in Monterey. The cause of action was based on allegations to the effect that the sidewalk was wet and slippery and therefore dangerous, and was made so by the defendant's negligence. The trial court found from the evidence, however, that plaintiff had not established any negligence on the part of defendant and further found that the accident was due to the failure of Mrs. Scholz to exercise ordinary care for her own safety while walking along the sidewalk. As ground for reversal, plaintiffs contend that the evidence is insufficient to sustain said findings.

[1] It is well settled, however, that in cases such as this, where the trial court is

called upon to determine questions of negligence and contributory negligence, all intendments are in favor of its findings and they will not be overthrown on appeal unless it is manifest that the conclusions reached by the trial court cannot be sustained on any rational view of the testimony. If there is any competent evidence to support the findings, they will not be disturbed, or if two different inferences can be reasonably and properly drawn from the facts proved, the findings of the trial court are binding on the reviewing court. In other words, the trial court's findings are conclusive on appeal unless it can be held as a matter of law that the evidence is without substantial conflict and the only reasonable inference to be drawn therefrom is contrary to the findings; and it is quite evident that in the present case the factual situation is such that it cannot be so held.

The accident happened around 9 o'clock in the morning, on a clear, dry day. About half an hour earlier, when defendant arrived at his store to open it for the day's business, he noticed that the sidewalk immediately in front of one of the show windows and the tiling at the base of the window had been befouled by dogs, and he removed the offensive condition with a broom and about a pint and a half of plain water, which he took from a bucket, following which he used a mop to remove whatever water was left on the sidewalk, so that only a few damp spots remained; and it was at or near these damp spots that Mrs. Scholz fell. She was walking with her husband at the time, and they were in a hurry. She was fifty years of age, short, and exceptionally heavy. According to the evidence she was only five feet one and a half inches in height, and weighed 192 pounds; and she admitted that at some previous time she had sustained injuries from a fall. There were no other pedestrians on the sidewalk near the Scholzes to obstruct their view or progress, and as stated, they were hurrying along. Mr. Schloz was a step or two ahead of his wife, and she was trying to keep up with him. She was talking to him at the time, and she admits she was not watching her step or paying any attention to the sidewalk. The evidence further shows that after defendant had removed the obnoxious conditions created by the dogs he got some fresh water in the bucket and started to wash some of the windows and that in doing so he used a wet rubber sponge and a rubber "squeegee" window cleaner attached to a six-foot pole, and less than two quarts of water; and that in two places the water trickled about half way across the sidewalk; and it was while defendant was thus engaged in washing the windows that the accident happened. The testimony shows, however, that plaintiff fell several feet distant from said trickles of water, and that they could not have contributed in any way to the cause of the accident.

[2-4] As will be seen from the foregoing, the question of whether under all the conditions there present the existence of the water spots on the sidewalk which remained after defendant had used the mop, made the sidewalk dangerous for pedestrians exercising ordinary care for their own safety, to walk thereon, was one of pure fact, and obviously the testimony is sufficient to sustain the trial court's view that there was no negligence on the part of defendant in attempting to remove whatever water there was on the sidewalk. Necessarily, therefore, the trial court's finding thereon is conclusive on appeal. In any event, the conditions there present were clearly not such as would justify a reviewing court in holding as a matter of law contrary to the finding of the trial court, that the sidewalk was in a dangerous condition. And there would seem to be ample evidence also to sustain the inference drawn by the trial court that Mrs. Scholz was not exercising ordinary care for her own safety while walking hurriedly along the sidewalk. The water spots were plainly visible, and it appears that Mrs. Scholz could have easily avoided them and thus prevented the accident if she had been exercising ordinary care while walking along the sidewalk. It is quite true that while a pedestrian using a city sidewalk is not required to keep his eyes fastened constantly on the ground before him, the law does require that he exercise ordinary care in observing where he is going so as to avoid any perils which ordinary prudence and reasonable use of his eyes would disclose, and if he fails so to protect himself, he is deemed to be negligent. The most that can be possibly said in the present case is that the evidence is such that reasonable minds might differ upon the question of Mrs. Scholz's negligence, and that being so, the trial court's finding thereon is final on appeal. We have found nothing in the cases cited by plaintiffs which is at variance with the views here expressed.

The judgment is therefore affirmed.

I concur: TYLER, P. J.

30 Cal.App.2d 115

TRAVELERS FIRE INS. CO. v. BROCK & CO. et al.

Civ. 11982.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1938.

1. Appeal and error ⇐205

Where question to which an objection is sustained does not in itself indicate that answer will be favorable to party seeking to introduce testimony, ruling will not be reviewed unless an offer of what is proposed to be proven is made to trial court so that reviewing court can determine whether proffered evidence would have been material and beneficial to party offering it.

2. Appeal and error ⇐692(1)

In action to recover value of diamond brooch delivered by appellant to respondent for repairs, reviewing court would not consider alleged error in sustaining objection to questions asked appellant's witnesses concerning alleged custom in jewelry trade with reference to liability assumed by jeweler accepting merchandise for repair from another jeweler, where questions did not indicate that answers would be beneficial to appellant and no offer of proof was made concerning what custom was.

3. Bailment ⇐33

In action to recover value of diamond brooch delivered by appellant to respondent for repairs, and thereafter delivered by respondent to a diamond cutter from whom it was stolen, wherein it was assumed that respondent would have been liable for any negligence on part of diamond cutter, finding that brooch was stolen without negligence on part of any person whose negligence could be imputed to respondent constituted a finding that diamond cutter was not negligent in caring for brooch.

4. Appeal and error ⇐931(1)

The reviewing court, under rule that error must affirmatively appear in record before judgment will be reversed, was bound to assume, in absence of contrary showing, that trial judge applied correct rules of law to facts of case.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by the Travelers Fire Insurance Company against Brock & Co., E. & I. Woorgaft & Co. and others to recover the value of a diamond brooch delivered by the first-named defendant to the last-named defendant, wherein the first-named defendant filed a cross-complaint. Judgment for the last-named defendant, and the first-named defendant appeals.

Judgment affirmed.

Shattuck, Davis & Story and Edward S. Shattuck, all of Los Angeles, for appellant.

Lillick, McHose & Adams and James L. Adams, all of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment in favor of respondent after trial before the court without a jury in an action to recover the value of a diamond brooch delivered by appellant to respondent for the purpose of supplying a small diamond which was missing therefrom.

The essential facts are:

Appellant, a retail jewelry concern, received from one of its customers a diamond brooch from which a small diamond had been lost. This they delivered to respondent with the request that the missing diamond be supplied and cut in to fit the brooch. Respondent supplied the diamond and delivered it to a diamond cutter by the name of Julian Del Monte. Mr. Del Monte placed the diamond in his safe, locked the safe, and upon opening it the following morning found that the brooch together with other merchandise of his had been stolen.

Appellant relies for reversal of the judgment on these propositions:

First. The trial court committed prejudicial error in sustaining an objection to questions asked appellant's witnesses relative to an alleged custom in the jewelry trade with reference to the liability assumed by one jeweler who accepts merchandise for repair from another jeweler.

Second. The trial court committed prejudicial error in finding that the diamond brooch was stolen without any negligence on the part of respondent.

Third. The trial court committed prejudicial error in failing to find that Mr. Del Monte was guilty of negligence in the manner in which he safeguarded the diamond brooch delivered to him.

Fourth. The trial court committed prejudicial error in holding that respondent would not be responsible for the negligence, if any, of Mr. Del Monte.

[1, 2] We will not consider the first proposition presented by appellant for the reason that it is the established law in California that where a question to which an objection is sustained does not in itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal an offer of what is proposed to be proven must first be made to the trial court so that the reviewing court can determine whether the proffered evidence would have been *material* and *beneficial* to the party offering it. Guyer v. Pacific Elec. Ry. Co., 24 Cal.App.2d 499, 503, 75 P.2d 550. In the present case the questions to which objections were sustained did not indicate that the answers would be material or beneficial to appellant, nor was any offer of proof made as to what the custom was that appellant was endeavoring to prove. So far as is disclosed by the record here, the custom referred to by appellant's witnesses might have placed the entire responsibility for the loss of the brooch upon appellant, and in the absence of a showing to the contrary we must assume in support of the judgment that such was the fact.

Appellant's second proposition is without merit. An examination of the record discloses substantial evidence to sustain the trial court's finding that the diamond brooch was stolen without any negligence upon the part of respondent.

[3] The third proposition is likewise without merit. The trial court did find that the brooch was stolen "without any negligence on the part of * * * any person whose negligence could be imputed to or binding upon" respondent. This is clearly a finding, assuming as we do that respondent would have been liable for the negligence if any of Mr. Del Monte, that the latter was not negligent in the manner in which he safeguarded the property entrusted to his care.

[4] Appellant's final contention is untenable. There is an entire absence of any showing in the record that the trial judge was of the view that respondent would not be liable if the diamond brooch had been lost or stolen through the negligence of Mr. Del Monte. Therefore, under the well-established rule that error must affirmatively appear in the record before a judgment will be reversed, we are bound to assume in the absence of a showing to the contrary that the trial judge applied the correct rules of law to the facts of the present case.

For the foregoing reasons, the judgment is affirmed.

I concur: CRAIL, P. J.

I concur in the judgment: WOOD, J.



30 Cal.App.2d 112

TRAVELERS FIRE INS. CO. v. BROCK & CO. et al.

Civ. 11982.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1938.

Rehearing Denied Jan. 12, 1939.

Hearing Denied by Supreme Court Feb. 20, 1939.

1. Bailment ⇐31(1)

A bailee who has failed to return bailed property to bailor has burden of proving that property was lost by theft, or otherwise, without negligence of the bailee.

2. Bailment ⇐14(1)

Where bailment is for mutual benefit, bailee, in absence of a special contract, must exercise ordinary care in relation to subject matter of bailment and is responsible for loss or injury resulting from failure to use ordinary care.

3. Bailment ⇐14(1)

A bailee under bailment for mutual benefit is not an insurer of bailed property, and is not liable for loss resulting from robbery, burglary or theft.

4. Bailment ⇐14(1)

A bailee intrusted with merchandise for purpose of repair is deemed a "bailee for hire," and is not liable for loss or injury resulting without negligence on his part.

[Ed. Note.—For other definitions of "Bailee for Hire," see Words & Phrases.]

5. Bailment ⇐16

A bailee for repairs does not wrongfully assume control in placing bailed article with

another for repairs unless bailment agreement expressly or impliedly requires bailee to make repairs personally.

6. Bailment ⇐31(1)

In action to recover value of diamond brooch delivered to defendant for repairs and by it delivered to another jeweler, defendant had burden of proving that it used ordinary care in handling of brooch, and that brooch had been lost without fault upon its part or that of the subbailee.

7. Appeal and error ⇐1056(1)
Bailment ⇐31(2)

In action to recover value of diamond brooch delivered to defendant for repairs and by it delivered to another jeweler, which then delivered it for making of repairs to a diamond cutter from whom it was stolen, exclusion of defendant's proof that reputation of the other jeweler and diamond cutter was not such as to cause any apprehension that brooch would not be kept in a safe place, and that diamond cutter placed brooch in locked container within locked safe from which it was taken was prejudicial error.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by the Travelers Fire Insurance Company against Brock & Co. and another to recover the value of a brooch allegedly converted by the defendants. Judgment for plaintiff, and defendants appeal.

Judgment reversed.

Shattuck, Davis & Story, and Edward S. Shattuck, all of Los Angeles, for appellant.

Homer L. Breidenbach, of Bayertown, Pa., for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover the value of a brooch which it is alleged defendants converted defendants appeal.

The essential facts are:

Plaintiff's assignor, Mrs. Mary Brandt, delivered to defendant Brock and Company, who was engaged in the jewelry business, a diamond brooch from which one of the small diamonds had been lost and requested said defendant to replace it. Defendant Brock and Company delivered the brooch to E. and I. Woorgaft & Company to supply a diamond, who in turn delivered the brooch with a diamond to Julian Del Monte, a diamond cutter, for the purpose of cutting in the diamond to fit the brooch. Mr. Del Monte placed the brooch in a locked container in his safe. The following morning he found that the brooch, together with other merchandise belonging to him, had been stolen from the safe. Plaintiff had insured Mrs. Brandt against the loss of her property and thereafter paid her the sum of $2,500, took an assignment of her claim against defendant, and brought the present action to recover the value of the brooch.

This is the sole question to be determined:

Did the trial court commit prejudicial error in sustaining an objection to defendant's offer to prove that the reputation of E. and I. Woorgaft & Company and Julian Del Monte at the time the diamond brooch was delivered to them was such that it would cause no apprehension on defendant's part that the brooch would not be kept and maintained in a safe place; that Mr. Del Monte placed the diamond brooch in a locked container within his safe, closed, and locked three successive doors in the safe; and that the brooch was taken from the safe together with other merchandise of Mr. Del Monte by unknown persons?

This question must be answered in the affirmative and is governed by the following established principles of law:

[1] (1) The burden of proof rests with the bailee to prove, where the bailed property is not returned to the bailor, that the property was lost by theft, etc., without negligence of the bailee. U Drive & Tour, Ltd., v. System Auto Parks, Ltd., Cal. Super., 71 P.2d 354, 356.

[2, 3] (2) Where a bailment is for mutual benefit the bailee in the absence of a special contract is held to the exercise of ordinary care in relation to the subject-matter of the bailment and is responsible for loss or injury resulting from his failure to use ordinary care. He is not an insurer of the chattel entrusted to him and is not liable for loss resulting from robbery, burglary, or theft. 6 Cor.Jur., 1916, 1121, 1123.

[4] (3) A bailee entrusted with merchandise for the purpose of repair is deemed a bailee for hire and is not liable

for loss or injury resulting without negligence on his part. Copelin v. Berlin Dye Works, etc., Co., 168 Cal. 715, 719, 144 P. 961, L.R.A.1915C, 712; 6 Cor.Jur., 1916, 1124; 26 A.L.R. 224.

[5] (4) A bailee for repairs does not wrongfully assume control in placing the bailed article with another for repairs unless the bailment agreement expressly or impliedly requires the bailee to perform the labor personally. 8 Cor.Jur.Sec., 1938, 285; Rourke v. Cadillac Automobile Co., 268 Mass. 7, 167 N.E. 231, 232.

[6, 7] Applying the foregoing rules of law to the facts of the instant case, since the burden of proof was with defendants to prove that they used ordinary care in the handling of the diamond brooch entrusted to them by plaintiff's assignor and that the brooch had been lost without fault upon their part or that of the subbailee, the offered evidence was material to an issue before the court and it was therefore prejudicial error to exclude the same.

For the foregoing reasons, the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.



30 Cal.App.2d 182

MORALES v. INGELS et al.

Civ. 2157.

District Court of Appeal, Fourth District, California.

Dec. 27, 1938.

1. Mandamus ⇐154(4)

To furnish basis for relief, petition for writ of mandate must show that respondents are under some duty to do what petition asks that they be required to do.

2. Mandamus ⇐87

One whose motor vehicle operator's license was revoked by director of department of motor vehicles pursuant to recommendation of trial board was not entitled to writ of mandate commanding director and chief of driver's license division to issue license within year after revocation on ground of such board's failure to prepare findings as required by statute. St.1935, pp. 132, 139, 140, §§ 270, 314(a)(3), (d), 315(c).

3. Mandamus ⇐71, 72

A writ of mandate may not issue to compel officer or board to act in any particular way, except in performance of ministerial duties, and never to control exercise of discretion, unless abused.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Proceeding by Alex Morales, Jr., for a writ of mandate, commanding Ray Ingels, as Director of the Department of Motor Vehicles, and Paul Mason, as Chief of the Division of Drivers' Licenses, to issue a motor vehicle operator's license to petitioner. From a judgment ordering respondents to issue the license, they appeal.

Reversed.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for appellants.

No appearance for respondent.

GRIFFIN, Justice.

On the 18th day of September, 1937, a petition for a writ of mandate was filed in the superior court of Orange county by Alex Morales, Jr., petitioner and respondent, against appellants Ray Ingels, as Director of the Department of Motor Vehicles of the State of California, and Paul Mason, as Chief of the Division of Drivers' Licenses of the Department of Motor Vehicles of the State of California, praying for an alternative writ, commanding them to issue to petitioner an operator's license to drive and operate motor vehicles upon the highways of the state of California or show cause before the court why they have not done so. An alternative writ was so issued. On December 7, 1937, the day of the hearing, a judgment was made ordering appellants forthwith to issue to petitioner an operator's license. The appeal is from this judgment.

The amended petition for the writ presents in substance the following facts: On the 17th day of December, 1936, petitioner was notified in writing by Paul Mason, as Chief of the Division of Drivers' Licenses, that his privilege to operate a motor vehicle had been revoked by the department in ac-

cordance with the provisions of section 314(a), subdivision (3) of the Vehicle Code, for the reason that he was an habitual violater of the traffic laws according to the records of the department, and petitioner was requested to surrender his operator's license unless a hearing was demanded in accordance with section 314(d) of the Vehicle Code. Petitioner demanded a hearing. The hearing was properly held at the time and place specified, before a board of three officers of the department. The petitioner was present with counsel and testimony was taken. At the conclusion of the hearing petitioner was informed that findings would be prepared and presented to Ray Ingels, as Director of the Department of Motor Vehicles. The following report was made by the board:

"Report of Findings, Review of Testimony and Recommendation for Revocation of Driving Privilege.

"Re: Alex Morales.

"Upon the conclusion of the hearing of Alex Morales, 410 South Olive, Anaheim, California, and upon reviewing the testimony, it is the recommendation of the Board that the order of the Director revoking the driving privilege of Alex Morales be sustained.

"Appointed to hold the above hearing by the Director of the Department of Motor Vehicles.

"Donald I. Squires
"George Peterkin
"Sam Bagby."

On March 9, 1937, Ray Ingels, Director, sustained the recommendation of the board and revoked the license effective as of March 1, 1937. Petitioner was duly notified of this action. His license would have otherwise expired June 19, 1937.

On July 30, 1937, petitioner duly applied for an operator's license, took the necessary examinations and claims that he passed all of the required tests and alleges that his application for such license was filed with the department of motor vehicles on August 4, 1937; that appellants refused to consider petitioner's application and to issue him an operator's license. Counsel for petitioner has failed to file a brief in support of the order of the trial court.

The only basis for the issuance of the writ, as we determine from the record, is petitioner's claim that no findings were prepared by the trial board as required by section 315, subdivision (c) of the Vehicle Code.

Section 270 of the Vehicle Code provides as follows:

"The department shall not issue or renew an operator's or chauffeur's license to any person: * * *

"(b) When a license previously issued to such person hereunder has been revoked until the expiration of one year after the date of such revocation except where a different period of revocation is prescribed by this code or unless the revocation was for a cause which has been removed."

[1] Although the procedure prescribed for the commencement of actions before governmental administrative agencies and judicial tribunals is not in all instances alike, nevertheless, it is not so dissimilar as to change the principles of law relative to the invocation of a writ of mandate. To furnish any basis for the relief sought, the petition for a writ of mandate must show that the respondents are under some duty to do what the petition asks that they be required to do. Meyer v. San Francisco, 150 Cal. 131, 88 P. 722, 10 L.R.A., N.S., 110; San Diego Cotton Club v. State Board of Equalization, 139 Cal.App. 655, 34 P.2d 749. What was the duty especially enjoined by law upon appellants to be performed by them, which they failed to perform under the delegations set forth in the amended petition?

[2] The only step in the proceeding required to be performed and which was not performed was the preparation by the trial board of findings. If petitioner desired findings he should have aimed his petition in that direction i. e., at the trial board, after demand had been made therefor, and not at the director, to issue a license which he had, in the exercise of his discretion, previously revoked and which he was especially enjoined by law from reissuing until one year from the date of the revocation had expired. Sec. 270, Vehicle Code.

[3] A writ of mandate may not issue to compel an officer or board to act in any particular way except in the performance of ministerial duties, and never to control the exercise of discretion unless it has been abused, and in the instant case there is no such allegation. Kelley v. Kingsbury, 210 Cal. 37, 290 P. 885; Doble

Steam Motors Corp. v. Daugherty, 195 Cal. 158, 232 P. 140.

The judgment of the trial court is reversed.

We concur: BARNARD, P. J.; MARKS, J.



30 Cal.App.2d 124

MADSEN v. CAWTHORNE.

Civ. 10854.

District Court of Appeal, First District, Division 2, California.

Dec. 22, 1938.

1. Partnership ⇐153(1)

A partnership is liable for injuries resulting from willful misconduct or intoxication of a copartner while he is engaged on business of the partnership. Civ.Code, §§ 2338, 2403, 2407.

2. Automobiles ⇐192(4)

Where partner going on a partnership mission invited guest to ride with partner for their mutual pleasure, partner became intoxicated and drove motor vehicle in a reckless manner for purpose of frightening the guest, and, while weaving from side to side of winding mountain road, vehicle left highway and overturned, partnership was liable for injuries sustained by guest. Civ. Code §§ 2338, 2403, 2407.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Personal injury action by Marceline Madsen, a minor, by and through her guardian ad litem, Henry O. Madsen, against James E. Cawthorne. From an adverse judgment, defendant appeals.

Affirmed.

Hoey, Hamilton & Turner, of Concord, for appellant.

Carlson & Collins, of Richmond, Ward & Sutton, of Antioch, and Jesse E. Nichols, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff, a minor, sued through her guardian for injuries incurred in a motor vehicle accident. The cause of action was bottomed on the wilful misconduct and intoxication of the driver who was a copartner of the defendant. The evidence disclosed that the partners were engaged in the trucking business, that the driver of the car was on a partnership mission at the time of the accident, that he had invited the plaintiff to ride with him for their mutual pleasure, that he became intoxicated and drove the car in a reckless manner for the purpose of frightening the plaintiff. While proceeding down grade on a winding mountain road, weaving from side to side, the car left the highway and overturned. The driver was killed and the plaintiff received serious personal injuries for which the jury gave her a verdict.

[1, 2] The appeal presents the single question whether the partnership is liable for the injuries resulting from the wilful misconduct or intoxication of a copartner while he was engaged on the business of the partnership. An affirmative answer to the question follows accepted rules—both statutory and judicial.

Section 2407 of our Civil Code provides in part: "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership * * * loss or injury is caused to any person * * * the partnership is liable therefor to the same extent as the partner so acting or omitting to act."

In 47 Corpus Juris, page 886, the rule is stated: "There is considerable authority for the view that one partner is not presumed to concur in another partner's willful torts, such as false imprisonment or arrest, malicious prosecution, maliciously suing out attachment without probable cause, and assault, nor in acts that are clearly illegal, as in violation of statutes, even though such acts be connected with, although not within the scope of, partnership affairs; but the true test seems to be, not the illegality or the malicious and willful character of the wrong, but whether it was done within the scope of the wrongdoing partner's authority, and such determination must necessarily rest upon the facts of the particular case."

The principle upon which the liability rests is the same as that applicable to the relation of principal and agent, and master

and servant. "Every partner is an agent of the partnership." Sec. 2403, Civ.Code. A principal is liable for the "wrongful acts" of his agent committed in the transaction of the principal's business. Sec. 2338, Civ.Code. This liability includes wilful and malicious acts as well as act of simple negligence. Ruppe v. City of Los Angeles, 186 Cal. 400, 402, 199 P. 496; Johnson v. Monson, 183 Cal. 149, 152, 190 P. 635; Hiroshima v. Pacific Gas & Elec. Co., 18 Cal.App.2d 24, 29, 63 P.2d 340. There is nothing in Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407, to the contrary. That case involved the relation between the owner of a motor vehicle and one who was operating it with the owner's permission. The opinion expressly excepted from its rule the relations of master and servant, and principal and agent.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



30 Cal.App.2d 222

WOOD v. LEHNE et al.

Civ. 11661.

District Court of Appeal, Second District, Division 1, California.

Dec. 30, 1938.

Rehearing Denied Jan. 24, 1939.

1. Municipal corporations ⇐173(5), 182, 189(1)

The statute authorizing injured persons to sue on official bonds executed by officers of state or political subdivision was not restricted in its application to towns or cities organized under the Political Code, but was available to plaintiff in action for false arrest and malicious prosecution against city clerk, police chief, police desk sergeant, and police officer, so as to justify recovery on their official bonds. Pol.Code, § 961; Gen. Laws 1931, Act 5233, § 853, as amended by St.1933, p. 1322.

2. Municipal corporations ⇐173(5), 182, 189(1)

Where statute authorized injured persons to bring suit on official bond executed by any officer of state or political subdivision, fact that surety bonds of city clerk, police chief, police desk sergeant, and police officer sued for false arrest and malicious prosecution appeared to be contracts between city and surety, and included no reference to any third party, did not preclude plaintiff from suing the surety. Pol.Code, § 961.

3. Municipal corporations ⇐182, 189(1), 742(6)

In action for false arrest and malicious prosecution against a city clerk, police officer, desk sergeant, and chief of police, based upon plaintiff's arrest by officer and his subsequent incarceration after being taken to the city jail, questions as to who participated in violation of plaintiff's personal liberty, extent thereof, and causes and reasons therefor, were for the trial court. Pen.Code, § 236.

4. Appeal and error ⇐1010(1)

A judgment reasonably supported by the evidence cannot be disturbed on appeal.

5. Municipal corporations ⇐182, 189(1), 742(6)

In action for false arrest and malicious prosecution against city clerk, police officer, desk sergeant, and the chief of police, based upon plaintiff's arrest by officer who had been ordered by desk sergeant, as result of information given by clerk, to recover recall petitions which had been taken from clerk's office and which were handed to plaintiff immediately before arrest, and upon plaintiff's incarceration for six hours after appearing before desk sergeant and chief of police at city jail, whether element of malice entered into commission of acts of city officials was question for trial court's determination. Pen.Code, § 236.

6. Municipal corporations ⇐182, 189(1), 742(5)

Evidence relating to malice on part of city clerk, police officer, desk sergeant, and chief of police in connection with the arrest of plaintiff by officer, subsequent to order given by desk sergeant as result of information received from clerk, and with the incarceration of plaintiff after his appearance before desk sergeant and chief of police at city jail, justified judgment against the officials except the desk sergeant, who was not shown to have been vested with, or to have exercised, any discretion in connection with plaintiff's incarceration. Pen.Code, § 236.

7. Municipal corporations ⇐182

A chief of police of city before whom plaintiff appeared after his arrest and prior to his imprisonment could not avoid liability for false imprisonment on ground that his acts were in the performance of an official duty, where evidence supported trial judge's conclusion that the chief of police had cooperated in the commission of an unlawful arrest. Pen.Code, § 236.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Ernest E. Wood against Helen Lehne and others to recover for false arrest and malicious prosecution. From a judgment for plaintiff and from an order denying defendants' motion for new trial, the defendants appeal.

Judgment affirmed in part and reversed in part, and appeal from order denying a new trial dismissed.

Guy Lewis, of Hawthorne, and Hugh B. Rotchford and Everett H. Smith, both of Los Angeles, for appellants.

Roland G. Swaffield, of Los Angeles (T. H. Sword, of Los Angeles, of counsel), for respondent.

DORAN, Justice.

This is an appeal by defendants from the judgment in an action for false arrest and malicious prosecution. An appeal is also taken from the order denying defendants' motion for a new trial.

The facts as revealed by the record are in substance as follows: Some time prior to August 19, 1935, there were filed in the office of defendant Helen M. Lehne, as city clerk of the city of Hawthorne, certain petitions demanding the recall of the individual members of the City Council of Hawthorne. On that day one John R. Morris (by occupation a general contractor) who was connected with the recall movement, appeared at the office of said defendant Lehne and made inquiry as to whether the petitions had been checked. Upon learning that this had not been done because an opinion of the city attorney had expressed the belief that said petitions were illegal, Morris asked to see the opinion, and, after reading the same, he left the office. At about 4 o'clock that afternoon Morris returned to the office and requested permission to see the recall petitions and particularly the certificates thereon. Miss Lehne, after producing the petitions, said: "There isn't any certificate on them; that is what is wrong with them." Morris then took the petitions and walked out of the office. Defendant Lehne immediately telephoned the police department of Hawthorne and reported the occurrence. The desk sergeant, defendant E. J. Parker, ordered a motorcycle officer, defendant Floyd E. Winchell, to overtake Morris and recover the petitions. Winchell pursued Morris and was a matter of a few steps behind the latter as Morris entered a real estate office located on the ground floor of a building a block away from the city clerk's office. Plaintiff and respondent herein, Ernest E. Wood, an attorney at law, occupied an office in the rear of the real estate office.

As to what occurred thereafter, defendant Winchell testified upon direct examination in substance as follows: That as he went in the door pursuing Mr. Morris he observed Morris hand the recall petitions to Mr. Wood; that he immediately placed Mr. Morris under arrest; that he asked Mr. Wood to give him the petitions and that Mr. Wood said, "Wait a minute, wait a minute," whereupon Winchell took the petitions away from Wood, who was then taken by the arm and informed that he was under arrest.

Mr. Wood was forthwith taken to the city jail of Hawthorne, where, upon his arrival, he explained to the desk sergeant Parker and to the chief of police, Vernon P. Craig, both of whom were acquainted with him, that he knew nothing about the matter and that they were making a mistake. Despite his explanations, and over his insistent protests, plaintiff was booked and searched, his personal belongings were removed, and he was placed in a cell where he was confined for a period of six hours.

A preliminary examination of Mr. Wood upon the charge of violating section 114 of the Penal Code, i. e., theft of public records, was held on August 21, 1935, before the city judge of Hawthorne; at the conclusion of the prosecution's evidence the charge against Wood was dismissed and his bail was exonerated.

The action for false arrest and malicious prosecution followed, and upon trial thereof judgment was obtained against the defendants on both causes of action, with the exception that defendant Helen M. Lehne was not held liable for the false arrest. Defendant Maryland Casualty Company was the surety on the official bonds of the defendants.

Appellants contend, in substance, that the evidence is insufficient to sustain the judgment for false arrest or imprisonment; that there is no evidence of any malice on the part of the defendants; and that as to the liability of the surety company, in each of the several bonds sued upon the city of Hawthorne is named as the obligee, and that therefore section 961 of the Political Code does not inure to the benefit of a third person such as respondent. The judgment is not attacked as excessive.

Section 961 of the Political Code reads as follows: "Persons who may sue on bond. Every official bond, given pursuant to law, executed by any officer of the state, or of any county or any subdivision thereof, or of any town or city organized under the provisions of this code, or by any officer of a city or county governed by a freeholders' charter, is in force and obligatory upon the principal and sureties therein to and for the state of California, or such municipal corporation, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity; and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof."

[1] In connection with appellants' contention last above mentioned, it is argued that said section 961 applies only to towns or cities organized under the provisions of the Political Code. City of Los Angeles v. Teed, 112 Cal. 319, 326, 44 P. 580, by analogy, appears definitely to hold to the contrary. Appellant surety company relied upon Sunter v. Fraser, 194 Cal. 337, 228 P. 660, and Municipal Bond Co. v. Riverside, 138 Cal.App. 267, 32 P.2d 661, in support of the claim that section 961 "does not inure to the benefit of a third person such as respondent". The decisions are not in point; both refer to cities operating under a freeholders' charter, which cities are expressly exempted from the operation of general laws under such circumstances.

The Municipal Corporation Act (Deering's Gen.Laws, Act 5233, § 853, as amended by St.1933, p. 1322), provides that "All the provisions of any law of this State relating to the official bonds of officers shall apply to any bonds herein required or authorized, except as herein otherwise provided." Section 961 clearly is a "law of this State relating to the official bonds of officers" within the meaning of the Municipal Corporation Act, and hence is available to respondent.

[2] It is also contended by appellant surety company that respondent's right to sue said surety company would, in effect, add a third party to the bond, which was a contract between the city of Hawthorne and the surety company. This, it is argued, enlarges the scope of the bond and thereby "holds" the surety beyond the express terms of the contract. The argument is untenable, for inasmuch as both the municipality and the surety company were subject to the general laws with regard thereto, the failure of the insurance contract to include any reference to said third party in the policy did not operate to defeat the effect of such code provisions. There can be no question as to the surety company's liability, nor can there be any question as to respondent's right to include the surety company as a party defendant under the circumstances. "The law providing the remedy for the enforcement of a contract is as much a part of the contract as any other legal requirement affecting the contract. * * * It is settled that all the laws of a state existing at the time a contract is made which affect the rights of the parties to the contract enter into and become a part of it, and are as obligatory upon all courts which assume to give a remedy on such contracts as if they were referred to or incorporated in the terms of the contract." Meriwether Invest. Co. Ltd. v. Lampton, 4 Cal.2d 697, 702, 53 P.2d 147, 150.

[3, 4] Referring now to appellants' contention that there is a lack of evidence of malice, it is argued that officer Winchell "was entirely within his legal right, and acting merely in the performance of his duty, in arresting the plaintiff"; that the arrest was complete when officer "Winchell stated to plaintiff that he, the plaintiff, was under arrest"; and that therefore, "Since neither defendants Parker nor Craig were present, nor had any part in the arrest of plaintiff, it is difficult to conceive any theory upon which they might be held liable therefor." The last mentioned argument, especially as to Craig, misconceives the basis of the cause of action. It is not predicated upon the announcement by officer Winchell to plaintiff that plaintiff was under arrest, but is based on the series of events above related, which commenced with the first act of officer Winchell with relation thereto and ended with plaintiff's release from custody. The imprisonment alleged to be false continued until plaintiff's release. False imprisonment is defined to be "* * * the unlawful violation of the personal liberty

of another". Sec. 236, Pen.Code. The violation of plaintiff's personal liberty continued during his incarceration. As to who participated therein, and to what extent, as well as to the causes thereof and the reasons therefor, were questions addressed to the judgment of the trial court. Hence, whether officer Winchell's act in making the arrest was in the faithful performance of official duty and therefore legal, was necessarily presented for determination. And the same may be said with regard to the other defendants whose acts, after plaintiff was brought before them, were but additional steps in the process which continued and completed the alleged false imprisonment. On these questions the trial court found against appellants, and it is elementary that when there is evidence in the record that reasonably supports such findings, the judgment cannot be disturbed on appeal.

[5] Whether the element of malice entered into the commission of such acts was likewise for the trial court's determination as a matter of fact. In that connection, a reading of the evidence at once suggests that the trial judge might have concluded that the arrest, followed by incarceration, had its source in local political factionalism and, thus inspired, was resorted to as a means of discouraging opposition in a political controversy. If this were true, such imprisonment was not only malicious but vicious.

[6] In the light of the record, and with regard to all of the defendant officials, with the exception of the defendant Parker, it cannot be said that the evidence is insufficient to support the implied finding that malice was the underlying cause of the arrest and imprisonment. This being true, the judgment as to the defendant officials, except defendant Parker, is sustained by the evidence. As to Parker, the evidence shows him to have been the desk sergeant who booked the plaintiff at the direction of Craig and Winchell. Unlike Craig, the chief of police, there is no evidence that Parker was vested with or exercised any discretion in connection with plaintiff's incarceration, nor can it be reasonably inferred from the evidence that Parker entertained any malice; therefore, as to defendant Parker the evidence fails to support the judgment.

[7] In connection with defendant Craig, the chief of police of the city of Hawthorne, it is contended that there is no evidence to show that the defendant Craig took any part in the prosecution of plaintiff. Official acts cannot always be successfully defended by declaring them to be in the performance of an official duty, as argued by appellant. Obviously, the trial court regarded such argument as a mere disguise and rejected the defense. The evidence supports the evident conclusion of the trial judge that the defendant Craig cooperated in the commission of an unlawful arrest.

The judgment appealed from is affirmed as to each of the defendants except the defendant Parker; as to defendant Parker the judgment is reversed. The appeal from the order denying a new trial is dismissed.

We concur: YORK, P. J.; WHITE, J.



30 Cal.App.2d 219

MARTIN et al. v. DONOHUE.

Civ. 10834.

District Court of Appeal, First District, Division 1, California.

Dec. 29, 1938.

1. New trial ⇐75(1)

Where amount of damages awarded is grossly inadequate, trial court may, under statute, grant a new trial upon the ground of insufficiency of evidence. Code Civ.Proc. § 657.

2. New trial ⇐9

Where amount of damages awarded is grossly inadequate, trial court in granting a new trial upon the ground of insufficiency of evidence may, under statute, limit retrial to issue of damages alone. Code Civ.Proc. § 657.

3. New trial ⇐75(5)

$2500 for death of 24-year-old steadily employed boiler-maker helper, who had enjoyed excellent health, was earning $27 a week, had an increasing earning capacity, maintained a good home, was a kind and affectionate husband and father, left a young widow and infant son, and whose funeral expenses were $475, was so inadequate as to justify the grant of a new trial. Code Civ. Proc. § 657.

4. New trial ⇐9

In death action, where damages awarded were inadequate, there was nothing in record to warrant belief that verdict was a compromise verdict, and evidence supported finding that defendant's negligence was sole cause of deceased's death, limiting retrial to issue of damages was not an abuse of discretion. Code Civ.Proc. § 657.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Julia Martin and another against Francis T. Donohue for damages resulting from an automobile collision. Judgment was entered for plaintiffs for $2,500. Upon plaintiffs' motion for a new trial, the court ordered a new trial, limited to issue of damages alone. Defendant appeals, and plaintiffs file a motion to dismiss the appeal or affirm the judgment.

Order of trial court affirmed and plaintiffs' motion dismissed.

Yale S. Kroloff, of Oakland (Carl L. Christensen, Jr., of Oakland, of counsel), for appellant.

Convery, Fahey & O'Connor, of San Francisco, for respondents.

KNIGHT, Justice.

An automobile driven by the defendant Francis T. Donohue collided with one driven by Albert Martin at the intersection of Flournoy street and San Jose avenue in Daly City, San Mateo county, as the result of which Martin was fatally injured and died the following day. He was survived by a widow and an infant son, and they joined in bringing this action for damages against Donohue, alleging that the collision was proximately caused by his negligence. Upon trial a jury returned a verdict in favor of plaintiffs for $2,500, and judgment was entered accordingly. Deeming the amount of the award grossly inadequate, plaintiffs moved for a new trial on several statutory grounds, including insufficiency of the evidence; and the trial court granted their motion, vacated those portions of the verdict and judgment determining the amount of damages, and limited the retrial to the issue of damages alone. From the orders so made defendant took this appeal, it being contended in support thereof that the trial court abused its discretion in granting a new trial, and especially in limiting the retrial to the issue of damages alone. There is no merit in the contention.

[1, 2] As to the law of the case, it is well settled that where the amount of damages awarded is grossly inadequate the trial court may, as it did here, grant a new trial upon the ground of insufficiency of the evidence (20 Cal.Jur. 104), and under the authority conferred by section 657 of the Code of Civil Procedure may limit the retrial to the issue of damages alone. Among the many cases so holding are Amore v. Di Resta, 125 Cal.App. 410, 13 P.2d 986; Rigall v. Lewis, 1 Cal.App.2d 737, 37 P.2d 97; Mariani v. Dougherty, 46 Cal. 26.

[3] Here the record discloses the following facts: At the time of Martin's death he was 24 years of age, his wife was 20, and their infant son only four months. He had always enjoyed excellent health, and was steadily employed as a boiler maker's helper at a salary of $27 a week, or $1,404 a year. His life expectancy was practically forty years, and his earning capacity was steadily increasing, his wages having been raised only a short time before he met his death. He lived with his family, maintained a good home, turned over his weekly pay check to his wife, and according to the testimony was a kind and affectionate husband and father. Neither before nor after marriage was Mrs. Martin engaged in any gainful occupation. It was stipulated at the trial that the expenses for decedent's funeral amounted to more than $475. Therefore, taking into consideration the decedent's earning capacity, his life expectancy, the right of his wife and child to his support, and the several other elements of damage necessarily involved in an action of this kind, it is quite evident that there is no ground upon which it may be held as a matter of law that the trial court abused its discretion in declaring that an award of damages of $2,500 under the circumstances was entirely inadequate, and in granting a new trial for that reason.

[4] Defendant contends, however, that before a trial court is justified in granting a new trial upon the ground of insufficiency of evidence, based on inadequacy of damages, and in limiting the retrial to the question of damages alone, it must consider not only the evidence relating to the issue of damages, but also all evidence bearing upon the question of liability, for the purpose of ascertaining whether the verdict as rendered was in fact a compromise verdict and consequently not a real determination of

either the issue of damages or liability; and that if it reasonably appears that it was a compromise verdict and a new trial is granted, it is an abuse of discretion to limit the retrial to the issue of damages alone. Assuming that such is the law, there is nothing in the record in the present case to warrant the belief that this was a compromise verdict. Quite to the contrary, there is an abundance of evidence supporting the conclusion reached by the jury and the trial court that defendant's negligence was the sole proximate cause of the accident which resulted in Martin's death. It cannot be fairly held on appeal, therefore, that in limiting the retrial to the issue of damages alone, there was an arbitrary refusal on the part of the trial court to exercise a reasonable discretion.

The orders appealed from are affirmed; and the motion heretofore made by plaintiffs to dismiss the appeal or affirm the judgment upon the ground that the appeal was taken merely for delay, is dismissed.

We concur: TYLER, P. J.; CASHIN, J.



30 Cal.App.2d 231

PEOPLE v. MEGUGORAC.

Cr. 3073.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1938.

Hearing Denied by Supreme Court Jan. 26, 1939.

1. Criminal law ⇐572

Evidence supported conviction of murder as against claim of alibi.

2. Criminal law ⇐552(3)

The rule that the circumstances relied upon by prosecution to establish guilt must be consistent with guilt of defendant and inconsistent with any other rational conclusion is for guidance of jury only, and does not deprive jury of the right to determine whether guilt of defendant is established beyond a reasonable doubt.

3. Criminal law ⇐1159(2)

Where finding of guilt is sustained by the evidence, reviewing court is bound by jury's finding.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Nick Megugorac was convicted of murder, and he appeals.

Affirmed.

Peter T. Rice, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

WOOD, Justice.

The defendant was convicted of the murder of William Jacobson and prosecutes this appeal from the judgment and from the order denying his motion for a new trial. The evidence is circumstantial and it is the contention of defendant that it is insufficient to sustain the conviction.

William Jacobson during his lifetime conducted a service station and small store in a neighborhood known as the Studebaker tract in Los Angeles county. He lived alone in the rear of his establishment. Early in the morning of July 22, 1937, his body, on which there were four bullet wounds, was found at the service station. The flap on the bib pocket of his trousers was turned back and the pocket was empty. The time of the murder was fixed at approximately 8:40 p. m. in the evening of July 21, 1937, by witnesses who heard several shots fired at that time in the neighborhood of the service station.

The defendant was on the date of the crime a boy of the age of fifteen years. A few days before the commission of the crime he was in the service station and had a revolver in his possession. A witness testified that on that occasion he had asked defendant if he had a permit to carry the revolver and threatened to take the revolver away from him. The defendant then left the service station. It was shown that defendant was familiar with the habits of the decedent and that decedent was in the habit of carrying his dollar bills in the bib pocket of his overalls. Another witness testified that he was in the vicinity of the service station on the evening of July 21, 1937, that he heard the shots fired and saw a slender person running down the railroad tracks at a distance away of a quarter of a city block. The person running wore light trousers that appeared to be "cords" and a white shirt. When defendant was arrested the following evening he

wore light corduroy trousers and a light blue shirt. A lady friend of defendant, who lived three or four blocks from the service station, testified that defendant had previously left a revolver at her home and that on July 20, 1937, she had delivered the revolver to defendant at his request. It was not loaded and she had given him nine shells which had not been discharged. Bullets taken from the body of decedent and from the scene of the crime were examined by a ballistic expert who made experiments with defendant's revolver. He testified that the bullets had been discharged from defendant's revolver.

A number of footprints made by defendant were found in and about the service station. Impressions of these were taken by plaster casts. Some of the impressions corresponded with impressions made by the shoes which defendant wore at the time of his arrest and which according to the statement of defendant were the only shoes he had. These shoes were worn by defendant the Saturday before the murder. Other footprints were found at the service station which corresponded to prints made by another pair of shoes belonging to defendant, which was found by the officers at his home. These shoes had characteristics which were shown in the plaster casts of the footprints. A metal cleat was fixed on the heel of the shoe in the same position as shown in the casts. A nail head visible near the butt of the heel due to the wear of the cleat was shown in the plaster casts. Conditions of wear of portions of the metal cleat were also shown in the plaster casts.

David Ferris testified that in the latter part of June, 1937, he had met defendant at a street corner and defendant had asked the witness if he cared to go with him and rob a filling station but the witness had refused. On the day following defendant's arrest this witness met defendant in jail and asked him, "How about these burglary jobs?" Defendant replied that if Ferris told about the jobs he would kill him.

[1-3] We need not prolong this discussion by detailing other incriminatory circumstances established by the prosecution. The evidence is sufficient to sustain the verdict. Defendant presented a number of witnesses in an attempt to establish an alibi. He now points out certain circumstances which he claims are favorable to the defense and refers to the well-established rule that the circumstances relied upon by the prosecution to establish guilt must be consistent with the guilt of defendant and inconsistent with any other rational conclusion. This rule is for the guidance of the jury. It does not deprive the jury of the right and duty to determine whether the guilt of the defendant is established beyond a reasonable doubt. People v. Perkins, 8 Cal.2d 502, 66 P.2d 631. Since the finding of the jury is amply sustained by the evidence it is binding upon the reviewing court.

The judgment and order denying a new trial are affirmed.

We concur: CRAIL, P. J.; McCOMB, J.



30 Cal.App.2d 147

DENNIS v. BARNETT et al.

Civ. 2189.

District Court of Appeal, Fourth District, California.

Dec. 22, 1938.

1. Mines and minerals ⇐19(1)

The essential requirement of a mining claim location notice is that it must be so described and identified that the location can be found or located from the description by any one interested in doing so. Civ.Code, § 1426; 30 U.S.C.A. § 28.

2. Mines and minerals ⇐38(15)

The description of mining claim in location notice was not so obviously deficient on its face as to preclude admission of notice into evidence where notice stated that claim was located on the north side of Mojave river about 400 yards from Union Pacific track and in Cave Canyon Mining District. Civ. Code, § 1426; 30 U.S.C.A. § 28.

3. Appeal and error ⇐907(3)

Where description of mining claim in defendants' location notice was not so obviously deficient on its face as to preclude admission of notice into evidence and where plaintiff appealed on judgment roll alone, appellate court was required to assume in support of judgment sustaining defendants' location notice that any possible uncertainty in connection with the notice was cleared

up by evidence and was required to sustain implied finding that notice was sufficient. Civ.Code, § 1426; 30 U.S.C.A. § 28.

4. Mines and minerals ⇐19(1)

Where plaintiff, before he attempted to locate mining claim, knew that defendants had located it and were in possession and claimed ownership, the location by defendants was good as against plaintiff who claimed that description in defendants' location notice was inadequate. Civ.Code, § 1426; 30 U.S.C.A. § 28.

5. Appeal and error ⇐656(3)

In action to quiet title to a mining claim where there was a conflict between findings regarding technical description of claim but evidence was not before appellate court, appellate court could not correct findings.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action to quiet title by C. P. Dennis against C. L. Barnett and others, wherein defendant filed a cross-complaint. From an adverse judgment, plaintiff appeals.

Judgment reversed with instructions.

John L. Campbell, of Pasadena, for appellant.

H. Sidney Laughlin, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to a mining claim. The complaint is in the usual form alleging, among other things, that the plaintiff is the owner of a described piece of property, the claim being known as "Bristol No. One", and that the original location notice was recorded on July 2, 1936. The defendants answered and also filed a cross-complaint alleging that on April 10, 1934, they discovered and located a mining claim which they named "Big Sulphur Claim" and describing the same as it was described in the recorded notice of location, a copy of which is attached to the cross-complaint as exhibit "A". It is further alleged that subsequent to the location thereof the locators posted said claim and erected monuments thereon in accordance with the requirements of the statutes of the United States and of the state of California; that they entered into possession of said claim and performed work of the value of $600 during the year 1934-35 and work to the value of $700 during the year 1935-36, making proper proof thereof; and that at all times since the discovery and location of said claim cross-complainants have been and now are in the open, notorious and adverse possession thereof and have never abandoned the same nor any part thereof.

It is then alleged that sometime during the year 1935 and while the cross-complainants were in open, notorious and adverse possession of this claim the plaintiff, with the knowledge and consent of the cross-complainants, went upon said claim for the purpose of examining the same and procuring samples of the ores thereon and of ascertaining the boundaries thereof with the view of purchasing said claim from the cross-complainants; that the plaintiff did examine said claim and the boundaries thereof and the monuments erected thereon and the work done thereon, and took samples of ores and minerals therefrom; that thereafter and during the year 1936, without the knowledge or consent of the cross-complainants and against their will, the plaintiff entered upon said Big Sulphur Claim and attempted to locate the same or some part thereof and caused to be recorded a purported notice of location dated July 2, 1936; and that said purported location and notice of location were made within the limits of the Big Sulphur Claim without the knowledge or consent of the cross-complainants and against their will. The prayer was that the plaintiff take nothing and that the defendants have judgment quieting their title in and to the claim known as the Big Sulphur Claim.

The court found in all respects in favor of the defendants, finding, among other things, that the defendants discovered the Big Sulphur Mining Claim on April 10, 1934; that they erected a substantial discovery monument at the point of discovery consisting of a pile or mound of rocks approximately 3 feet high; that they erected similar substantial monuments at the four corners and one in the center of the end lines of said claim; that all of these monuments were at all times sufficiently conspicuous so that anyone wanting to learn whether the property was located could have readily found the discovery monuments and the boundaries of the claim; that on April 10, 1934, the defendants placed their original location notice in a tobacco can which was put in the discovery monument; that on May 18, 1934,

they recorded a copy thereof in the office of the county recorder of San Bernardino county; that the copy of said recorded notice attached to the cross-complaint is a true copy thereof; that upon inspection and examination of the discovery monument the location notice would have been found and the monument referred to therein could be none other than the discovery monument mentioned in the findings; that Cave Canyon was, at all times mentioned, about five miles long and ranged in width from 1320 feet to a narrow space; that the distance of the discovery monument on said claim from the Union Pacific tracks is about 1200 feet; that the plaintiff could have readily ascertained the extent and boundaries of the Big Sulphur Claim had he made any reasonable effort so to do; that at all times mentioned there was located on said claim the tools and mining equipment of the defendants; that the defendants had been at all times mentioned in possession of said claim, in good faith working the same, and at no time had they abandoned it.

It was further found that on or before July 1, 1936, the plaintiff attempted to locate the Bristol No. 1 claim on substantially the same area of ground set out and described in the Big Sulphur Claim; that the plaintiff on July 2, 1936, recorded in the office of the recorder of San Bernardino county a notice of location; that on July 1, 1936, the plaintiff erected a discovery monument on said Big Sulphur Claim which purported to be the discovery monument of plaintiff's claimed Bristol No. 1; that this monument was erected out of rock and ore taken from a 20-foot shaft sunk by the defendants; that this monument was located 20 feet distant from this shaft; that on that date the shaft contained tools and mining equipment belonging to the defendants; that on that date the discovery monument erected by the defendants on the Big Sulphur Claim was in place and in its original form, was clearly visible from the site of the discovery monument erected by the plaintiff and still contained the tobacco can with the notice of location which had been placed therein by the defendants; and that plaintiff, before he attempted to locate the Bristol No. 1 Claim, knew that the defendants had located the same property under their claim known as the Big Sulphur, and knew that the defendants were in possession and claimed the ownership of the said Big Sulphur Claim. A decree was entered adjudging that the plaintiff has no right, title or interest in and to the land described in the decree, and quieting title to said property in the defendants. From the judgment so entered the plaintiff has appealed upon the judgment-roll alone.

The only point raised by the appellant is that the notice of location recorded by the respondents on May 18, 1934, was ineffectual for the reason that it failed to contain a sufficient description of the property claimed, as required by section 2324, R.S., title 30, section 28, U.S.C.A. and section 1426 of the Civil Code of this state. These sections provide that such a notice shall contain a description of the claim "by reference to some natural object or permanent monument as will identify the claim". While the appellant concedes that under established rules such location notices are to be liberally construed and that since the evidence is not before us all assumptions and intendments are to be taken in favor of the judgment, he contends that since the insufficiency of the notice recorded by the respondents on May 18, 1934, appears upon its face, the court erred in admitting the notice in evidence (citing Darger v. Le Sieur, 8 Utah 160, 30 P. 363) and, therefore, that no evidence which might have been received could have cured the defects and nothing may be assumed in favor of the judgment.

The location notice thus attacked, which the court found to have been placed on the premises and recorded, described the property as follows:

"The general course of the vein is Northerly and Southerly Situated in the Cave Canyon Mining District, County of San Bernardino, State of California, and more particularly described as follows, to-wit:

"Commencing at Monument & running 750 feet Northeasterly 750 Southwesterly together with 300 feet on each side of the center of the vein, this claim is located on the North side of the Mojava River about 400 yards from the Union Pacific track."

[1-3] The statutes above referred to require that the location notice shall contain a description of the claim by reference to some natural object or permanent monument in such a manner as to identify the claim. The essential requirement is that it shall be so described and identified that it could be found or located from the description by anyone interested in doing so,

in other words, that the location of the claim can be readily ascertained. We are unable to agree with the contention that the description here in question is so obviously deficient, on its face, as to preclude the admission of the notice into evidence. Not only did the respondents erect seven substantial monuments on the premises, as found by the court, but the location notice states that the claim is located on the north side of Mojave river about 400 yards from the Union Pacific track and in Cave Canyon Mining District. For all that appears on the face of the notice Cave Canyon may be narrow for a considerable distance near its mouth, which may open at a point on the Union Pacific track. If that be true, and with the additional description that the claim is north of the Mojave river, this may have been a perfect description of the location, enabling a person to locate the property accurately by going to the point on the Union Pacific track opposite the entrance to the canyon and proceeding into the canyon a distance of about 400 yards. It might even be that the Union Pacific had a spur track running into the Cave Canyon Mining District and that the claim in question was about 400 yards from the end of this track. While the facts are not before us, other than as shown by the findings, the court did find that Cave Canyon ranges in width from 1320 feet to a narrow space and that the distance of the discovery monument on this claim from the Union Pacific tracks is about 1200 feet. It does not appear on the face of the notice that the description was not sufficient to enable the property to be readily found and the notice was properly received in evidence. It must be assumed, in support of the judgment, that any possible uncertainty in connection with the notice was cleared up by the evidence and the implied finding that the notice was sufficient must be sustained.

[4] A further consideration is that the appellant had actual notice and knowledge of the location of this claim. The court not only found that at all times the monuments erected by the respondents were sufficiently conspicuous so that anyone seeking to learn whether the property had been located could readily have discovered them, and that the extent and boundaries of the claim could readily have been ascertained by any reasonable effort, but also found that the appellant, before he attempted to locate the same claim, knew that the respondents had located it and that they were in possession and claimed ownership. It was even found that the appellant took rock and ore from the respondents' shaft, which contained their tools and mining equipment, for the purpose of erecting his purported discovery monument some 20 feet away from the shaft. As a conclusion of law, the court found that the appellant "did not act in good faith in attempting to locate or relocate the claim". Under the circumstances the location by the respondents was good as against the appellant. Stock v. Plunkett, 181 Cal. 193, 183 P. 657.

[5] An error appears, however, in the technical description of the property appearing in the findings and in the decree. In each instance, after describing the property as it was described in the location notice which was recorded by the respondents, and in referring to the discovery monument mentioned in said notice, the description continues: "That said discovery monument bears North 43° 36' West 2320 feet, more or less, from the west quarter corner of Section 22, Township 11 North, Range 6 East, San Bernardino Base and Meridian." From this description it would appear that the Big Sulphur Claim was in section 21, township 11 north, range 6 east, S. B. B. & M., whereas the claim described in the complaint is in section 22, township 11 north, range 6 east, S. B. B. & M. The cross-complaint alleged that the property in question was the same as that described in the complaint and the court found that the claim which the appellant attempted to locate, known as Bristol No. 1, was substantially the same area of ground described in the location notice locating the Big Sulphur Claim. There is a conflict between that finding and the finding above quoted as to the relation of the discovery monument to the west quarter corner of section 22 of this township. Apparently the discrepancy and the conflict between these findings arose because of a typographical error in the description last referred to, and the words "West 2320 feet" should be "East 2320 feet". If the word "East" had there been used instead of the word "West" it would seem from the record and the briefs that the description used in the findings and decree would coincide with the description used in the complaint and correctly describe the property in question. Because the evidence is not before us it is not possible to correct the findings here.

For the reasons given the judgment is reversed with instructions to the trial court

to correct the findings by amendment, in so far as this conflict is concerned, taking further evidence if necessary, and after finding the correct description of the property to enter judgment quieting the respondents' title thereto.

We concur: GRIFFIN, J.; MARKS, J.



30 Cal.App.2d 241

TIMM v. McCARTNEY.

Civ. 11564.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1938.

Hearing Denied by Supreme Court Feb. 27, 1939.

1. Appeal and error ⇐1195(1)

The "law of the case" principle applies only to the facts appearing in the original opinion.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

2. Appeal and error ⇐1195(3)

Where decision on appeal disposed of question whether complaint stated cause of action and issues presented by affirmative defenses in second trial were new and were not passed upon at the first trial, decision on appeal became the "law of the case" only to the extent that complaint stated cause of action and did not control the affirmative defenses not previously passed upon.

3. Judgment ⇐4

Generally, the recovery of a judgment creates a new debt or liability distinct from the original claim or demand which liability is not merely the evidence of the creditor's claim but is thereafter the substance of the claim itself.

4. Election of remedies ⇐3(2)

Where vendor conveyed lots to third party during pendency of vendor's action to quiet title in which judgment was entered directing vendor to convey lots to purchaser who sought specific performance, on vendor's failure to comply with judgment, purchaser was not barred from maintaining action for rescission for recovery of purchase money, as against contention that purchaser's election to seek specific performance barred action for rescission and recovery of money paid.

5. Vendor and purchaser ⇐151

Where vendor conveyed lot to third party during pendency of vendor's action to quiet title in which judgment was entered directing vendor to convey lots to purchaser, vendor could not defeat purchaser's right to rescission and recovery of purchase money on ground that third party took property subject to the judgment and that on third party's refusal to convey purchaser could have obtained a commissioner's deed, since purchaser was entitled to a deed from vendor.

6. Limitation of actions ⇐60(5)

Where vendor conveyed lots to third party during pendency of vendor's action to quiet title in which judgment was entered directing vendor to convey lots to purchaser who sought specific performance, purchaser's action for rescission and recovery of purchase money, brought after vendor's failure to comply with judgment, was not barred by limitations, since cause of action arose out of the judgment under which it became the duty of the vendor to convey the lots and was not dependent on original obligation. Code Civ.Proc. §§ 318, 337(1), 338 (2), 339(1), 343.

7. Vendor and purchaser ⇐82

In purchaser's action for rescission and recovery of purchase money paid for lots which vendor conveyed to third party during pendency of vendor's action to quiet title in which judgment was entered directing vendor to convey lots to purchaser, whether purchaser agreed that, if third party could secure purchaser title to certain property involved, she would quitclaim the property she was to get under the judgment to third party, on which alleged agreement vendor relied in making certain settlements with third party, was for the jury.

8. Novation ⇐1

Where vendor conveyed lots to third party during pendency of vendor's action to quiet title in which judgment was entered directing vendor to convey lots to purchaser and it was not shown that an alleged agreement between third party and purchaser existed whereby purchaser was to quitclaim property to third party, if third party could secure for purchaser title to certain property

involved and that vendor relied on such alleged agreement in making a settlement, vendor could not defeat liability in purchaser's action for rescission and recovery of purchase money on ground that a "novation" occurred, since purchaser was never a party to any agreement providing for the substitution of a new obligation for an existing one in so far as she and vendor were concerned. Civ.Code, §§ 1530, 1531.

[Ed. Note.—For other definitions of "Novation," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Emma R. Timm against Alice G. McCartney to recover the amount paid by plaintiff under the terms of a contract for the purchase of realty. From an adverse judgment, defendant appeals.

Affirmed.

Henry G. Bodkin, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment of the superior court of Los Angeles county entered upon a verdict for plaintiff on the first cause of action contained in her amended complaint by which she sought to recover the amount paid by her to defendant under the terms of a contract for the purchase of real property. Plaintiff's first cause of action, which is the only one before us on this appeal, sets forth that by reason of the affirmance by the Supreme Court of a judgment in the case of McCartney v. Campbell et al., 216 Cal. 715, 16 P.2d 729 (hereinafter referred to as action No. 129–142), defendant was obligated, but failed to convey certain described premises to plaintiff; that while said judgment was pending on appeal and before the same became final, defendant, Mrs. McCartney, had placed it beyond her power to convey the property in question to plaintiff by transferring the same to one C. E. McDowell; wherefore plaintiff sought to recover on the first cause of action of her amended complaint, and received a judgment for, the amount of the original purchase price paid by her for the lots, together with interest thereon.

For a better understanding of the issues presented upon this appeal, an epitome of the facts will prove helpful. From the record before us, it appears that on or about April 17, 1918, appellant, Alice G. McCartney, was the owner of a tract of land in the harbor district of the city of Long Beach in the county of Los Angeles. On that day she entered into a contract with A. P. Campbell which constituted both a selling agency and a purchase contract. The character of the contract is determined and settled in action No. 129–142, supra. This contract was by mutual agreement assigned to Campbell-Santley Company, and that company sold to Charles J. Timm and his wife, Emma R. Timm, the latter of whom is the respondent here (her husband having died, she succeeded to his interest in the contract), two lots on partial payment contracts. The original contract between appellant and Campbell was subsequently again assigned by Campbell-Bentley Company to McCalla Company, and finally became the property of E. E. McCalla. Upon completion of their instalment payments, Mr. and Mrs. Timm made demand upon appellant, Mrs. McCartney, record owner of the property, for a deed to the lots. Refusing to execute such deed, Mrs. McCartney instead declared a forfeiture of the original Campbell-McCalla sales agency and purchase contract, for nonpayment of a balance allegedly due her from McCalla and brought an action to quiet title, including in such action the lots upon which the Timms had made payments and allegedly purchased. In this quiet title proceeding Mrs. McCartney took the position that the original Campbell contract was not an agency contract, but only a sale and purchase agreement, and that such contract, not having created an agency between herself, Campbell and his successors and assigns, she was not bound to convey to Mr. and Mrs. Timm or to others who had purchased lots from Campbell or his successors. In that case (action No. 129–142, supra) it was decided that Campbell and his successors were Mrs. McCartney's agents. The judgment in that case, as finally affirmed by the Supreme Court of California, expressly provided that appellant herein, Mrs. McCartney, who was plaintiff therein, should take nothing against any of the defendants, including respondent Mrs. Timm, except as in said judgment provided, and which exceptional provisions adjudged that there was due from E. E. McCalla, one of the defendants in that action, to Mrs. McCartney, the sum of $7,796.60 on the Campbell contract, with

interest from May 1, 1921, and that when said sum should be paid, plaintiff McCartney should convey all of the property to McCalla except, among others, the Timm lots. The judgment provided that Alice G. McCartney should then "duly execute and deliver to the defendant, Mrs. Charles J. Timm, a good and sufficient grant deed, conveying to her, the said Mrs. Charles J. Timm, free and clear of all encumbrances except unpaid taxes and assessments, which became a lien thereon subsequent to the first day of May, 1921", those parcels bought by the Timms.

In this last-named litigation C. E. McDowell, hereinbefore mentioned as the party to whom Mrs. McCartney transferred the property, was one of counsel for McCalla, who as assignee was the then holder of the original Campbell contract. The Timms, who were codefendants of McCalla in the quiet title action, were not represented therein by attorney McDowell, but appeared by separate counsel. During the pendency of Mrs. McCartney's appeal in the Supreme Court in the quiet title action, attorney McDowell received a deed of conveyance from his client, McCalla, transferring to McDowell all of McCalla's interest in the property, and McCalla then sought relief in bankruptcy. In June, 1928, while the appeal was still pending in the Supreme Court, and after McDowell had obtained the deed from McCalla, the former commenced negotiations with Mrs. McCartney looking toward a settlement of that litigation, and on July 9, 1928, entered into an agreement with Mrs. McCartney, appellant herein, to pay her a certain sum of money, and to quitclaim to her all of his interest in a portion of the property involved, and Mrs. McCartney agreed on her part to convey to McDowell all of her title in other portions of the property, among which were the lots that respondent herein, Mrs. Timm, and her husband had contracted to purchase. This settlement between McDowell and appellant was perfected without consulting or obtaining the consent of Mrs. Timm, the respondent herein. Under the terms of that settlement, Mrs. McCartney composed her claims to $7,796.60 and for the taxes as provided in the judgment then pending on appeal, and agreed to dismiss such appeal, pursuant to which the appeal was later dismissed as to certain parties thereto, but not in so far as respondent herein, Mrs. Timm, was concerned. Following the consummation of the settlement agreement between McDowell and Mrs. McCartney it appears that the former commenced negotiations with the respondent herein, Mrs. Timm, and other lot purchasers named in the quiet title suit then pending on appeal, with the object in view of compromising their claims. Finally Mrs. Timm signed a letter addressed to McDowell, in which letter she stated that if McDowell could obtain title in himself to her lots, she would accept from him a portion of them and he could retain the remainder under certain terms and conditions. Later Mrs. Timm repudiated this letter on the ground that it was not in accord with the representations McDowell had made to her as to what it would contain, and that she, relying upon his representations, had not read the letter at the time she signed it. Another instrument was drafted by Mr. McDowell, but Mrs. Timm refused to sign it because she claimed it did not contain all of the terms originally agreed upon. Meanwhile, McDowell received from Mrs. McCartney a deed conveying to him the property named in the McDowell-McCartney settlement, and which deed included the so-called Timm lots, while Mrs. McCartney received from McDowell a quitclaim deed to the remainder of the properties and some cash.

About this time Mrs. Timm substituted her present counsel and proceeded to file a brief in action No. 129–142, supra, in the Supreme Court. Thereupon Mr. McDowell had himself substituted as a party plaintiff in the same litigation as the alleged owner of the property conveyed to him by Mrs. McCartney and filed a brief urging a reversal of the judgment which he as attorney for McCalla had obtained against Mrs. McCartney. We call attention to this last-named factual situation in connection with the matter of notice on the part of McDowell, and to which notice, if any, upon his part we must give consideration later in this opinion.

[1, 2] Upon the first trial of the cause now before us, the trial court sustained defendant Mrs. McCartney's objection to introduction of evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action and entered judgment for Mrs. McCartney. Upon appeal this judgment was reversed. Timm v. McCartney, 9 Cal.App.2d 230, 49 P.2d 315. Respondent's contention that this decision on appeal becomes the law of the case is without merit, except that the decision did

become the law of the case only to the effect that the first cause of action of the amended complaint now before us states a cause of action. It is well established that the law of the case principle applies only to the facts appearing in the original opinion. As a matter of fact, the decision of the District Court of Appeal contains the following language [page 318]: "Certain defenses are set up by the defendant in an answer and there may be other defenses when the pleadings are finally formed and the issues joined; indeed, there may be several meritorious defenses to the plaintiff's cause of action, but we are discussing a ruling of the court which amounts to the sustaining of a general demurrer without leave to amend, and such defenses do not appear upon the face of the complaint. The first count of the complaint states a cause of action. * * *" The issues presented by the affirmative defenses contained in the answer were new, were not passed upon at the first trial, and are not foreclosed by the reversal of the former judgment in this case.

By her answer filed in the instant case, defendant, Mrs. McCartney, put in issue eleven separate and affirmative defenses: (1) that McDowell took title from Mrs. McCartney with knowledge of and subject to plaintiff's rights and was bound by the judgment, and was substituted in the action in the place of Mrs. McCartney; hence the clerk of the court could have issued a deed binding upon McDowell and passing good title to Mrs. Timm had she demanded it and complied with the terms of the judgment; (2) that prior to the conveyance to McDowell, Mrs. Timm agreed with McDowell in writing to a settlement whereby she authorized the conveyance, and was therefore estopped; (3) that by a modification of the judgment entered by stipulation Mrs. McCartney was not required to make a deed unless she was reimbursed for taxes paid pending the litigation; (4) that the judgment is a bar to this suit; (5) that heretofore Mrs. Timm had sued McDowell as successor to Mrs. McCartney upon the same cause of action as herein set forth and had dismissed that suit with prejudice; (6) that Mrs. Timm had settled and compromised her claims with McDowell as successor to Mrs. McCartney; (7, 8, 9, 10, 11) that the cause of action was barred, respectively, by subdivision 1 of section 337, subdivision 2 of section 338, subdivision 1 of section 339, section 343, and section 318, of the Code of Civil Procedure.

[3, 4] Appellant contends that when respondent and her husband made their original demand for a deed and the same was refused by appellant, Mrs. McCartney, who instead filed a suit to quiet title to the lots claimed by respondent, the latter had two alternatives—first, to rescind the contract and sue to recover the purchase money paid on the purchase price, or second, to sue for damages suffered by reason of the vendor's refusal to perform the contract. Milton Realty Co. v. Butterfield, 87 Cal.App. 772, 262 P. 419; Craig v. White, 187 Cal. 489, 202 P. 648; Buckmaster v. Bertram, 186 Cal. 673, 200 P. 610. Therefore, asserts appellant, when respondent filed an answer in the heretofore mentioned quiet title suit (action No. 129–142, supra), in which respondent sought affirmative relief, to-wit, specific performance of the contract for the sale and purchase of her lots, she thereby made an election of remedies and is now barred from bringing the instant action for rescission and to recover the money paid by way of purchase price. Conceding the correctness of these abstract principles of law, the answer nevertheless to appellant's contention in the present case is that the cause of action now before us is not based on a breach of the original contract, but is predicated on a breach of the obligation to convey the lots that were ordered to be conveyed by the judgment entered in said action No. 129–142. The rule in this regard is thus stated in 34 Corpus Juris at page 755: "As a general rule the recovery of a judgment creates a new debt or liability, distinct from the original claim or demand, and this new liability is not merely the evidence of the creditor's claim, but is thereafter the substance of the claim itself." After the rendition of the judgment in action No. 129–142, supra, in which action respondent here sought specific performance of her contract with Mrs. McCartney and at which time the latter held the property, it became her duty to convey the property bought and paid for by respondent Mrs. Timm when certain asserted and established claims urged by Mrs. McCartney and set forth in the judgment were paid and discharged. However, when her claims were compromised, appellant, Mrs. McCartney, instead of complying with the obligation imposed upon her by the judgment in action No. 129–142, supra, conveyed the lots in question to Mr. McDowell while the cause was on appeal, and thus put it beyond her power to comply with the terms of the judgment. The question then arises as to

whether appellant here, having put it out of her power to carry out the terms of the judgment may retain the money paid on account of the purchase price of the lots. We hold that Mrs. McCartney should not be permitted to convey the land to someone other than the purchaser thereof and still retain the purchase money. Even though respondent did undertake in action No. 129–142, supra, to enforce specific performance of her contract, nevertheless, when it appeared that after such judgment became final appellant herein refused to comply with the terms thereof by delivering up the property in question upon the settlement of her claims as provided for in the judgment, and when she based her refusal upon the ground that after the entry of the judgment and while it was pending on appeal she had disposed of the property, then respondent herein was entitled to avail herself of her right of action to recover the purchase price. Until the judgment for specific performance was satisfied, it was no bar to a subsequent action for rescission and recovery of the purchase money.

[5] Appellant's contention that McDowell took the property subject to the judgment in action No. 129–142, supra, and that therefore Mrs. Timm could have demanded a deed from McDowell, and should he refuse such deed recourse could have been had under the judgment to the court for a commissioner's deed, is answered by the statement that respondent herein was entitled to a deed from Mrs. McCartney upon satisfaction of the latter's claims as enumerated in the judgment. Respondent herein, as vendee under the purchase contract, was not required to accept the property subject to any claims McDowell might assert against it. She was entitled to a deed from Mrs. McCartney, and when the latter placed it without her power to execute such a deed with its accompanying warranties, every principle of justice, equity and right dictates the existence of an obligation upon her part to return the purchase price.

[6] Appellant next contends that the first cause of action in respondent's claim herein is barred by the statute of limitations. This claim is without merit, because it is at once apparent that the cause of action now before us did not arise until subsequent to the entry of judgment in action No. 129–142, supra, and at the time when it became the duty of Mrs. McCartney, pursuant to the terms of the judgment, to deed the lots to Mrs. Timm. The instant litigation is based on a new set of facts not existing at the time of the former judgment. Silva v. Reclamation District No. 1001, 41 Cal.App. 326, 182 P. 786. It was the violation of the new obligation contained in the judgment which gave rise to the instant cause of action.

[7] It is next urged by appellant that respondent was barred from maintaining this action by reason of the terms of a contract dated November 8, 1928, in the form of a letter which provided that if McDowell could get respondent's title to certain property involved, she would quitclaim the rest of the property she was to get under the judgment to McDowell. In support of this claim it is asserted that Mrs. McCartney, with the knowledge of respondent, relied on said settlement in making her settlement with McDowell. Testimony with reference to the nature of and the circumstances surrounding the signing of this letter is in sharp conflict. There was testimony presented to the jury that the letter in question was signed by the plaintiff without reading the same, in the belief, induced by the allegedly fraudulent representations of McDowell, that the provisions of such letter were different from those actually contained therein. The state of the evidence was such that the trial court was warranted in giving an instruction to the effect that if the jury believed respondent's testimony they would be warranted in finding that such agreement was not binding upon the plaintiff. By their verdict the jury resolved this conflict in favor of respondent and against appellant. There was substantial evidence, which, if believed by the jury, would warrant such a finding, and we cannot disturb it. There is also evidence in the record that McDowell and appellant, Mrs. McCartney, had already agreed upon a settlement before the letter in question was written and that consequently appellant did not rely upon it when she made her bargain with McDowell.

[8] Appellant's contention that the alleged agreement between McDowell and respondent and the agreement between McDowell and Mrs. McCartney amounted to a novation, which relieved Mrs. McCartney of any obligation to return any money paid under the original contract between her and respondent, cannot be sustained, for the reason that, as heretofore stated, the jury found, upon competent evidence, that respondent was never a party to any agreement providing for the substitution of a new obligation for an existing one in so far

as she and appellant, Mrs. McCartney, were concerned. A novation must be a substitution of a new obligation between the same parties, with intent to extinguish the old obligation. Civ.Code, §§ 1530, 1531. These requisites are not here present.

Finally, appellant urges that the court erred in giving certain instructions. We have carefully considered appellant's assignments of error with reference to the instructions given, have examined the challenged instructions, and find therein nothing prejudicial to appellant's rights in so far as respondent's first cause of action, which alone is before us and is the only one upon which respondent prevailed, is concerned. The instructions as a whole correctly instructed the jury as to the law of the case.

For the foregoing reasons, the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.



30 Cal.App.2d 165

WIDENER v. HARTNETT et al.

Civ. 11917.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1938.

1. Abatement and revival ⇐74(1)

The administrator of estate of plaintiff dying after judgment in his favor may be substituted as party plaintiff and enforce judgment after five years from date of entry thereof. Code Civ.Proc. §§ 385, 685, 686.

2. Appeal and error ⇐983(3)

The trial court's ruling on administrator's motion for issuance of execution on judgment for decedent after five years from date of entry thereof should not be disturbed by appellate court, in absence of showing of clear abuse of discretion. Code Civ.Proc. § 685.

3. Execution ⇐73

An attorney, who represented judgment debtor in supplementary proceedings, instituted by judgment creditor just before expiration of five years after entry of judgment, to examine debtor concerning his ability to pay judgment, was proper party to be served with notice of motion by administrator of deceased creditor's estate for issuance of execution after lapse of such period, though another attorney represented debtor during trial and was served with notice of entry of judgment, appeal from judgment of nonsuit as to debtor's codefendant and abandonment of latter appeal. Code Civ.Proc. § 685.

4. Execution ⇐73

Service of notice of motion by administrator of deceased judgment creditor's estate for issuance of execution after five years from entry of judgment on attorney who represented judgment debtor in supplementary proceedings was sufficient, even if personal service is required, in view of statute defining such service as "delivery to the party or attorney on whom the service is required to be made." Code Civ.Proc. §§ 685, 1011.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action for personal injuries by Burthold Widener against Timothy T. Hartnett and another. Judgment for plaintiff against named defendant, and from an order granting a motion by H. Park Arnold, as administrator of plaintiff's estate, after plaintiff's death, to substitute movant as party plaintiff and issue execution on the judgment, named defendant appeals. On the administrator's motion to dismiss the appeal and affirm the order.

Motion granted and order affirmed.

D. Joseph Coyne and Dan M. Critchley, both of Los Angeles, for appellant.

Holbrook & Tarr, of Los Angeles, for respondent.

YORK, Presiding Justice.

Respondent has moved to dismiss the appeal herein and affirm the judgment or order on the ground that the appeal therefrom is frivolous and the question presented so unsubstantial as not to require further argument.

It appears from the record that Burthold Widener recovered a judgment against appellant on February 17, 1932, in a personal injury action, but was unable to collect the same before his death, which occurred on February 22, 1937, although two executions had theretofore issued, to-wit: one on April 9, 1932, and the other on October 22, 1936. Letters of administration in his estate were duly granted on September 13, 1937, to H. Park Arnold, respondent here-

in, and on February 4, 1938, said administrator moved the court for an order substituting himself as party plaintiff in place of decedent (under section 385, Code of Civil Procedure), and also for issuance of execution after a lapse of five years from the date of entry of the judgment (under section 685, Code of Civil Procedure), which motion was granted. The appeal herein is from such order granting said motion, appellant contending (1) that a new party plaintiff may not be substituted after the five-year statute has run; and (2) that he had no proper notice of the motion for issuance of execution for the reason that service was made upon attorney Dan M. Critchley, while Max A. Sturges was at all times his attorney of record.

Respondent in support of his motion to dismiss and affirm contends that a mere inspection of the record will disprove appellant's contentions; that it is elementary that a judgment may be enforced by the administrator in the same manner as the deceased might have enforced it, and that service upon attorney Critchley was proper for the reason that in January, 1937, appellant was brought into court on supplementary proceedings in connection with the judgment of February 17, 1932, at which time he was represented by said attorney Critchley.

[1, 2] Section 685 of the Code of Civil Procedure provides: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion. * * *"

As regards appellant's first point, it is said in 1 California Jurisprudence 76: "Even in the case of actions which do not survive death, it is well settled that death of the plaintiff after judgment in his favor and while the judgment stands does not abate the action or affect the validity of the judgment. Sherwin v. Southern Pacific Co., 168 Cal. 722, 145 P. 92; Andrews v. Valley Ice Co., 167 Cal. 11, 138 P. 699; Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 86 P. 178; Blackwell v. American Film Co., 48 Cal.App. 681, 192 P. 189. Such a judgment becomes part of his estate and may be enforced by his representatives. Sherwin v. Southern Pacific Co., supra. This rule rests upon the theory that the original wrong or claim is merged in the judgment and that thereafter the controversy is over the judgment and not over the original wrong."

Section 686 of the Code of Civil Procedure provides: "Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced, as follows:

"1. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest."

The trial court's ruling on a motion pursuant to the statute (sec. 685, Code Civ. Proc.) should not be disturbed in the absence of a showing of a clear abuse of discretion. Corcoran v. Duffy, 18 Cal.App.2d 658, 64 P.2d 735.

There is not merit in appellant's first point.

[3] With reference to appellant's second point that he had no proper notice of the motion for issuance of the execution after a lapse of five years, while it is shown by the record that Max A. Sturges was one of the attorneys of record during the trial of the action and that notice of entry of judgment was served upon him, as was the notice of appeal from the judgment of nonsuit as to defendant corporation, and as well the notice of abandonment of that appeal, the record also shows that on January 13, 1937, in a supplementary proceeding instituted by respondent's intestate to examine appellant concerning his ability to pay the said judgment, appellant was represented by Attorney Dan M. Critchley.

Inasmuch as it has been held that "when a judgment in a cause has once been entered under the direction of the court, the rights of the client have been finally determined and the attorney ceases to have any authority except for the purpose of sustaining and enforcing the judgment, or seeking to have it set aside or reversed" (Spencer v. Barnes, 6 Cal.App.2d 35, 37, 43 P.2d 847, 848); and the said Max A. Sturges so far as the record reveals has never attempted to have the said judgment either set aside or reversed, it would appear that the attorney Dan M. Critchley, who represented appellant in the supplementary proceedings just prior to the expiration of five years after the entry of said judgment, was the proper party to be served.

[4] In this connection, appellant contends that under the ruling in the case of Tolle v. Doak, 12 Cal.App.2d 195, 55 P.2d 542, personal service is required in a proceeding under section 685, supra, for the reason that said section is silent as to the manner of giving notice. However, personal service means "delivery to the party or attorney on whom the service is required to be made". Sec. 1011, Code Civ. Proc. It is therefore the conclusion of this court that service upon attorney Dan M. Critchley was sufficient notice to appellant of the motion for issuance of execution.

For the foregoing reasons the motion to dismiss appeal is granted and the order is affirmed.

We concur: DORAN, J.; WHITE, J.



30 Cal.App.2d 169

WIDENER v. HARTNETT.

Civ. 11956.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1938.

1. Appeal and error ⇐786

An appeal from judgment for administrator in action to renew judgment for his intestate against appellant in intestate's personal injury action on ground that judgment was not final when complaint was filed because of intestate's pending appeal therefrom must be dismissed as frivolous, where intestate's notice of appeal from judgment of nonsuit as to appellant's codefendant was inadvertently so worded as apparently to include appeal from judgment for intestate and such purported appeal was abandoned soon after filing of complaint and over a year before entry of judgment in instant action.

2. Appeal and error ⇐174

Defendant, failing to raise point that plaintiff had no right to maintain action to renew judgment in his favor against defendant because it was not final when complaint was filed on three prior occasions when plaintiff endeavored to collect judgment, cannot avail himself of such point on appeal from judgment for plaintiff in instant action.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Burthold Widener, after whose death H. Park Arnold, administrator of plaintiff's estate, was substituted as party plaintiff, against Timothy T. Hartnett, to renew a judgment for plaintiff in a personal injury action against defendant. Judgment for substituted plaintiff, and defendant appeals. On respondent's motion to dismiss the appeal and affirm the judgment.

Motion granted and judgment affirmed.

D. Joseph Coyne and Dan M. Critchley, both of Los Angeles, for appellant.

Holbrook & Tarr, of Los Angeles, for respondent.

YORK, Presiding Justice.

The within action was brought by Burthold Widener, now deceased, to renew a judgment in his favor recovered in a personal injury action against appellant herein, within five years from the date of its entry. Judgment was rendered in favor of respondent in the instant action from which appellant has prosecuted an appeal. Respondent has made a motion in this court to dismiss the appeal and affirm the judgment on the ground that the appeal is frivolous and the question presented thereby so unsubstantial as not to require further argument.

[1, 2] Appellant's sole point is that respondent had no right to maintain this action because it was predicated upon a judgment which had not become final when the complaint herein was filed.

The record discloses that the judgment which forms the basis of the instant action was recovered by respondent in a personal injury suit which he brought against appellant and the Southern California Telephone Company. In the original action judgment was entered against appellant but a nonsuit was granted in favor of said Southern California Telephone Company. Respondent appealed from the judgment of nonsuit and in so doing worded his notice of appeal in such manner that it might appear to also have included an appeal from the judgment in his favor and against appellant. That appeal, or purported appeal, was pending when the present action was commenced, but it was abandoned about a month after the complaint herein was filed and more than a year prior to the date of entry of judgment herein, the trial

of the instant action having taken place on March 9, 1938.

The question here involved was recently before the Supreme Court in an action between the same parties to set aside a conveyance and assignment of real and personal property. Widener v. Hartnett, 83 P.2d 718. It was there stated [page 719]: "On two occasions prior to the filing of the present action, and on one later occasion, writs of execution were issued on the prior judgment against appellant, and were returned unsatisfied, without attempt by appellant at any time to quash the writs or to prevent plaintiff from endeavoring to collect on the prior judgment on the ground that a purported appeal therefrom was pending. These facts do not sustain appellant's charge that the present action was premature."

The court in the instant action found "that said judgment has become final and conclusive upon the defendant herein and that there was no appeal taken from said judgment and that the appeal taken from the codefendant Southern California Telephone Co., a corporation, against plaintiff, was duly abandoned".

From this it appears that while the notice of appeal purports to include an appeal by respondent from a judgment in his own favor, it was inadvertently done. Further, appellant having failed to raise the question upon the three prior occasions when respondent was endeavoring to collect said prior judgment, his attempt to do so at this time cannot avail him anything.

The motion to dismiss the appeal is granted and the judgment is affirmed.

We concur: DORAN, J.; WHITE, J.



30 Cal.App.2d 185

PEOPLE v. KING et al.

Cr. 1947.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1938.

Rehearing Denied Jan. 12, 1939.

Hearing Denied by Supreme Court Jan. 26, 1939.

1. Homicide ⇐234(10)

A voluntary confession by accused that he had pointed out victim's stateroom to another but that he understood other was "only going to beat up" victim was sufficient to sustain conviction for murder in the second degree, although uncorroborated, where there was independent proof of the corpus delicti.

2. Homicide ⇐234(3)

Testimony of accomplice *held* sufficiently corroborated to sustain conviction for murder in the second degree.

3. Criminal law ⇐507(1)

The governing factor in determining whether witness is an accomplice is the part which he played in perpetration of the crime.

4. Criminal law ⇐507(1)

A corrupt co-operation in the commission of crime must be shown to establish witness as accomplice.

5. Criminal law ⇐507(1)

Aid or assistance given after commission of a crime does not establish a witness as an accomplice, as it would constitute an independent crime on part of witness and would not make him responsible for crime originally committed.

6. Criminal law ⇐742(2)

Where acts and conduct of witness are admitted, whether witness was accomplice is question of law for the court.

7. Criminal law ⇐742(2)

Where it is disputed whether witness committed acts which would make him accomplice, issue is for jury under proper instructions.

8. Criminal law ⇐1159(5)

Where it is disputed whether witness committed act which would make him an accomplice, finding of jury on such issue will not be disturbed on appeal.

9. Criminal law ⇐1159(5)

Where it was alleged that testimony of witness was not competent corroborative evidence on ground that he was an accomplice, but there was no direct evidence tending to show that witness intentionally furthered undertaking of defendants or that he corruptly co-operated with them, jury's finding under proper instructions defining an accomplice and informing jury of the necessity for corroboration of the testimony of an accomplice and the kind and degree of proof required to establish corroboration, that witness was not an accomplice would not be disturbed on appeal.

10. Criminal law ⇐1144(13)

In determining sufficiency of corroborating evidence, appellate court assumes jury drew all inferences from facts proved as "reason of jury" might sanction.

11. Criminal law ⇐1159(5)

Appellate court cannot weigh evidence corroborating accomplice.

12. Criminal law ⇐511(2)

Evidence corroborating testimony of accomplice need not connect defendant with commission of offense beyond all reasonable doubt.

13. Homicide ⇐234(3)

Statements and admissions of defendants viewed in connection with other evidence produced independently of accomplice *held* to sufficiently connect defendants with commission of alleged murder to sustain conviction as against contention that testimony of accomplice was not sufficiently corroborated.

14. Homicide ⇐254

Evidence that plans were made to "beat up" victim, that preparations were made to meet force with force, and that death was accomplished by means of a deadly weapon, was sufficient to sustain conviction for murder in the second degree of all who united in the plan, including those not present as well as the actual assailants, notwithstanding that plan was only to commit a misdemeanor. Pen.Code, § 192.

15. Homicide ⇐169(4)

In prosecution for murder committed as result of a common design, evidence of conspiracy is not considered for purpose of establishing existence of a conspiracy as such, but to show circumstances under which homicide was committed.

16. Homicide ⇐29

One who unites with others to commit an unlawful act, whether a felony or misdemeanor, with intent to resist opposition by force, is as guilty of murder committed by some one of the parties in furtherance of unlawful design as the one actually wielding the weapon, particularly where the means to be used by the conspirators were not specifically understood and at least some of persons before setting out on unlawful mission prepared for trouble with knowledge and consent of all.

17. Conspiracy ⇐47

The existence of a conspiracy to commit an unlawful act need not be proven by direct evidence.

18. Conspiracy ⇐47

The existence of a conspiracy to commit an unlawful act may be inferred from circumstances as by the number, aims, and behavior of the parties at and before commission of the crime.

19. Conspiracy ⇐47

In prosecution for an offense committed as result of a common design, evidence may be given of any facts from which existence of a conspiracy can be fairly deduced or logically inferred.

20. Conspiracy ⇐48

In prosecution for offense committed as result of a common design, jury may determine from all facts whether crime charged is the natural and probable consequence of the unlawful design.

21. Conspiracy ⇐48

In prosecution for an offense committed as result of a common design, whether offense committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of one of the conspirators foreign to the common design is for the jury.

22. Criminal law ⇐1159(5)

Where there is any evidence to support jury's finding on question of whether act committed was ordinary and probable effect of common design or whether it was independent product of mind of conspirators outside of common design, jury's determination is conclusive.

23. Homicide ⇐249

Where it was planned to "beat up" victim and preparations were made for trouble, at least one of parties equipping himself with a bludgeon, evidence warranted finding that killing of victim with a deadly weapon was a natural and probable consequence of a conspiracy on part of all to commit an unlawful assault on victim, and finding was conclusive on appeal.

24. Criminal law ⇐59(5)

One who counsels the commission of an act is liable for the natural and probable consequences attendant on commission of the contemplated act.

25. Homicide ⇐249, 305

In prosecution under indictment charging defendants as principals with murder, prosecution was not limited to proving guilt by showing that defendants were aiders and abettors or that they were coconspirators, but was entitled to prove guilt by any evidence competent to establish the crime charged and was entitled to an instruction permitting jury to determine guilt without limitation to any specific theory.

26. Homicide ⇐305

In prosecution under indictment charging defendants as principals with murder, court could instruct on as many theories as were logically deducible from the evidence, leaving it for jury to say whether from all circumstances defendants were to be held guilty as principals.

27. Criminal law ⇐59(3)

Those who aid and abet commission of an offense, though not present, are liable for the natural and probable consequences incident to commission of act which they have counseled or advised.

28. Criminal law ⇐25

Under California law, as at common law, the nature of crime actually committed, and not act contemplated, determines liability and character of guilt not only of the one committing the act but of those who counseled him to proceed.

29. Criminal law ⇐69

One who would have been an accessory before the fact at common law is liable and punishable as a principal under California statutes. Pen.Code, § 792.

30. Criminal law ⇐110

There being no such offense as accessory before the fact under California statutes, but those who would have been an accessory before the fact at common law being triable and punishable as principals, jurisdiction is in county in which offense is committed. Pen.Code, § 792.

31. Criminal law ⇐73

The responsibility of one who has counseled and advised the commission of a crime or engaged in a criminal undertaking does not cease unless within time to prevent contemplated act he has done everything practicable to prevent its consummation, notwithstanding he may have changed his mind and tried too late to avoid responsibility.

32. Homicide ⇐29

If the actual perpetrator of a homicide done in furtherance of the common criminal undertaking is guilty of murder, all who have joined with him and who have not withdrawn from the undertaking, even though not present at time of actual killing, are likewise guilty of murder.

33. Homicide ⇐309(3)

In prosecution for murder committed while carrying out a common design to "beat up" victim, failure to instruct with reference to manslaughter was not error, notwithstanding that killing was not intended by defendants.

34. Homicide ⇐35

"Manslaughter" is distinguished from "murder" by the absence of malice, but may be included in it. Pen.Code, § 188.

[Ed. Note.—For other definitions of "Manslaughter" and "Murder," see Words & Phrases.]

35. Homicide ⇐11

The existence of malice is indispensable to constitute murder, and any unlawful killing of a human being with malice aforethought is "murder." Pen.Code, § 188.

36. Homicide ⇐22(1), 23(1)

All murder except that defined by statute to be murder in the first degree is murder of the second degree, and, if the killing is not one so defined as murder in the first degree, and no considerable provocation appears therefor, or the circumstances show an abandoned and malignant heart the killing is murder in the second degree. Pen. Code, §§ 188, 189.

37. Homicide ⇐11

Where members of union conspired to "beat up" on chief engineer on steamer for having discharged a member of the union without paying him overtime pay allegedly due him but engineer was killed by one of party in carrying out plan, malice sufficient to constitute the killing murder rather than manslaughter was implied, on ground that there was no evidence of provocation and that circumstances showed an abandoned and malignant heart. Pen.Code, §§ 188, 189.

38. Homicide ⇐309(3)

In prosecution for murder, where the evidence clearly shows that accused, if guilty at all, is guilty of murder, an instruction on manslaughter should not be given.

39. Homicide ⇐309(3)

In prosecution of union members for murder of chief engineer of steamer while carrying out a plan to "beat up" engineer for having discharged a union member without paying him overtime pay allegedly due, refusal to instruct on manslaughter was not error.

40. Homicide ⇐309(3)

In prosecution for murder, refusal to instruct on manslaughter was not error under circumstances, particularly where all proper instructions requested by defendants were either given or included in court's charge and all principles of law necessary for proper understanding of case were properly instructed upon.

41. Criminal law ⇐777½

In a criminal prosecution, the court in commenting on the evidence is not required to sum up all of the evidence, both favorable and unfavorable, or comment on the testimony of every witness in the case.

42. Criminal law ⇐777½

In a criminal prosecution, the court may make such comment as in its discretion it may deem necessary for a proper determination of the case, so long as material evidence is not withdrawn from consideration of the jury, nor an attempt made to control the verdict.

43. Criminal law ⇐782(3), 785(1)

In a criminal prosecution, the court should make clear to the jury that they are the final and exclusive judges of all questions of fact and of credibility of witnesses.

44. Criminal law ⇐762(2)

In prosecution for murder, where court repeatedly admonished jury that they were the final and exclusive judges of all questions of fact and of the credibility of witnesses, comment advanced only as views of trial judge without attempting to infringe upon powers of jury did not violate rights of defendants.

45. Criminal law ⇐622(1)

A defendant jointly charged is not entitled to a separate trial as a matter of law but question of severance rests in discretion of trial court. Pen.Code, § 1098.

46. Criminal law ⇐622(1)

Refusal to grant a motion for severance is not an abuse of discretion merely because damaging testimony or admission of confessions of a codefendant might be admitted in evidence against such codefendant, and not be admissible against the moving defendant. Pen.Code, § 1098.

47. Witnesses ⇐268(1), 280.

In prosecution for murder, where witness had testified at length that he had been living with an attache of the district attorney's office up to day he took witness stand, and was cross-examined exhaustively as to his employment and whereabouts from time of murder until he was called as a witness and prolonged cross-examination brought out that witness had been kept by district attorney's office in Alameda county for a considerable period continuously up to his taking the stand, question "Where do you live today?" after such examination was not a "preliminary question" and refusal to permit answer was not an "undue limitation of cross-examination."

48. Jury ⇐62(3)

A departure from the statutory requirements with respect to the procedure to be followed by the jury commissioner in making up and submitting the trial jury list is not basis for error, unless there is a material departure prejudicing defendant. Code Civ.Proc. § 204b.

49. Jury ⇐62(3)

Where no bias or prejudice on part of jury commissioner was asserted and only error claimed was in his method of procedure in compiling trial jury list, alleged failure to make up list according to the statutory requirements did not constitute a "substantial departure" on which error could be predicated. Code Civ.Proc. § 204b.

50. Jury ⇐91

Mere acquaintanceship of a prospective juror with one or more of the attorneys in the case is not a ground of disqualification nor is the fact that the prospective juror is a client of one of the attorneys. Pen.Code, § 1074, subd. 2.

51. Criminal law ⇐1158(3)

Where it was alleged that juror had intentionally concealed on examination on voir dire that relationship of attorney and client existed between client and husband and a deputy district attorney, but allegation was denied by counter affidavits and testimony of juror who, on examination on voir dire, had answered all questions propounded fully and fairly and testified that she knew the deputy district attorney but that she knew an attorney for one of the defendants slightly better, trial court's de-

termination that prejudice on part of juror did not exist and was not concealed would not be disturbed on appeal. Pen.Code, § 1074, subd. 2.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Earl King, E. G. Ramsay, and Frank Conner were convicted of murder in the second degree, and they appeal.

Affirmed.

Leo Friedman, of Long Beach, and George R. Andersen and Aubrey Grossman, both of San Francisco, for appellant King.

Herbert Resner, and George Olshausen, of San Francisco, for appellant Conner.

Myron Harris and William H. Older, both of Oakland (John B. Ehlen, of San Francisco, of counsel), for appellant Ramsay.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellants herein, namely, Earl King, E. G. Ramsay and Frank Conner, were, with one George Wallace and one Ben Sakovitz, indicted by the grand jury of Alameda county as principals for the murder of George W. Alberts. Sakovitz has never been apprehended. King, Ramsay, Conner and Wallace were tried before a jury and all four were found guilty of murder in the second degree. The defendant Wallace has not appealed, but King, Ramsay and Conner have each appealed from the individual judgments of conviction and from the orders denying each a new trial.

George W. Alberts was chief engineer on the steamer Point Lobos. He was killed in his stateroom on Sunday morning, March 22, 1936. At the time of his death he was about thirty-seven years of age, in excellent physical condition, and stood about six feet in height and weighed around two hundred pounds. A crushing blow with a dull instrument of some kind was dealt him in the middle of the back of the head, which blow did not cut, but battered the flesh from the skull. Likewise severe blows were dealt him on each side of the head above and behind the ear. According to the testimony of the autopsy surgeon, any one of the three blows on the head would have rendered Alberts unconscious, and in all probability that on the back of the head was fatal. In addition he was stabbed in the chest and shoulders, and a knife had been thrust into his abdomen, through both walls of the stomach and into the pancreas; and a cut nine and one-half inches long was made on the back of the left thigh to the bone, which severed both the large artery and vein of the left leg.

Alberts entered his stateroom at about 11 o'clock on Sunday morning, having come aboard ship with the captain. At about 11:20 the ship's first engineer opened the door of Alberts' stateroom to call him and found him dead. The killing had been accomplished and the escape of the assailants from the scene of the crime had been effected in about fifteen minutes.

At the time of the killing the three appellants here were connected with the Marine Firemen, Oilers, Watertenders and Wipers Union. King was the secretary and chief executive officer of the union; Ramsay was a patrolman of the union; and Conner, an oiler on the Point Lobos, was the union's delegate on the ship. The defendants Wallace and Sakovitz were also active members of the same union. All of the defendants, except Sakovitz, were arrested about five months after the killing. Conner was taken into custody in Seattle, Washington, and shortly afterwards made a confession which later he attempted to repudiate. Wallace was arrested in Brownsville, Texas. He also confessed, and at the trial became a witness for the people. Much of the evidence introduced by the prosecution to establish its case consisted of the testimony given by Wallace, the testimony introduced in corroboration thereof, and Conner's confession. The remainder of the evidence upon which the convictions were based included independent facts and circumstances which it was claimed tended to establish guilt. From all of the evidence so offered and received, the following facts appear: On Saturday morning, March 21, 1936, Conner telephoned King at the office of the union in San Francisco, telling him that Alberts had discharged one Edward Widmer, a member of the engineroom crew and a member of the union, without paying him all of his overtime money due and asking King for a patrolman to come over and get the matter fixed up. The defendant Wallace was at the union headquarters at

about the time Conner telephoned to King. King met Wallace and asked him if he wanted to go on a job, to which Wallace replied that he did not, and walked away. Ramsay and Sakovitz met Wallace shortly thereafter and told him that he had better come back to King's office; that King wanted to see him. The three, Wallace, Ramsay and Sakovitz, then entered King's private office, where Ramsay stated: "That God damn fink, he belongs to some company union and he needs a lesson." To which King added: "Go over and beat him up." It appears that in addition to this there was further discussion among those assembled, both prior and subsequent to King's instruction to go over and beat him up. King went to the outer office of the union where A. M. Murphy, assistant secretary and treasurer of the union, had his desk. Here, he directed Murphy to give Ramsay $30, which Murphy did. Upon being asked by Murphy for what purpose the union funds were being given to Ramsay, King replied that the money was to be used for an "expedition across the bay", that he did not know how much Ramsay would need but he wanted him to have enough so he would not run short.

Wallace and Sakovitz proceeded to the street in front of the union headquarters. Here, Sakovitz asked Wallace if he had anything on him as they expected trouble over there. Wallace replied that he did not, and Sakovitz suggested that he go see the janitor, which he did. While Wallace was waiting at the supply room of the union hall, King passed him and told him not to say anything to the janitor about the matter. The janitor gave Wallace a piece of rubber, described as being one-half of a printing roller about eighteen inches to two feet long and about four or five inches in thickness. This bludgeon was given by Wallace to Sakovitz. Ramsay, Wallace, Sakovitz and a sailor whose name is not known, then proceeded to the Howard Terminal in Oakland where the Point Lobos was docked. They arrived on the dock at about noon and remained there until about four o'clock in the afternoon. During this time Ramsay twice left the group and boarded the Point Lobos. Upon his first return he remarked: "That God-damned fink, I talked to him and I could not get him off." Conner then joined the group on the dock. Ramsay boarded the ship a second time, and upon leaving said: "I'm going aboard the ship and try to get him to come ashore." Upon rejoining the group, Ramsay stated: "The only way to get him is to go aboard the ship." Ramsay left the group a third time, going in the direction of the ship, but came running back saying: "He is coming." At this juncture a police officer in uniform appeared on the dock. Alberts, with a companion, had left the ship and, upon crossing the dock, entered an automobile and drove away. Sakovitz turned to Wallace and Ramsay saying: "That God damned fink got away." Whereupon Ramsay said to the group: "You had better beat it, split up." They then separated.

On the following day, Sunday, March 22nd, the Point Lobos was moored at the Encinal dock in Alameda, it having been moved over night. On the morning of this day, Wallace and Sakovitz met in San Francisco. With them was the sailor whose name is not given, but who was with them on the previous day. Sakovitz stated: "Well, I have got to go over and get that God damned fink." Whereupon, Wallace spoke up saying: "I don't want to go over." To which Sakovitz replied, "You had better come over if you know what is good for you." The three, Wallace, Sakovitz and the sailor, proceeded to the dock in Alameda. Here Sakovitz gathered up two more sailors from the steamer Arctic. Conner, who had been with them on the previous day, then joined the group. After a few minutes Sakovitz asked Conner to go aboard and see if he could locate Alberts. At the same time Sakovitz explained to Conner and the rest of the group where each should station himself should Conner find Alberts aboard. The whole group then went aboard the ship and took their stations as planned. Wallace went to the starboard side of the ship near the passageway in which Alberts' stateroom was located, and was later seen with his hand on the knob of Alberts' stateroom door; Sakovitz to the forward end of the passageway close to Alberts' door, facing Conner; and the others took various positions about the deck of the ship.

When Alberts came aboard with Captain Odeen, he entered his stateroom. Conner gave a signal with his hand to Sakovitz. In a few minutes a noise emitted from the stateroom which Alberts had entered, and which was described by Wallace as sounding like "ugh, ugh, ugh". In a

matter of seconds Sakovitz emerged with blood on his hands and told Wallace: "You had better beat it."

After the killing the group met at a nearby warehouse, where Sakovitz told them "it is all over with—beat it". The group then dispersed, but later Sakovitz, Wallace and the unidentified sailor met in a hotel in San Francisco where Sakovitz lived, and at that time Sakovitz told them that they were in trouble and he gave Wallace $10, which he said had been sent by King so that Wallace could leave San Francisco. Thereafter Sakovitz, Wallace and the sailor met in Salt Lake City, in Chicago, and again in New York; and while in New York Sakovitz told Wallace that he knew friends who could get papers so that he could go to Russia; but nothing further was done about the plan. In the meantime, on the day following the killing, Ramsay returned to Murphy part of the $30 which had been given to Ramsay the day before the killing at King's request, Ramsay stating that he was "hot". Murphy afterwards asked King how the money should be entered in the books, and King told him they would discuss the matter later. Two months after the killing and on May 31, 1936, Wallace returned to San Francisco, saw Murphy and told him he wanted to see King; but Murphy informed him that King was away. Wallace then asked Murphy if he knew that he, Wallace, was "in that bunch on the Point Lobos job". Murphy replied he did not; whereupon Wallace told him that King had sent him and Sakovitz and the sailor over to the Point Lobos and that after the job was over they fled; and that not having heard from King, he came back to "find out what the score was". The next morning Ramsay was brought to the hotel room where Wallace was staying. Murphy was present; and Ramsay, upon seeing Wallace, turned pale and said "For God's sake, what are you here for?" and Wallace replied "I am here to find out what the score is". Ramsay and Wallace then engaged in a conversation, in Murphy's presence, wherein Ramsay told Wallace he didn't think the police were wise, that nobody knew who did the job, and that he, Ramsay, had been thoroughly questioned by the police.

King was absent from the city at that particular time, so Murphy made an appointment to see one Lawrence Ross, and at the conference which followed Murphy told Ross who Wallace was and about his participation in the killing of Alberts, thereupon Ross suggested that Wallace go back east and notify Murphy, addressing him under another name, where he would be located about July 2nd. Ross also suggested that Wallace's membership book be "phoneyed" so that Wallace could go back and work on east coast ships. In accordance with Ross' suggestions, Murphy made out a new union book for Wallace, under the name of George White, with a notation showing the payment of all dues to July, 1936; and he asked Wallace to write to him under the name of Albert Diekman. Wallace then, for the second time, left San Francisco for New York. Upon King's return Murphy told him of Wallace's visit, and King told Murphy that Wallace was a "damn fool" and "should not have come out here". He further stated that he had sent Sakovitz and Wallace to the Point Lobos to "tamp up" on Alberts, but "the damn fools had gone too far and killed him". Subsequently Wallace wrote to Murphy telling him to have King write to him. Wallace signed his own name to the letter and Murphy handed the letter to King, and when King saw the signature he told Murphy that Wallace was crazy for signing his own name; that it was very dangerous because the authorities might have gotten hold of the letter; that Wallace was a menace and it would be a good thing if something happened to him. Later Murphy received a second letter from Wallace signed "George White", asking why King had not written to him, and stating that if King did not take care of him he would "cut the line—you know what I mean". When Murphy gave King this letter, King again said that Wallace was a fool and a menace and that he wished he would not write. On August 1st, Wallace again returned to San Francisco, and went to King's hotel. He told the clerk his name was Wallace and that he wanted to see King; and the clerk told him King was not home. Across the street Wallace met a man named O'Neill who told him King did not want to see him and did not want him to be seen by anyone who knew him; so O'Neill took Wallace to a hotel, gave him $50 and told him to keep off the street and avoid seeing anyone. O'Neill also told him that Ross had tried to make arrangements for Wallace to go to Russia, but was unable to do so, and suggested that Wallace go to Mexico.

Shortly after Wallace's arrival in San Francisco on this occasion, King told Murphy that Wallace was in town again and that he was planning to get him into Mexico; and he instructed Murphy to give his dues stamp to O'Neill because he wanted Wallace's book to be stamped ahead. Thereupon, O'Neill took Wallace's union book and returned it to him about six hours later with the dues marked paid up to April, 1937, and although Murphy's initials "A. M. M." were attached to the union book they were written by someone else.

Wallace then again left San Francisco and went to El Paso, and from there to Del Rio, and then on to Brownsville, Texas. While in Brownsville he attempted to go to Mexico City, but not having sufficient money to get across the border, he wrote a letter to Murphy, under the name of Albert Dickman, requesting that Murphy give the letter to King and that King write to him at Brownsville, Texas. Upon receipt of the letter Murphy told King about it and King said he would take care of it, but he never did. Shortly afterwards Murphy learned through his room mate that officers from the district attorney's office were in the building; and he related to them what he knew about the case; and within a few days thereafter Wallace was apprehended in Brownsville, and Conner taken into custody in Seattle.

Many of the facts above narrated were established by the testimony of Wallace, and appellants contend as one ground for reversal that his testimony is without sufficient corroboration to entitle it to consideration. We are unable to sustain this view.

[1,2] As to the appellant Conner, the record shows, as stated, that he confessed his part in the affair. In this regard he admitted to the district attorney that on the morning Alberts was killed he pointed out Alberts' stateroom to Sakovitz, just after Alberts entered it, but he claimed that he understood Sakovitz was only going to beat up Alberts. That this confession was voluntarily made and properly admitted in evidence finds ample support in the record, and where, as here, there is independent proof of the corpus delicti, a conviction based on confession will stand although uncorroborated by any other evidence. People v. Ruef, 57 Cal.App. 230, 206 P. 775; People v. Vuyacich, 57 Cal. App. 233, 206 P. 1031; People v. Ford, 25 Cal.App. 388, 143 P. 1075. And as to the appellants Ramsay and King, it appears that corroborative testimony was given by several witnesses. A man named Jackson testified that he saw the appellant Ramsay on the Point Lobos after 12:00 o'clock noon of Saturday, March 21st, and that he saw him inside the door of a warehouse on the dock after 3:00 o'clock p. m. of the same day, although Ramsay testified he left the ship and the dock about 2:15 p. m. of that day. Another witness, named Showell, testified that he and Alberts left the Point Lobos together about 3:30 p. m. on Saturday and drove away in Showell's car. Officers on the Point Lobos testified that they saw Wallace on the Point Lobos about 10:15 Sunday morning, March 22nd, and that they saw both Sakovitz and Wallace leave the ship about 11:15 of the same morning. Moreover, there was the testimony given by Murphy describing the meeting between Ramsay and Wallace in the hotel room, as to Ramsay's startled demeanor and exclamations when he first saw Wallace there; and as to the incriminating conversations carried on between Ramsay and Wallace in which they related circumstances leading up to and following the killing, wherein Ramsay stated, in addition to what has already been mentioned, that they missed Alberts the first day, that they were waiting for him to come down the gangplank and were just ready "to take him" when a policeman appeared and "they had to scram". Murphy also testified as to the circumstances of King having given Ramsay the $30 for the "expedition across the bay", and as to King's statement as to the purpose of such payment; also as to King's statements, activities, and alarm concerning Wallace's subsequent visits to San Francisco, and the correspondence Wallace tried to carry on with King, through Murphy; also, as to the preparations and plans King endeavored to carry out to keep Wallace away from California; and particularly King's statement to Murphy to the effect that he had "sent Sakovitz and Wallace to the Point Lobos to tamp up on the chief and the damn fools had gone too far and killed him". Wallace's testimony was further corroborated in many other details, by the testimony of other witnesses, and by documentary evidence; but it would seem to be unnecessary, in view of the foregoing, to further elaborate thereon.

[3-9] The further contention is made that the testimony of Murphy is not competent corroborative evidence for the reason that he, too, was an accomplice. The evidence conclusively shows, however, that his only connection with the case prior to the killing of Alberts was when he handed the $30 of union money to Ramsay at King's direction. The governing factor in determining whether a witness is, or is not, an accomplice, is the part which he played in the perpetration of the crime. To establish him as an accomplice, a corrupt cooperation in the commission of the crime must be shown. Aid or assistance given after the commission of the crime is of no avail as it would constitute an independent crime on the part of the witness, and make him in no way responsible for the crime originally committed. People v. Collum, 122 Cal. 186, 54 P. 589. That Murphy handed $30 of union money to Ramsay at King's request is conceded. Nor is it controverted that Murphy asked King the purpose for which the money was to be used at the time it was handed to Ramsay. There is no direct evidence tending to show that Murphy intentionally furthered the undertaking of the defendants or that he corruptly cooperated with them in the slightest degree. Where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice. People v. Coffey, 161 Cal. 433, 119 P. 901, 39 L.R.A.,N.S., 704; People v. Schumann-Heink, 98 Cal.App. 225, 276 P. 625; People v. Allison, 200 Cal. 404, 253 P. 318. Whenever there is any dispute about what a witness did or did not do, which if he did do would make him an accomplice, this issue of fact should be submitted to the jury under proper instructions, and the finding of the jury upon such an issue will not be disturbed on appeal. People v. Coffey, supra. In this case any inference of the complicity of Murphy deducible from his acts and conduct was resolved adversely by the jury. The trial court gave them proper instructions defining an accomplice, informing them of the necessity which the law imposes for the corroboration of the testimony of a witness who is such an accomplice, and the kind and degree of proof required to establish a sufficient corroboration. On the issue of the complicity of Murphy their finding cannot be disturbed on the showing here made.

[10-12] In urging their point that the testimony of the defendant Wallace is not sufficiently corroborated to entitled it to consideration, the appellants most vehemently disavow their former associate and characterize him as a person wholly unworthy of belief. The tests to be applied in determining the sufficiency of the corroboration of the testimony of an accomplice are aptly set forth in the case of People v. Collier, 111 Cal.App. 215, 295 P. 898. The court there reviewed the leading cases dealing with the question of the sufficiency of the corroboration of the testimony of an accomplice and, in view of the importance of the question here, we quote from the opinion at length. The court there stated, at page 228, 295 P. at page 903:

"There is no hard and fast rule by which it can be determined what evidence is sufficient and what is insufficient when the appellate court approaches the subject as a trier of fact in the place and stead of the jury. The Code section is plain, section 1111 of the Penal Code provides: 'A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.' In People v. Davis, supra [210 Cal. 540, 293 P. 32], the Supreme Court pointed out that the rule had always been adhered to that 'the corroborating evidence must do more than raise even a grave suspicion of defendant's guilt' and People v. Kempley, 205 Cal. 441, 271 P. 478, and other authorities were cited. Of course, evidence which merely creates a suspicion would not be sufficient else the provisions of section 1111 would be meaningless, and, though we find many 'negative' authorities on what is insufficient under the section, it is difficult to find the authorities which declare what is sufficient. People v. Negra, 208 Cal. 64, 69, 280 P. 354, 356, comes closest to the line where it is said: 'And if there is other evidence which measures up to the requirement of the Code (supra), tending to connect the defendant with the commission of the crime charged, then such testimony of the accomplice is to be considered by the jury, as is any other testimony, and must be given the weight to which the jurors may conclude that it is entitled. People v. Hoosier, 24 Cal.App. 746, 142 P. 514. The evidence tending to connect a defendant with the commission of the crime may be slight, and, when standing by itself, entitled to but little consideration. People v.

McLean, 84 Cal. 480, 24 P. 32. The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. People v. Martin, 19 Cal. App. 295, 125 P. 919. The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict. People v. Armstrong, 114 Cal. 570, 46 P. 611; People v. Sullivan, 144 Cal. 471, 473, 77 P. 1000. It is not necessary that the corroborating evidence should go so far as to establish by itself, and without the aid of the testimony of an accomplice, that the defendant committed the offense charged.'

"The foregoing quotation was quoted with approval by the Supreme Court in People v. Davis, supra, with the explanation that it was not intended to hold that the corroborating evidence was sufficient if it merely raises a suspicion of defendant's guilt. But, though evidence which merely creates a suspicion is insufficient because of the statutory presumption of innocence of crime, we must not overlook the weight of an inference which is 'a deduction which the reason of the jury makes from the facts proved.' Code Civ. Proc. § 1958. Hence, when the question of the sufficiency of the corroborating evidence is before the appellate court we cannot approach it in the same manner the jury would do, but we must assume that the jury drew all inferences from the facts proved as 'the reason of the jury' might sanction. If, therefore, facts are in evidence which would reasonably support an inference that defendant was involved in the conspiracy alleged and the jury so found, it is not the province of the appellate court to weigh the evidence or to determine in its mind what weight it would give to such evidence.

"The code section expressly states that the corroborating evidence 'shall tend to connect the defendant with the commission of the offense.' This does not mean that such evidence shall connect the defendant beyond all reasonable doubt. Such is the rule of People v. Martin, 19 Cal.App. 295, 301, 125 P. 919, which is quoted with approval in People v. Negra, supra. Therefore, unless the appellate court can say that the corroborating evidence is either incompetent or is, as matter of law, of such a character that it could not tend to connect defendant with the commission of the offense and could not reasonably support an inference of such connection, the finding of the jury on that issue should not be disturbed."

[13] Viewing the statements and admissions of the appellants in connection with the other evidence in the case produced independently of the defendant Wallace, we cannot say that the whole does not tend to connect the appellants with the commission of the offense charged, and that the finding of the jury in this particular is without support.

[14] Appellants also urge with much force the further contention that in any event the evidence taken as a whole is not sufficient to support the verdict against them. It is maintained that the killing of Alberts was not the natural or probable consequence of any act on the part of any of them. In this connection it is argued that the evidence discloses nothing more than a plan to subject the decedent to a simple assault. The acts of beating and stabbing Alberts to death are denounced as the independent products of the minds of Sakovitz and Wallace, foreign to and outside of any common plan or design, advised, counseled or joined in by the appellants. The claim is also made that the evidence discloses only an undertaking to commit a misdemeanor and consequently none of them can be held guilty of any crime greater than manslaughter.

In support of this last contention they rely upon the case of People v. Munn, 65 Cal. 211, 3 P. 650. The facts in that case show that two individuals became engaged in an altercation in a bar room. One man struck the other above the temple with his fist. The man who was struck died later as the result of the blow. The court held that since death was not intended, and since the assailant intended and actually made only a simple assault, although death did flow from it, he could be held for manslaughter only. This holding is in consonance with the provisions of section 192 of the Penal Code defining manslaughter.

In the present case there is presented no question of death resulting from the commission of a simple assault or occur-

ring in the commission of a misdemeanor. There is here a death resulting from the use of a deadly weapon which the appellants say they never intended. Such weapon was, however, actually used, and by one who joined with them in the plan to beat up the deceased, which plan they counseled. The question is whether the use of such a deadly weapon upon the person of Alberts and his resulting death was a natural or probable consequence of the plan or agreement among the actual assailants and the appellants for which the appellants may be held liable, two of them, Ramsay and King, not being present.

The character of the plan is of great importance. Here, several men set out to beat up another. In the words of King, he "sent them over to tamp the chief". Preparations were made for trouble. It was known that he was vigorous and strong. One, at least, prior to setting out on the expedition, equipped himself with a bludgeon. At the scene of the expected trouble others were asked to stand by. Not being able to get at the victim the first day, the majority returned the second day and proceeded to the victim's place of abode aboard ship. They prepared, and were prepared, to meet force with force and to overcome resistance at any cost. The natural and probable consequence of such an undertaking is homicide, and the homicide here committed by one of the conspirators is nothing less than murder. All who combined to commit the unlawful act of violence are equally guilty. The law makes no distinction between them and each is responsible for the act of any other of the party in the prosecution of the original design. All joining in the enterprise are as guilty of murder as the person who actually caused the death. People v. Creeks, 170 Cal. 368, 149 P. 821; People v. Ford, supra; Peden v. State, 61 Miss. 267.

[15, 16] In such cases evidence of a conspiracy is not considered for the purpose of establishing the existence of a conspiracy as such, but to show the circumstances under which the homicide was committed. The law is that when one person unites with other persons in an enterprise to commit an unlawful act, whether a felony or a misdemeanor, with the intention to resist all opposition by force, and murder is committed by some one of the party in the furtherance of the unlawful design, he is as guilty as the person actually wielding the weapon, and particularly where, as in this case, the means to be used by the conspirators were not specifically understood or agreed upon and at least some of the persons before setting out upon the unlawful mission prepared for trouble with the knowledge and consent of all. People v. Ford, supra.

[17-23] The existence of a conspiracy to commit an unlawful act need not be proven by direct evidence. As is said in People v. Donnolly, 143 Cal. 394, 77 P. 177, 179: "From the secrecy with which unlawful undertakings are adopted, it would be generally impossible to make such proof by direct testimony." It may be inferred from circumstances, as by the number, aims and behavior of the parties at and before the commission of the crime. Evidence may be given of any facts from which the existence of a conspiracy may be fairly deduced or logically inferred. The jury may likewise determine from all of the facts in the case whether the crime charged is the natural and probable consequence of the unlawful design. The rule is stated in People v. Kauffman, 152 Cal. 331, 335, 92 P. 861, 863, as follows: "But whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury. Bowers v. State, 24 Tex.App. 542, 7 S.W. 247, 5 Am.St.Rep. 901; Spies v. People, 122 Ill. 1 [12 N.E. 865, 17 N.E. 898], 3 Am.St.Rep. 320, and, if there be any evidence to support the finding of the jury on this question, its determination is conclusive." In this case there is ample evidence from which the jury were warranted in concluding that the killing of Alberts was the natural and probable consequence of a conspiracy on the part of all the defendants to commit an unlawful assault upon him, and the finding of the jury upon this question of fact is conclusive on appeal.

[24] The numerous cases cited by appellants in support of the proposition that the criminal responsibility of aiders and abettors—accessories before the fact at common law—is no greater than the intent formed by them, and that this intent is limited to the particular criminal act contemplated, do not go to the point that such an accessory is not liable for all the natural and probable consequences attendant upon the commission of the contemplated act.

These cases are authority only in support of the rule that one is not bound by the act of another foreign to and different from the act counseled and advised. The guilt of an accessory in the crime actually committed, though not advised, is illustrated in the case of Regina v. Bernard, 1 F. & F., 240, 242: "'"* * * As if A. advised B. to rob C., and in robbing him B. kills him, either upon resistance made, or to conceal the fact; or if A. solicit B. to burn the house of C., and B. does it accordingly, and the flames taking hold of the house of D., that likewise is burnt; in these cases A. is accessory to B. both in the murder of C. and in the burning of the house of D.; the events, though possibly falling out beyond his original intention, were, in the ordinary course of things, the probable consequences of what B. did under the influence and at the instigation of A."'"

That one is not liable who has counseled a particular criminal act, and the perpetrator has committed a different one not falling within the probable consequences of that advised, is illustrated in note 37, 16 Corpus Juris, 135, as follows: "If one advises another to beat a man and the latter dies as the result of the beating, it is murder, and the adviser is an accessory to the murder; but if the advice is to burn a house and the person advised breaks in and commits larceny therein, but does not burn it, the adviser is not an accessory to the burglary, for that is a distinct and separate offense. (Reg. v. Henry, 9 C. & P., 309, 38 ECL 187; 4 Blackstone Comm., p. 37; 1 Hale P.C., p. 617.)"

[25, 26] Complaint is made that the prosecution proceeded upon a dual theory of guilt, viz., that the appellants were guilty as aiders and abettors and were likewise guilty as coconspirators, and that the court committed error in instructing the jury accordingly. Under the charge in the indictment it is immaterial whether the defendants were proved guilty by showing that they were aiders and abettors or coconspirators. The prosecution was not limited to either theory, but was entitled to make proof of guilt by any evidence competent to establish the crime charged, and was likewise entitled to an instruction permitting the jury to determine the ultimate fact of guilt without limitation to any specific theory or aspect of the case. People v. Burke, 18 Cal.App. 72, 122 P. 435. It was proper for the court to instruct the jury on as many theories as were logically deducible from the evidence, and it was for the jury to say from all the circumstances connected with the commission of the act whether the defendants were to be held guilty or not guilty as principals in the crime. People v. Quimby, 6 Cal.App. 482, 92 P. 493; People v. Byrnes, 30 Cal. 206; People v. Sica, 76 Cal.App. 648, 245 P. 461; People v. Burdg, 95 Cal.App. 259, 272 P. 816.

[27-30] In this state those persons who aid and abet in the commission of a criminal offense, though not being present, are liable for all the natural and probable consequences incident to the commission of the act which they have counseled or advised. As at common law, the nature of the crime actually committed, and not the act contemplated, fixes and determines the liability and character of guilt not only of him who committed the act, but of those who counseled him to proceed. One who would have been an accessory before the fact at common law is triable and punishable as a principal under our statutes, and, there now being no such offense as accessory before the fact, the jurisdiction is in the county in which the offense is committed. Pen.Code, § 792. The case of People v. Huling, 71 Cal.App. 144, 234 P. 924, cited by appellants, holds merely that since all of the acts of Huling were done after the initial acts of Alford in committing the offense, he could not be held as a principal and would at most be but an accessory after the fact, an accessory under our statutes, and, as such, could be tried only in Los Angeles county where his acts were done.

[31] Furthermore, in this state the responsibility of one who has counseled and advised the commission of a crime, or engaged in a criminal undertaking, does not cease, unless within time to prevent the commission of the contemplated act he has done everything practicable to prevent its consummation. It is not enough that he may have changed his mind, and tries when too late to avoid responsibility. He will be liable if he fails within time to let the other party know of his withdrawal, and does everythnig in his power to prevent the commission of the crime. People v. Ortiz, 63 Cal.App. 662, 219 P. 1024; 16 Cor.Jur. 137.

[32] If the actual perpetrator of a homicide done in the furtherance of the common criminal undertaking is guilty of

murder, all who have joined with him and who have not withdrawn from the undertaking, even though not present at the time of the actual killing, are likewise guilty of murder.

[33-37] Nor do we find any error in the failure to instruct the jury with reference to manslaughter. Appellants concede the killing to be murder, but deny responsibility on the ground that it was never intended by them. This position, as heretofore pointed out, is untenable. Moreover, manslaughter is a crime distinct from murder, but may, however, be included in it. It is distinguished from murder by the absence of malice. To constitute murder the existence of malice is indispensable, and any unlawful killing of a human being with malice aforethought is murder. Section 188 of the Penal Code provides that malice may be express or implied, and that "it is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart". All murder, except that defined by section 189 of the Penal Code to be murder in the first degree, is murder of the second degree, and if the killing is not one so defined as murder of the first degree, and no considerable provocation appears therefor, or the circumstances show an abandoned and malignant heart, it is murder in the second degree. People v. Ford, supra, page 401, 143 P. 1075. There is no evidence of provocation for the killing of Alberts. The circumstances show nothing but an abandoned and malignant heart. Malice is, therefore, implied.

[38, 39] The rule is well established that when the evidence clearly shows that a defendant, if guilty at all, is guilty of murder, an instruction upon manslaughter should not be given. People v. Turley, 50 Cal. 469; People v. Chaves, 122 Cal. 134, 54 P. 596; People v. Shannon, 203 Cal. 139, 263 P. 522. Under the circumstances of this case it was not error for the trial court to omit or refuse to instruct upon the subject of manslaughter.

[40] In addition, all proper instructions requested by appellants were either given or included in the charge of the court, and all principles of law necessary for a proper understanding of the entire case were properly instructed upon.

[41-44] The contention is made that the comment of the trial court on the evidence was unfair and prejudicial to the defendants. The court in commenting on the evidence is not required to sum up all of the evidence, both favorable and unfavorable, or comment on the testimony of every witness in the case. The court may make such comment as in its discretion it may deem necessary for a proper determination of the case, so long as material evidence is not withdrawn from the consideration of the jury, nor an attempt made to control the verdict. In all such cases it should make clear to the jury that they are the final and exclusive judges of all questions of fact and the credibility of witnesses. People v. De Moss, 4 Cal.2d 469, 50 P.2d 1031; People v. Ottey, 5 Cal.2d 714, 56 P.2d 193; People v. Gosden, 6 Cal.2d 14, 56 P.2d 211. Here the trial court repeatedly so admonished the jury, and the comment was a fair statement of the court's view of the evidence. The comments at all times were advanced only as the view of the trial judge, without in any manner attempting to infringe upon the powers of the jury, and in our opinion did not violate the rights of any of the defendants.

[45, 46] Error is claimed because of the refusal of the trial court to grant separate trials. Since the enactment of section 1098 of the Penal Code, in its present form, a defendant jointly charged is not entitled to a separate trial as a matter of right, and the question of severance rests entirely in the discretion of the trial court. People v. Thomas, 135 Cal.App. 654, 27 P. 2d 765. It is not an abuse of discretion to refuse to grant a motion for a severance because damaging testimony or the admission or confessions of a codefendant might be admitted in evidence against such codefendant, and not be admissible against the moving defendant. People v. Swoape, 75 Cal.App. 404, 242 P. 1067; People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951.

[47] The cross-examination of the witness, Slade was not unduly limited. Upon the subject of his residence, he testified at length that he had been living with an attache of the district attorney's office up to the very day he took the witness stand. In addition he was cross-examined exhaustively and answered all questions as to his employment and whereabouts from the time of the murder until he was called as a witness. The defendants were permitted by prolonged cross-examination to bring before the jury the fact that he had been kept by the district attorney's office in

Alameda county for a considerable period of time continuously up to his taking the witness stand. The question, "Where do you live today?" was asked after such exhaustive examination, was not a preliminary question, and the rule stated in Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624, does not apply.

[48, 49] The appellants have raised the point that the trial jury list, from which the panel and the jury were ultimately selected, was not made up according to the requirements of section 204b of the Code of Civil Procedure, and in this particular have attacked the procedure followed by the jury commissioner in making up and submitting such trial jury list. No bias or prejudice on the part of the commissioner is asserted, and the only error claimed is in his method of procedure in compiling the list. Unless there be a material departure from the provisions of the statute which militates to the prejudice of a defendant, no error can be claimed in presenting a panel from which a jury is to be selected. People v. Richards, 1 Cal.App. 566, 82 P. 691. Here we find no such substantial departure.

[50, 51] Upon their motions for a new trial, the appellants urged upon the trial court, and have made the point here, that there was misconduct on the part of the jury, in that one of the jurors, Mrs. Julia Vickerson, intentionally concealed certain facts upon examination on voir dire, which rendered her disqualified to act as a juror in the case. In support of this contention, an affidavit was filed alleging the relationship of attorney and client between Charles Wehr, deputy district attorney, and the juror, and the juror's husband, Dr. J. I. Vickerson. The allegations of this affidavit were contradicted by several affidavits filed counter thereto and by the testimony of the juror, her husband and Mr. Wehr, as well as the testimony of several other witnesses, taken upon the hearing of the motion. Upon her examination on voir dire, the juror answered all questions propounded to her fully and fairly, and then testified that she knew Mr. Wehr, but that she knew Mr. Harris, attorney for one of the defendants, slightly better. Mere acquaintanceship with one or more of the attorneys in the case is not a ground of disqualification, and neither is the fact that a prospective juror is a client of an attorney a ground of disqualification. Pen.Code, § 1074, subd. 2; People v. Conte, 17 Cal.App. 771, 122 P. 450, 457. It does not appear that a prejudiced state of mind existed on the part of the juror which would deprive the defendants of a fair trial, and upon extensive evidence the trial court determined that such prejudice did not exist and was not concealed. This finding of the trial court will not be disturbed on appeal. People v. Zirbes, 6 Cal.2d 425, 57 P.2d 1319; People v. Galloway, 202 Cal. 81, 259 P. 332.

Appellants' other and varied specifications of error based on objections running through some four thousand pages of transcript, and discussed in half that number of pages of printed matter presented here in the form of briefs, have been carefully considered and appear to be without merit. From a consideration of the whole record we are convinced that no prejudicial error was committed in the rulings of the court and that all questions of fact involved were submitted to the jury under proper instructions.

The judgments of conviction, and the orders appealed from are, and each of them is, affirmed.



30 Cal.App.2d 73

GOODMAN v. MORTHRIFT FINANCE CORPORATION, Limited, et al.

Civ. 10907.

District Court of Appeal, First District, Division 2, California.

Dec. 21, 1938.

Rehearing Denied Jan. 20, 1939.

Hearing Denied by Supreme Court Feb. 16, 1939.

1. Evidence ⇐417(9)

In action for conversion against pledgee of motorboat under pledge agreement reciting pledge of boat to secure payment of "indebtedness now due or hereafter to become due" to pledgee, with provision that in event "all indebtedness owed by me" should not be paid to pledgee within 10 days from date, pledgee was authorized to sell boat, parol evidence was properly introduced to show what debt was payable under pledge agreement, since agreement showed no debts due or to become due within 10-day period.

2. Shipping ⇐30

Evidence *held* to justify judgment in favor of buyer of motorboat against pledgee for conversion of boat on ground that amount for which boat had been pledged by seller had been paid.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Booth B. Goodman against Morthrift Finance Corporation, Limited, and others for conversion of a motorboat. Judgment for plaintiff, and the named defendant appeals.

Affirmed.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

Booth B. Goodman, of Oakland, for respondent.

STURTEVANT, Justice.

The plaintiff brought this action to recover damages for the alleged wrongful conversion of a certain motor boat. The trial court rendered a judgment in favor of the plaintiff and the defendant Morthrift Finance Corporation, Ltd., a corporation, has appealed.

For some time prior to the 6th day of May, 1937, C. C. Cumby was engaged in the business of buying and selling used automobiles. From time to time he discounted the sales contracts with Morthrift Finance Corporation, Ltd., a corporation. Prior to the 6th day of May, 1937, Cumby had so sold and financed a large number of automobiles. In general the sales were made under contracts which provided that the deferred payments should be made in monthly instalments in from twelve to twenty-four months. There was approximately the sum of $12,000 owing to defendant upon said promissory notes secured by mortgages payable in monthly instalments but no one of said notes was in default. However, as to seven automobiles, deferred payments in the sum of $3,000 had been collected by Cumby and not accounted for. In the early part of May, Cumby made payments on the last mentioned sum and certain of the automobiles were repossessed by the defendant. In this manner the said sum of $3,000 was fully accounted for.

On May 6, 1937, Cumby met with Mr. Beck, the president of the defendant corporation, and discussed a possible settlement of the alleged misappropriations by Cumby. Prior to that date Cumby had paid defendant certain sums on the above mentioned $3,000. He promised to pay the balance, an additional amount in the sum of $1,000. As a part of the same transaction and conversation Cumby executed and delivered to the defendant a "Pledge to secure payment of indebtedness". That document is as follows:

"In consideration of any financial accommodations given, or to be given, I have this day deposited with the Morthrift Finance Corporation, Ltd., a California corporation, the following articles of personal property, to wit: One 19 foot 6 inch Krem Kraft built power boat, powered by one 12 cylinder Lincoln-Zephyr motor, Engine No. 68-7222, together with all accessories and appurtenances thereto, and one automobile boat trailer with two axle cradle, by way of pledge to secure the payment of any indebtedness now due or hereafter to become due from me to the said Morthrift Finance Corporation, Ltd., and in the event all indebtedness owed by me is not paid to said Corporation within ten (10) days from date hereof, I authorize the said pledgee to sell said pledge at any time without notice to me or to the public, at public or private sale, as said Corporation may elect and without any previous demand or notice whatsoever, and out of the proceeds of said sale said pledgee is authorized to reimburse itself for all costs and expenses of making the sale, all sums due, and in the event there shall be a balance then remaining to pay same over to me.

"Said pledgee may become a purchaser at said sale.

"I hereby warrant that I am the owner of the above described boat, motor, accessories and trailer, save and except liens not to exceed the sum of One Hundred ($100.-00) Dollars to G. F. Kremkau & Sons, builders of said boat, and for accessories purchased.

"Dated at Oakland, California this 6th day of May, 1937.

"C. C. Cumby."

[1] On the day the pledge was executed the boat mentioned in that agreement was at Cumby's place of business. The next day it was delivered to Kremkau & Sons as pledge holders. Within ten days Cumby paid defendant $1,000. On May 31, 1937, he executed a bill of sale of the boat to the plaintiff. On June 1, 1937, the plaintiff paid

off the lien in favor of Kremkau & Sons and had the boat registered in his name. On June 3, the defendant had the boat removed from Kremkau's possession and stored it elsewhere. Immediately after the boat was registered in the name of the plaintiff he made a demand on the defendant to deliver the boat to him. The demand was refused and this action was commenced.

If at the time the plaintiff made his demand the amount for which the boat had been pledged had been paid, then the title was vested in the plaintiff and he was entitled to recover. The question determined by the trial court, and sought to be reviewed before this court, is whether under the facts shown in the record the indebtedness secured by the pledge had been paid. An inspection of the pledge agreement shows at once that the amount of the debt and the particular debt the payment of which the pledge was executed to secure is not specified. It was the theory of the plaintiff that it was executed as security for the payment of the $1,000 mentioned above. On the other hand it was the contention of the defendant that it was executed to secure the payment of all debts amounting to $12,000. For the purpose of determining the issue so in dispute the trial court received evidence of the circumstances existing at the time the pledge agreement was executed, and thereafter acting on the evidence so received, made its findings. Among others the trial court made a finding as follows: "That on the 8th day of May, 1937, C. C. Cumby was the owner of the boat hereinabove described, and that C. C. Cumby did on said date execute the agreement attached to the defendant's answer, and marked 'Exhibit A'. That said agreement 'Exhibit A', executed by said C. C. Cumby (the instrument quoted above) was given to the defendant Morthrift Finance Corporation, Ltd., by C. C. Cumby to secure the payment of the sum of One Thousand and no/100 ($1,000.00) Dollars, which said C. C. Cumby had then and there agreed to pay to said Morthrift Finance Corporation, Ltd., on account of irregularities in the sale of automobiles under mortgage to C. C. Cumby to Morthrift Finance Corporation, Ltd., and that the said agreement 'Exhibit A', was given to create a pledge as security for the payment of said sum of One Thousand and no/100 ($1,000.-00) Dollars within 10 days after May 6, 1937, and for no other purpose." The defendant attacks that finding and asserts there was no evidence to support it. That assertion rests on its claim that the contract of pledge was not ambiguous and that no parol evidence should have been received by the trial court. That contention is clearly untenable. The pledge was executed "* * * to secure the payment of any indebtedness now due or hereafter to become due * * *". Such debts are to be "paid to said corporation within ten days from date (May 6, 1937)". As the contract shows no debts due or to become due within that period of time, the parol evidence was properly introduced to show what debt was payable within said period, and tended to support the theory of the plaintiff. The court found the value of the boat was $1,250. The contract further provided for the sale of the boat, the payment of costs and expenses, and then that there should be paid out of the proceeds "all sums due, and in the event there shall be a balance then remaining to pay same over to me", that is to Cumby. As it is wholly impossible to pay $12,000 of indebtedness out of a piece of personal property of the value of $1,250, the clause just quoted tended to further support the contention of the plaintiff.

[2] Conceding, without deciding, that the trial court might have been justified in making findings in favor of the defendant, it must be conceded that there was sufficient evidence in the record to justify it in making the findings complained of.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

30 Cal.App.2d 171

KARWOSKI v. GRANT et al.

Civ. 11551.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1938.

1. Appeal and error ⇐1004(3)

The jury's return of verdict for plaintiff in three times amount finally allowed by judge, who stated in minute order, directing remission of difference by plaintiff as condition precedent to denial of defendants' motion for new trial, that verdict was given under influence of passion and prejudice, did not show that judge's misconduct influenced jury to defendants' prejudice, where reduced amount was not disproportionate to plaintiff's damage.

2. Witnesses ⇐246(1)

Trial judges should leave their interrogation of witnesses until conclusion of counsels' examination thereof, but should then intervene, if anything material for jury to know remains obscure in court's judgment and it seems desirable that examination be further pressed.

3. Appeal and error ⇐1046(5)

The trial court's imposition of fine on one of defendants for contempt in stating that question asked him as witness was silly and intervention in examination of other witnesses because of their uncertainty, evasiveness, or reluctance *held* not misconduct prejudicial to defendants as indicating court's prejudiced mind or unfairness toward them.

4. Appeal and error ⇐201(2)

For trial judge's alleged prejudicial utterances or conduct to be available on appeal, exception to his remarks or assignment of misconduct must be reserved or made during trial.

5. Appeal and error ⇐201(2)

It is only when objection to trial judge's alleged misconduct would have been useless or no admonition to jury would have removed effect thereof that absence of assignment of error therein during trial will not preclude party from raising such point on appeal.

6. Appeal and error ⇐201(2)

It is particularly duty of counsel to call trial court's attention to evident impropriety of questions propounded to witnesses by, or conduct of, court by timely objection in order to take advantage thereof on appeal.

7. Death ⇐86(1)

The pecuniary loss, for which decedent's heirs may recover damages in death action, may be loss arising from deprivation of something to which they would have been legally entitled or benefits they could have reasonably expected to receive from deceased had he lived, though he owed only moral obligation to bestow such benefits on them. Code Civ.Proc. § 377.

8. Death ⇐99(3)

An award of $5,000 damages by jury's verdict, as reduced by remittitur, to father for death of his 20-year-old son 14 months after enlisting in navy for term expiring after he would have reached majority, was not so outrageously excessive as to suggest passion, prejudice or corruption at first blush, and hence could not be set aside on appeal, where evidence showed that deceased was strong and robust, contributed from his wages to maintenance of his parents' home and liquidation of mortgage thereon and visited with them during vacation.

9. Death ⇐87

Parents' right of action for their minor child's wrongful death is not based on legal right to child's earnings, but on their reasonable expectation of pecuniary benefit from continuance of child's life, so that child's emancipation does not preclude parents from recovering value of child's services and earnings for remaining period of his minority.

10. Death ⇐87

The jury was entitled to determine father's right to damages for his minor son's death under rule of reasonable expectation of pecuniary benefit during deceased's lifetime expectancy, regardless of his age, rather than rule of majority or emancipation, though he was nearly 21 years old when killed and had enlisted in navy for term expiring after he would have reached majority.

11. Appeal and error ⇐1033(5)

An instruction in action for death of plaintiff's minor son that plaintiff was legally bound to provide for, maintain, clothe, and educate deceased during latter's minority and entitled to receive his earnings was not error prejudicial to defendants.

Appeal from Supreme Court, Los Angeles County; Myron Westover, Judge.

Action by Stanley Karwoski against Vincent Grant and another for the death of Benedict Karwoski, a minor, from injuries sustained in a collision between his motorcycle and a bus owned by one defendant and driven by codefendant. Judgment for plaintiff, and defendants appeal.

Affirmed.

Edgar H. Craddock, Edward J. Cotter, and Arch G. McLay, all of Los Angeles, for appellants.

Crail, Crail, Crail & Wright, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action for damages resulting from a collision between a passenger-carrying bus owned by one of the defendants and driven by another of the defendants, and a motorcycle owned and driven by Benedict Karwoski, minor son of the plaintiff, and in which accident the minor son was fatally injured. The cause was tried before a jury, which returned a verdict in plaintiff's favor for $15,000. On hearing of the motion for a new trial the court directed that such motion be granted unless plaintiff filed a written consent to a reduction of the amount of the judgment from $15,000 to $5,000. The plaintiff having filed a consent to such remission, the motion for new trial was denied; and from such judgment, so reduced to said amount of $5,000, defendants prosecute this appeal.

Since appellants raise no question as to the sufficiency of the evidence to sustain the judgment, except indirectly with respect to the amount of the damages, we deem it unnecessary to set forth the facts concerning the accident itself, but in order to consider the points raised on this appeal a recital of the following facts will prove helpful: The deceased minor son was twenty years, ten months and seventeen days old at the time of his death. He was one of seven children, of whom plaintiff was the father. Benedict always lived at home before enlisting in the United States Navy in November, 1934. He had attended public schools in Superior, Wisconsin, and graduated from high school, following which he attended Superior State Teachers' College for one year, shortly thereafter entering the navy. He had attended a twelve-weeks' training school after entering the navy, and an electrical class in the navy for three months, from which class he had graduated with the award of honor student of his class. The evidence indicates that he was in good health, never having been sick, and was kind, loving, and thoughtful of his parents. Out of his rather meager pay, which he received during his first fourteen months in the navy, he had sent home five dollars on three occasions, two dollars once, and also had made three payments of ten dollars each and one of fifteen dollars to help his father pay off the mortgage on their home in Superior, Wisconsin; while at Christmas time he had sent gifts to each member of the family. In June, 1935, Benedict obtained a leave of absence from the navy, and during his vacation visited his family in Superior.

[1] Appellants' first contention is that the conduct of the trial judge influenced the jury in its verdict to the detriment and the prejudice of defendants. In support of this claim appellants direct our attention to the fact that the jury returned a verdict in three times the amount finally allowed by the court, and which verdict the court, in its minute order directing the remission, stated was given under the influence of passion and prejudice. To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence. Zibbell v. Southern Pacific Co., 160 Cal. 237, 254, 116 P. 513. In the case at bar we cannot say, for reasons to be hereinafter given, that the reduced judgment for $5,000 under all the circumstances of this case is in any way disproportionate to the damage suffered.

[2-6] In further support of the claimed prejudicial misconduct on the part of the trial court, we are directed to the actions of the judge while defendant Vincent Grant was upon the witness stand, at which time the following took place:

"Q. Then you go to Seventh——A. Then when we stop on Sixth we shift and we keep in third gear.

"Q. Wait a minute. I don't know what you did——

"Mr. Cotter: Just a moment. You have asked him what his course was, and he is telling you how he went.

"The Witness: How we go about it.

"The Court: I am sorry, Mr. Witness. You don't need to argue it. Objection sustained.

"The Witness: All right.

"The Court: The witness is volunteering something he did. He is only asked the course he took. * * *

"Q. What gear were you in? A. Well, we have four speeds.

"Q. Which one were you in? A. Third gear. I want to explain.

"The Court: Don't explain. Just answer the question. * * *

"Q. No. Did you stop? A. Well, there is no stop. Why should I?

"The Court: Did you stop your bus or keep going? A. No.

"The Court: Please answer his question. * * *

"Q. What was your first knowledge of the accident? A. Well, didn't he object to it?

"The Court: The Court is ruling on it. You don't need to rule on it. Go ahead and answer. * * *

"Q. (By Mr. Wright) Now, you didn't ever see this motorcycle at all, did you, until after you came to a stop? * * * A. Well, the only time I saw him was when he was about right on top of me, then I couldn't do nothing.

"Q. (By the Court) Was he up on the roof? A. Well, right on top of that wheel.

"Q. What do you mean? On top of the wheel? A. Well, about two feet from the wheel when he just started hitting me."

On another occasion during the examination of this witness the court said: "You wouldn't be shoved sideways by the motorcycle, would you, a distance of eight feet?"

On another occasion, plaintiff's counsel asked the witness:

"Q. While you were in the bus, after you felt the impact on your front hub, did you see the motorcycle? A. What a silly question! How could you see the motorcycle when you are in a big bus?

"The Court: Now, Mr. Grant, I will have to fine you for contempt. I can't permit anything like this. You are not entitled to make any comment here. You are assessed a fine of ten dollars. Now, just remember, young man, your sole role here is to answer questions and tell the truth."

"The Witness: That is what I am trying to do.

"The Court: You have no right to make any comment on the questions of counsel or anything else.

"The Witness: That is what I am trying to do.

"The Court: Now, don't let me hear anything like that again. Now, his question was an exceedingly simple one: Did you see the motorcycle after you felt the impact? I suppose you may have seen the motor after you got out of the bus, you may have seen it before you left the bus, we don't know. You are the only one that can tell.

"The Witness: I didn't see it.

"The Court: You never saw the motorcycle? A. After the impact I didn't see it.

"The Court: You never saw it again? A. No.

"The Court: All right, answer it directly right to the point. * * *

"Q. (By counsel) All right. Now after you got out did you then look at the motorcycle? A. Yes, I did.

"The Court: I am sorry. I understood you to say a moment ago you never saw the motorcycle. A. When he hit, of course.

"The Court: Nobody asked you that. I asked you very carefully, did you see it at any time. His question meant, did you see the motorcycle after the collision?

"The Witness: I must have misunderstood your Honor.

"The Court: Well, you certainly have an exceedingly bad understanding. That is an exceedingly clear question. I termed it so you would understand it.

"The Witness: I thought he meant before the impact.

"The Court: You listen to the question and answer the question only. Don't imagine some questions. Another thing I would like to ask, I understood you to say a moment ago you were out of the bus in thirty seconds. A. Yes, sir.

"Q. And the young man had been removed during that thirty seconds? A. Yes, sir.

"Q. You didn't see him at all? A. No sir, I didn't."

Appellants urge that this line of questioning and the manner in which the court framed questions to the witness would clearly indicate to the jury that the court did not believe the witness, and that when taken together with the fine for contempt which the court in the presence of the jury imposed upon the witness, together with the court's admonition to the witness "to tell the truth", that "it is not difficult to understand a $15,000 verdict against the witness by the jury".

During the presence of other witnesses upon the stand the court took a very active part in their interrogation. At no time throughout the trial did counsel make any objection to the charged misconduct of the trial court, which failure upon their part to make timely objection and afford the court an opportunity to admonish the jury in the premises appellants seek to excuse upon the ground that they are "satisfied that in the present case such a warning would have been useless".

It needs no citation to convince any unbiased observer that a jury has both ears and eyes open for any little word or act of the trial judge from which they may gather enough to read his mind and get his opinion of the merits of the issues under investigation. Trial judges therefore would better leave any interrogation of witnesses upon their part until the conclusion of the examination by counsel—direct, cross, redirect and recross, and then, if anything, in the judgment of the trial court, remains obscure, which may be material for the jury to know, and it seems desirable that an examination of the witness should be further pressed, then the trial judge may, and indeed should, intervene, so that the ends of justice may be subserved. An examination of the cases decided since the amendment of section 19, article 6, of the California Constitution, which engrafted a new rule of procedure on the jurisprudence of this state, permitting the court to single out an individual witness and comment upon his testimony, which power the court did not possess prior to such amendment, leads us to the conclusion that the procedure adopted in the instant case may not be held to indicate a prejudiced mind upon the part of the court or unfairness toward these appellants. The arrogance, if not contemptuous and disorderly conduct upon the part of one of the appellants while on the stand merited the stern rebuke administered by the court through the imposition of a fine, while the uncertainty, evasiveness or reluctance of other witnesses warranted the court's intervention in their examination, though the court's interrogation in some instances might well have been deferred until respective counsel had completed their examination. In the face of the record here, we perceive no misconduct on the part of the judge. Apparently at the trial appellants found no fault with the court's conduct, because no objection or exception to such conduct was reserved by appellants. The question of prejudice on the part of the trial judge is raised for the first time on appeal. In order to avail themselves of the benefit of alleged prejudicial utterances or conduct of a trial judge, exception to the remarks or an assignment of misconduct must be reserved during the process of the trial. Compton-Gardena Milling Co. v. McCartney, 69 Cal.App. 708, 231 P. 764; Franceschi v. Nardi, 77 Cal.App. 78, 246 P. 130; Ledgerwood v. Ledgerwood, 114 Cal.App. 538, 300 P. 144. An examination of the entire record before us does not show a persistent course of conduct on the part of the trial judge from which it is apparent that objection would have been useless or that the acts complained of are of such a character that no admonition to the jury would have removed their effect, if any, and it is only in the last-named instances that the absence of an assignment of error during the trial will not preclude one from raising the point on appeal. The present case does not come within the exception. It is particularly the duty of counsel, by timely objection, to call the court's attention to the evident impropriety of questions propounded by, or conduct on the part of, the trial court. Otherwise it would be possible to refrain intentionally from making objections or reserving exceptions in order to lay ground for reversal.

[7, 8] Appellants next complain that an award of damages in the sum of $5,000 for the wrongful death of plaintiff's twenty-year-old son, who had enlisted in the United States Navy fourteen months prior to his death, and whose term of enlistment would not expire until after he had reached his majority, is excessive. Two reasons are urged for this contention: (1) That the earnings of the deceased and the contributions made by him to his parents up to the time of his death, if capitalized at four per cent, would not amount to $5,000, and (2) that deceased, by reason of his enlistment in the navy, had become "emancipated", and since the term of his enlistment would extend beyond the period of his minority, he was under no obligation whatsoever to the plaintiff; and further, that by reason of the plaintiff's consent to the enlistment the question of loss of society, comfort and protection was removed from the jury's consideration. The pecuniary loss referred to in section 377 of the Code of Civil Procedure may be either a loss arising from deprivation of something to which the heirs mentioned therein would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which,

from all the circumstances of the particular case, it could be *reasonably expected* such heirs would have received from the deceased had his life not been taken, although the obligation resting upon him to bestow such benefits on them may have been a moral obligation only. It is to be noted that a reasonable expectation might well exist, though from the father's not being in need the son had never done anything substantial for him. In the instant case it was alleged and established that the minor son had practically arrived at manhood, was strong and robust, and that he had helped by contribution from his wages in the maintenance of his parents' home and in the liquidation of a mortgage thereon. The early training of the minor son, his contributions to his parents, his visit with them during vacation after he had enlisted in the navy, were all circumstances tending to establish a reasonable probability that the same conditions would have continued for some time after he became of age; and the jury had a right to assume that the contributions of this minor son for the benefit of his parents would increase in amounts as his earning capacity increased, and that the society and comfort as well as the pecuniary contributions that his parents had the reasonable right to expect under the circumstances would continue for the full period of the expectancy of life common to the deceased minor and his parents. Reviewing the decisions of the appellate courts of this state in similar cases, we cannot hold as a matter of law that the sum of $5,000 in damages is excessive. See Hill v. Peres, 136 Cal.App. 144, 28 P.2d 944; O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381; Lahey v. So. Pac. Co., 16 Cal.App.2d 652, 61 P.2d 461; Jensen v. Hansen, 12 Cal.App.2d 678, 55 P.2d 1201; Frazzini v. Cable, 114 Cal. App. 444, 300 P. 121; Gallentine v. Fierro, 110 Cal.App. 345, 294 P. 59. Under the facts and circumstances before us, the amount of damages finally awarded cannot be said to be so outrageously excessive as to suggest at the first blush passion, prejudice or corruption, and therefore cannot be set aside on appeal. Connor v. Henderson, 108 Cal.App. 237, 242, 291 P. 641.

[9, 10] In urging that the "emancipation" of the minor forecloses the father from recovery, appellants adopt the erroneous assumption that the parents' right of action must be based upon a *legal right* to the earnings of the child rather than upon the correct premise that the cause of action is based upon the reasonable expectation of the parent (or heir) to pecuniary benefit from the continuance of the life of the minor. Appellants' main argument in regard thereto is that inasmuch as the right of action for the injury or death of a minor is given only to the person who by other statutory provisions is entitled to its earnings or services during minority, the conclusion must follow that the recovery was intended to be limited to the value of such services and earnings calculated for the remaining period of minority only, and that the "emancipation" of the minor son in the instant case, continuing up to the time of his majority, the parent cannot recover. Commenting upon a similar contention in Bond v. United Railroads of San Francisco, 159 Cal. 270, at page 281, 113 P. 366, at page 371, 48 L.R.A.,N.S., 687, Ann.Cas. 1912C, 50, our Supreme Court said: "* * * These discriminations, it is argued, show the legislative intent to limit the right of recovery of the parent, suing as such, to that to which he would have been legally entitled if the child had lived, and of which the untimely death deprived him; that is, the child's earnings and services during the residue of its minority. We regard these anomalies as mere evidence of careless legislation. * * * In neither alternative is the absurdity sufficient to overcome the fact that the *same rule of damages is fixed for all cases* [i. e., deaths of infants or of adults] *and that it is stated in terms which have an obvious meaning, well established, extending the recovery to the reasonable expectation of precuniary benefit from the continuance of the life, after as well as before majority.*" (Emphasis added.)

The jury here was entitled to determine plaintiff's right to damages under the rule of reasonable expectation of pecuniary benefits during the lifetime expectancy of the minor son regardless of his age, rather than under the rule of "majority" or "emancipation". The question of the minor's close proximity to his majority or his "emancipation" is entirely beside the point here involved.

[11] Finally, appellants assert error on the part of the trial judge in the giving of an erroneous instruction to the effect that the father was legally bound to provide for, maintain, clothe and educate his minor son during his minority, and to receive his earnings. The prejudice, if any, contained in this instruction militated against respondent more than appellants. We have, however,

carefully examined all the instructions given, and see no prejudicial error therein.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.



30 Cal.App.2d 77

BEHRENDT v. TIMES-MIRROR CO.

Civ. 11907.

District Court of Appeals, Second District. Division 2, California.

Dec. 21, 1938.

Hearing Denied by Supreme Court Feb. 16, 1939.

1. Libel and slander ⇐111

In action against newspaper for libel, evidence that other newspapers had printed similar statements was not admissible in mitigation of damages.

2. Libel and slander ⇐64

One who publishes a libel acts at his peril and cannot mitigate his damages because some other person has incurred the same liability for the same story.

3. Trial ⇐35, 36

A plaintiff is not precluded from presenting testimony by the fact that facts testified to are admitted by the pleadings or stipulated by both parties.

4. Libel and slander ⇐100(1)

In action against newspaper for libel, wherein the pleadings admitted that plaintiff was not a user of narcotics as the libelous article charged, permitting plaintiff to prove that he was not a user of narcotics was within trial court's discretion.

5. Libel and slander ⇐107(1)

In physician's action for libel, questions concerning condition of physician's mind as result of the libel, including his opinion about effect of the libel on his professional career, were proper as tending to prove injury to physician's feelings.

6. Appeal and error ⇐1050(1)

In libel action, admission of testimony concerning plaintiff's feelings and state of mind was not prejudicial error, even though some of the questions eliciting such testimony might have been improved upon.

7. Libel and slander ⇐108

In action against newspaper for libel, admission of testimony concerning illness and physical suffering caused by nervous shock allegedly resulting from the publication was not error where jury was carefully instructed to allow only compensatory damages for injury actually sustained as natural and probable consequence of the publication.

8. Libel and slander ⇐118

In libel action, damages may be awarded for physical suffering as well as mental anguish, if caused by the libel and a natural and probable result of its publication.

9. Libel and slander ⇐100(2)

In libel action, allegation of petition that plaintiff suffered "severe nervous shock and great mental anguish and humiliation" was sufficient basis for introduction of evidence concerning physical suffering and illness caused by nervous shock.

10. Appeal and error ⇐882(8)

Where counsel for defendant in libel action stated, in objecting to question, that physical effect of mental anguish should be shown, and cross-examined a witness at length on such physical effect, defendant could not claim on appeal that it was prejudiced by court's admitting testimony concerning physical effect and instructing jury to consider such testimony.

11. Appeal and error ⇐843(2), 1068(4, 5)

Where plaintiff in libel action remitted that part of the judgment representing award of punitive damages, as a condition to avoiding grant of new trial, and defendant appealed, questions concerning punitive damages were moot, and alleged error in giving and refusing instructions on punitive damages was not prejudicial.

12. Appeal and error ⇐1033(5)

Defendant in a libel action could not complain of instruction submitting the issue of whether retraction of the libel was sufficient, where instruction might have been made more favorable to plaintiff under the statute governing retractions. Civ.Code, § 48a.

13. Libel and slander ⇐123(7)

In action against newspaper for libel, wherein retractions were printed by newspaper but not in the same locations as the libelous articles, and under different kinds of headlines, whether the retractions were

fair and complete, and the extent to which they mitigated damages, were questions for jury. Civ.Code, § 48a.

14. Trial ⇐296(2)

In libel action, an instruction on retractions which referred only to a retraction printed on a specified date was not improper as telling the jury in effect that previous retraction was ineffective, where other instructions told jury that retractions printed on both dates should be considered. Civ. Code, § 48a.

15. Appeal and error ⇐978(2)

A trial judge's conclusion on motion for new trial on ground of counsel's misconduct should not be disturbed unless plainly wrong.

16. New trial ⇐32

Denial of motion for new trial on ground of counsel's misconduct, which consisted of such remarks as, "I can appreciate the desperation with which he wants to keep that out of the record," was not error where trial court instructed jury to disregard the remarks.

17. Appeal and error ⇐1004(1)

To justify interference with a verdict in a libel action, it must appear that the amount awarded is so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury was under the influence of passion or prejudice.

18. Appeal and error ⇐1004(3)

The trial court, not the reviewing court, has power to set aside a verdict considered to be unjust, and questions concerning amount of verdict are directed primarily to the trial court's discretion.

19. Libel and slander ⇐121(1)

$10,000 to young physician for libel, consisting of newspaper article alleging that such physician had been arrested for stealing narcotics, was an addict, and could not be arraigned because of his physical condition, *held* not grossly excessive so as to require reversal.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by R. Allen Behrendt against the Times-Mirror Company, for libel. From a judgment on a verdict for plaintiff, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; EDMONDS, SHENK, and CURTIS, JJ., dissenting; HOUSER, J., not participating.

Cosgrove & O'Neil and F. B. Yoakum, Jr., both of Los Angeles, for appellant.

Raymond L. Haight, Arthur L. Syvertson, and Lyle C. Newcomer, Jr., of Haight, Trippet & Syvertson, all of Los Angeles (Harvey A. Harkness, John W. Lehners, and Harkness & Lehners, all of Los Angeles, of counsel), for respondent.

WOOD, Justice.

This is an action for damages for libel. A jury returned a verdict in favor of plaintiff in the sum of $10,000 as compensatory damages and the further sum of $15,000 as punitive damages and judgment was accordingly entered. Thereafter upon motion for a new trial the trial court made an order that a new trial would be granted unless plaintiff should reduce "the judgment entered to the sum of $10,000 and costs, the amount of the compensatory damages awarded". In accordance with the conditional order of the court plaintiff remitted that part of the judgment over and above the sum of $10,000 awarded as compensatory damages.

The libel which is the basis of the action was published by the defendant in its newspaper, "Los Angeles Times", on May 24, 1937. The libelous matter was published in three separate editions of the newspaper and each edition is made the basis of a separate count. It was published of and concerning plaintiff that he had been arrested, charged with the theft of narcotics and had himself used the stolen narcotics as an addict until his health had become destroyed; that he could not be arraigned on the charge because of his physical condition. The statements were entirely untrue. At the time of the publication plaintiff was a physician and surgeon of the age of 32 years. He was a graduate of Rush Medical College and had been established for several months as a practitioner in an office in Los Angeles. He was well and favorably known in Los Angeles and had previously attained prominence as a football player at the University of Southern California. He was engaged to be married and the date of the marriage had been set for May 25, 1937.

Ralph A. Behrend, who on Friday, May 21, 1937, was resident physician at the Met-

ropolitan Water District Hospital at Banning, was on that date arrested on the charge of stealing narcotics and was brought to Los Angeles by police officers. He was taken by the officers to the home of Dr. Carey, the chief of the medical staff of the Metropolitan Water District. He was unmanageable and Dr. Carey and the officers took him to the Hollywood police station and the next morning he was taken to Riverside County Hospital for confinement and treatment. It will be noticed that the name of the plaintiff, R. Allen Behrendt, is similar to that of the party arrested, Ralph A. Behrend, the initials being the same. An interesting fact to be noted is that the plaintiff had been resident physician at the Metropolitan Water District Hospital at Banning before this position was held by Ralph A. Behrend.

On Sunday afternoon, May 23, a Times reporter was told by one of the officers at the Hollywood police station that he had missed a story concerning the doctor who had been in the station on Friday afternoon and who was being detained in Riverside. The reporter saw the records in the Hollywood station where the name "R. A. Behrend" appeared, together with a notation that he had been taken to Riverside. The reporter telephoned to the editorial rooms of the Times with the suggestion that if the man involved was the one who had been a football player at the University of Southern California it would make a good story. One of the Times staff telephoned to the office of the sheriff of Riverside and made inquiries concerning the identity of the man who had been taken to the Riverside County Hospital. Without here setting forth the details of the evidence concerning the efforts of the staff of the Times to investigate the identity of the person under arrest it is sufficient to say that the plaintiff claims that the publication was made without reasonable investigation and that the defendant claims that the publication was made "after investigation of the facts stated and upon dependable and reliable information".

The defendant voluntarily published in the Times of May 25, 1937, a retraction of the statements made concerning plaintiff and explained the reasons why the mistake in identity had been made. The retraction was accompanied by a photograph of plaintiff and was printed in several editions on that date. On June 10, 1937, plaintiff served upon defendant a demand for a retraction in accordance with the provisions of section 48a of the Civil Code. On June 18, 1937, defendant printed a retraction which it claims was published, "in as conspicuous a place and type" as were the statements which formed the basis of the litigation. The plaintiff claims that the retraction was not printed in as conspicuous a place and type as were the articles of which complaint is made.

[1, 2] It is contended on behalf of defendant that the trial court erred in refusing to allow the introduction of evidence to the effect that other newspapers in the city of Los Angeles had on May 24, 1937, printed statements similar to those printed in the Times. It is particularly urged that the jury should have received this evidence in mitigation of the amount of compensatory damages. In Wilson v. Fitch, 41 Cal. 363, a situation was presented similar to the one now before us and it was held that the evidence of other publications was inadmissible. In that case the article complained of was published in the Bulletin. The defendant sought to show that a similar article had been published three days earlier in the Call. The particular point now raised by the defendant was not discussed but it is pointed out in the opinion that the publication in the Call could be "treated in no other or more favorable light than as a printed rumor". The point presented by defendant has been directly passed upon in Palmer v. New York News Pub. Co., 31 App.Div. 210, 52 N.Y.S. 539, and also in Hagener v. Pulitzer Pub. Co., 172 Mo.App. 436, 158 S.W. 54. In both of these cases it was held that publications of similar libels in other newspapers may not be shown for the purpose of reducing the amount of the compensatory damages. The theory upon which the evidence is held inadmissible is sound and is aptly expressed in Palmer v. New York etc., Co., supra: "Each libel is a separate and distinct tort, and each person who sees fit to publish it is separately liable to the plaintiff for whatever damages may be fairly said to accrue. If 100 persons at 100 different places make 100 separate publications of a libel in 100 different newspapers, the fact that this simultaneous action of all of them has ruined the plaintiff's character is no reason why 1 of them, when sued for it, should shelter himself behind the acts of the other 99, and say that 99/100 of the plaintiff's character was ruined by the others, and therefore he is liable for only 1/100 part of the damage. The true

rule is, and must be, that whoever publishes a libel publishes it at his peril, and he cannot mitigate his damages because some other reckless or evil-disposed person has incurred the same liability that he has for the same story." [page 540.]

[3, 4] Complaint is made of the ruling of the trial court receiving in evidence testimony that plaintiff was not a user of narcotics. It was admitted by the pleadings that plaintiff was not a user of narcotics but we know of no rule which prevents plaintiff from presenting testimony concerning the facts, even though they be stipulated by both parties. Davis v. Hearst, 160 Cal. 143, 187, 116 P. 530. It was within the discretion of the trial court to permit plaintiff to prove the allegations which had been conceded. As pointed out in Martin v. Pacific Gas & Electric Co., 203 Cal. 291, 299, 264 P. 246, 249, "a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight".

[5, 6] Complaint is also made of the ruling of the court by which plaintiff was permitted to testify concerning his condition of mind resulting from the publication of the libel. Defendant particularly criticizes the form of some of the questions. In one instance plaintiff was asked, "In your own mind Doctor, what did you think about your own professional career?" The witness answered, "I thought my—in as far as the practice of medicine in this community, it was finished on my own part". It was proper for plaintiff to prove that his feelings had been injured and that he believed that the libels had affected his standing in the community and the happiness of members of his family. These matters could be presented as tending to prove injury to his feelings. Earl v. Times-Mirror Co., 185 Cal. 165, 171, 196 P. 57. Although some of the questions might have been improved upon, the answers given concerned the feelings and state of mind of plaintiff and were proper for presentation to the jury. Defendant has not been prejudiced by the ruling.

[7] The defendant contends that the court erred in receiving evidence of the physical suffering of plaintiff and in later instructing the jury on the subject of compensatory damages that they might "take into consideration the physical pain and suffering, if any, inflicted on plaintiff by the publication of the articles". It was established that plaintiff suffered frequent urination and other symptoms of extreme nervous shock beginning immediately after the publication. Dr. Bennetts, a witness called by plaintiff, testified concerning the passage of a stone from plaintiff's kidney to the bladder several months after the date of the publication. He testified that an extreme nervous shock would aggravate the symptoms of the condition which he described; that "the condition may have been aggravated or precipitated by such anguish or such mental shock". The witness was cross-examined at great length concerning the passage of the kidney stone and he explained to the jury the nature of the ailment and the probable effects upon plaintiff's condition of the nervous shock which he had received. The jury was not misled by the ruling admitting this testimony for they were carefully instructed by the court that the damages allowable were such as would "compensate the plaintiff for the injury he has actually sustained as the natural and probable consequence of the libelous publication".

[8] Although there is some conflict in the authorities, the better reasoned cases hold that damages may be awarded for physical suffering as well as mental anguish. Sweet v. Post Pub. Co., 215 Mass. 450, 102 N.E. 660, 47 L.R.A.,N.S., 240, Ann. Cas.1914D, 533; Burt v. McBain, 29 Mich. 260; Garrison v. Sun Printing & Publishing Co. Ass'n, 207 N.Y. 1, 100 N.E. 430, 45 L.R.A.,N.S., 766, Ann.Cas.1914C, 288; Osborne v. Leach, 135 N.C. 628, 47 S.E. 811, 66 L.R.A. 648; Hatt v. Evening News Ass'n, 94 Mich. 119, 54 N.W. 766; Warner v. Press Pub. Co., 132 N.Y. 181, 30 N.E. 393. No sound reason can be advanced why damages should not be awarded for physical suffering as well as mental anguish provided of course that the physical suffering be caused by the libel and be a natural and probable result of its publication.

[9] Further conflict appears in the authorities on the question whether it is necessary to specifically plead physical injury or suffering. In Sweet v. Post Pub. Co., supra, it was urged on appeal that the trial court had erred in admitting evidence of illness suffered by the plaintiff in consequence of the libel. In the complaint plaintiff had alleged that he was an attorney at law and that the publication of the libel had caused him loss in his business and greatly injured his feelings and his reputation in his profession. In sustaining the judgment the reviewing court held that [page 662]

"under these counts the plaintiff was entitled to recover for mental suffering and distress and for illness suffered by him in consequence of the libel". In Burt v. McBain, supra, an action for slander, the appellant urged that the trial court had erred in receiving evidence that the plaintiff's health had been affected. The reviewing court thus disposed of the point: "Another error assigned is, that plaintiff was permitted, although the declaration did not claim special damages, to show that in consequence of the slander she was excluded from the society in which she formerly moved, and was affected in mind and health. But these results are the natural, and we might almost say the inevitable results of such a slander of a virtuous young woman, and they might be shown without setting them out in the declaration". In Hatt v. Evening News, supra, under a general allegation of damages, the plaintiff introduced evidence that he was rendered sick and unfit to work. In disposing of the contention that the injury should have been specially pleaded the court held [94 Mich. 114, 53 N. W. 952] that "under a declaration which sets out a libel which is actionable per se, it is not necessary, in order to introduce evidence of special damages, to show that the results which naturally flow from the publication did in fact appear". Plaintiff's complaint contains the following allegation: "As a direct and proximate consequence of the publication of said articles, including their headlines and captions, the plaintiff has been caused to suffer a severe nervous shock and great mental anguish and humiliation * * *." In accordance with those decisions which hold that physical suffering must be specially pleaded as well as under the decisions to which reference has just been made, this allegation must be held sufficient to justify the reception in evidence of plaintiff's testimony concerning his physical suffering. Since the neural system is an important part of the human body, a severe shock to the neural system, causing suffering, can properly be said to occasion physical suffering.

[10] The record discloses an additional reason why defendant may not complain of the ruling of the trial court on the subject of physical suffering. Plaintiff testified in detail concerning the effect of the libel upon him physically. No objection was interposed and defendant cross-examined at length on the point. Plaintiff was asked to describe his "physical reaction". He was also asked this question: "What was the situation with reference to your physical condition a week later?" On cross-examination counsel asked: "With reference to the mental anguish that you have referred to in your testimony that resulted from a reading of this article by yourself, I would like to ask a few questions, and the physical suffering that you also explained. Did this suffering result in loss of weight?" To this question plaintiff answered, "Yes, it did at the time". At one point the judge remarked: "I just thought I would inquire as to what the purpose of it is". Thereupon the attorney for the defendant stated: "Yes. I want to show just the condition of the man in so far as any nervous shock or any physical condition that is a result of reading this article and any mental anxiety, that is most likely to occur at that time". During the examination of plaintiff there was considerable discussion between counsel on the admissibility of testimony and counsel for defendant stated, substantially, that testimony concerning the physical suffering and condition of plaintiff was proper. Reference might be made to one example. Counsel for plaintiff asked the witness what was the effect of the publication upon his professional work. In objecting to this question counsel for defendant stated, "but as I understand the law, it must be the effect on him, it must be the result of mental anguish. He has been explaining it here at some considerable length, and the physical effect, and the effect on him mentally, emotionally, of reading the article, and we think it should be confined to that". Having taken the position at the opening of the trial that testimony concerning physical suffering was proper, having permitted such testimony without objection and having cross-examined the witness at length on the point, defendant is not now in position to claim that it has been prejudiced by the ruling of the court in receiving the testimony and in instructing the jury that it should be taken into consideration. Jackson v. Snow, 62 Cal. App. 56, 216 P. 60.

[11] A number of criticisms are leveled at the court's rulings in instructing the jury. Defendant requested the court to instruct the jury that punitive damages can not be awarded. The court did not give this instruction but did instruct the jury: "Should you find that the defendant published the articles in question here wantonly, recklessly, and in utter disregard of

plaintiff's good name and reputation and with wanton and reckless disregard for the truth or falsity of the statements made therein concerning plaintiff, you may from such evidence infer that the defendant acted maliciously and award exemplary damages to the plaintiff in such sum as you may deem just in view of all the circumstances revealed by the evidence." The court very elaborately and accurately instructed the jury on the subject of compensatory damages. As heretofore stated the jury returned a verdict for $15,000 exemplary damages but the trial court required plaintiff to remit the exemplary damages as a condition of the denial of the motion for a new trial. It must be presumed that the jury weighed the evidence and awarded compensatory damages in accordance with the instructions of the court. The judgment for which plaintiff seeks an affirmance is for compensatory damages only. Questions concerning exemplary damages have become moot. Our conclusion that defendant was not prejudiced by the giving of the instruction is in harmony with the decision in Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas.1913C, 1093, a case in which the jury awarded $27,000 compensatory damages and an additional $27,000 as exemplary damages. The Supreme Court ruled that the evidence was insufficient to justify exemplary damages and held that the giving of an instruction on the subject of exemplary damages "could be prejudicial only with regard to punitive damages included in the verdict, and the error can be sufficiently cured by reducing the judgment to the amount of damages allowed as compensation" [page 779].

The defendant requested the court to instruct the jury that "the evidence in this case discloses that the retraction published by the defendant is a full, fair and complete retraction of the article of which the plaintiff complains". In place of the requested instruction the court gave instruction No. 22 as follows: "The plaintiff alleges in his complaint that on June 10, 1937, he served upon the defendant a notice specifying the libelous statements and requested that the same be withdrawn. The defendant admits that this request for a retraction was served upon it and alleges that it has in fact published a retraction in as conspicuous a place and type in The Los Angeles Times as were the statements complained of, and within two weeks after the date of the service upon it of the notice and demand, to wit: on June 18, 1937. The written request for a retraction and the articles published by The Los Angeles Times thereafter on June 18, 1937, have been presented to you in evidence. You are to determine from this evidence whether or not the articles published by the defendant on June 18, 1937, constitute a retraction or a correction of the libelous publications in as conspicuous a place and type in The Los Angeles Times as were the statements complained of. If you find from the evidence that a retraction or correction was not published pursuant to the written notice of plaintiff of June 10, 1937, in as conspicuous a place and type as were the statements complained of, then you may award to the plaintiff and against the defendant exemplary damages in such sum as you may deem just, unless you believe from the evidence that the libelous publication was made in good faith, without malice, and under a mistake as to the facts."

[12, 13] The defendant is not in position to complain of the ruling of the court in giving this instruction. Under the provisions of section 48a of the Civil Code it might have been made more favorable to plaintiff. The jury had before it the various libels which were the basis of the action and the various retractions printed by defendant. The retractions were not printed in the same locations in the newspapers as were printed the libelous articles. The headlines were clearly different in kind. One of the libels was printed under a heading in bold type which ran across the top of the newspaper. It was the duty of the jury to determine whether the retractions were fair and complete and to what extent they mitigated the damages suffered by plaintiff. Lawrence v. Herald Pub. Co., 158 Mich. 459, 122 N.W. 1084, 25 L.R.A.,N.S., 796. In Turner v. Hearst, 115 Cal. 394, 404, 47 P. 129, 132, the court in referring to a retraction published by a newspaper, stated: "The question of the sufficiency or insufficiency is peculiarly a question of fact, and therefore peculiarly for the determination of the jury."

[14] It is argued that by giving instruction No. 22, above quoted, the court in effect told the jury that the retractions printed on May 25, 1937, were of no force and effect as retractions. We see no merit in this contention. The jury was instructed in three separate instructions that the retractions printed on both dates should be

considered on the point of compensatory damages.

The defendant contends that plaintiff's counsel was guilty of prejudicial misconduct. On several occasions counsel for defendant cited certain remarks of plaintiff's counsel as misconduct. We set forth the incidents concerning one of the assignments of misconduct, one which if not typical, is as serious as any of them. The record discloses:

"Q. By Mr. Haight: Who was present at the time that you saw this story in the paper."

"Mr. Cosgrove: That is objected to on the ground it is incompetent, irrelevant and immaterial, it has no tendency to prove any of the issues of the case.

"The Court: I will sustain the objection at this time.

"Q. By Mr. Haight: Now, I suppose you got up and got dressed? A. Yes, sir.

"Q. And what was the next thing you did, Dr. Behrendt?

"Mr. Cosgrove: That is objected to on the ground it is incompetent, irrelevant and immaterial, and has no tendency to prove any of the issues of the case. I realize, in making that objection, it may or it may not be relevant, but it is entirely indefinite, and it may or may not refer to this particular matter. I think the question should be made more definite than that. I think counsel should undertake to state the subject-matter, of what it is he is proceeding to.

"Mr. Haight: I can appreciate the desperation with which he wants to keep that out of the record——

"Mr. Cosgrove: I object to that statement, if the Court please, on the ground ——

"The Court: The jury is instructed to disregard the statement of counsel. Statements of counsel are not evidence, or any statement that the Court makes is not evidence."

[15, 16] The various remarks which are assigned as misconduct were made at various intervals during the trial which lasted eight days and which is called "intense" in one of the briefs. In several instances the trial court properly instructed the jury to disregard the remarks of counsel. In its motion for a new trial defendant urged misconduct of counsel as one of the grounds for its motion, but the trial court held that there was not prejudicial misconduct. The trial judge is in a better position than an appellate court to determine whether a verdict in a given case is probably due to alleged misconduct. The conclusion reached by the trial judge should not be disturbed unless it is plainly wrong. Lafargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538. In view of all the circumstances of the present case we cannot hold that the conclusion of the trial court was wrong.

[17-19] It is contended on behalf of defendant that the verdict of $10,000 as compensatory damages is excessive. To justify interference by an appellate court with a verdict in a libel action it must appear that the amount awarded is so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury was under the influence of passion or prejudice. Wilson v. Fitch, supra. In actions for libel or slander the amount of damages recoverable is peculiarly within the discretion of the jury, for there can be no fixed or mathematical rule on the subject. Questions concerning the amount of the verdict are directed primarily to the discretion of the trial court, which has the power to weigh the evidence in order to determine whether the verdict is correct in view of all the testimony in the case. The trial court has the power to set aside the verdict if it is considered to be unjust. This power is not vested in a reviewing court. Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672, 12 A.L.R. 1007. The trial court found no occasion to interfere with the verdict and we find no occasion to interfere with its conclusion.

Many cases have been reviewed in the briefs. In some of these large amounts have been sustained by the reviewing courts and in others the jury awards have been held to be excessive. It would prolong this discussion unnecessarily to review many of these cases. However, the case of Scott v. Times-Mirror, supra, has been cited by both parties and reference to it might be helpful. In that case the jury awarded the plaintiff $7,500 as compensatory damages and $30,000 as exemplary damages. Mr. Scott, the plaintiff, had practiced law over twenty years in his community and had achieved an enviable reputation. In his complaint he had alleged that the defendant had published a libel concerning his actions in conducting a divorce case in the courts. In Brough-

ton v. McGrew, 7 Cir., 39 F. 672, 5 L.R.A. 406, the court instructed the jury that they could consider that there was less likelihood of a slander hurting a man of established character, whereas, "if he was a new man starting in the effort to build up a reputation, the same slander might well cause more harm" [page 679]. In the case under consideration Dr. Behrendt was a young professional man who was endeavoring to build up a practice in the community. He had not established an enviable reputation in his profession after a long period of practice. The jury doubtless took into consideration the fact that the libels were more likely to injure him than if he had been practicing his profession for many years. The Scott Case was decided in 1919. Since that time radical changes have taken place in conditions affecting the cost of living. This fact has been recognized by the courts in passing upon the amounts of verdicts. In O'Meara v. Haiden, 204 Cal. 354, 367, 268 P. 334, 60 A.L.R. 1381, the court quoted with approval from Quinn v. Chicago, M. & St. P. R. Co., 162 Minn. 87, 202 N.W. 275, 46 A.L.R. 1228, in which it is stated that the courts approve of verdicts today which would have been unhesitatingly set aside as excessive ten or fifteen years ago.

The judgment is affirmed.

I concur: CRAIL, P. J.

I dissent: McCOMB, J.



30 Cal.App.2d 118

BROOKS v. PENSION BOARD OF CITY OF ALAMEDA et al.

Civ. 10616.

District Court of Appeal, First District, Division 1, California.

Dec. 22, 1938.

Rehearing Denied Jan. 21, 1939.

Hearing Denied by Supreme Court Feb. 20, 1939.

1. Officers ⇐94

An ill or injured governmental officer or employee is not entitled as a matter of right to a pension from the government unless the government so contracts, expressly or impliedly.

2. Constitutional law ⇐102(2)

The right to a pension becomes vested only upon the occurrence of the contingencies prescribed in a pension statute.

3. Municipal corporations ⇐187, 200

The determination of the pension board of the city of Alameda as to whether a police or fireman is entitled to pension should not be disturbed unless board abused its discretion.

4. Mandamus ⇐168(4)

Where ordinance of city of Alameda providing that disabled police officers should be retired with pension equal to two-thirds salary was amended in March, 1933, reducing amount of pension to one-half salary, and police officer, who was injured in 1932, brought mandamus proceeding to compel payment of pension equal to two-thirds salary, evidence that police officer did actual police work after the accident sustained trial court's finding that at no time prior to March, 1933, did the officer become physically disabled from performance of his duties.

5. Officers ⇐94

Inability of governmental officer or employee to perform his work is the controlling factor in forcing the government to recognize its contractual duty to provide pension, and not illness or injury to the officer or employee which causes such disability.

6. Constitutional law ⇐102(2)

The right to a pension is a vested right, although the amount thereof may not always be ascertained until the last contingency has occurred.

7. Municipal corporations ⇐187

Where pension board of city of Alameda concluded that payment of pension to disabled police officer should have been equal to one-half of officer's salary rather than two-thirds thereof as had been paid, and officer refused to repay excess to board, proper method of recovery by board was to credit board's books with the difference.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Mandamus proceeding by Harold A. Brooks, retired police officer, against the Pension Board of the City of Alameda and others to compel payment to petitioner of a pension equal to two-thirds of his salary.

From an adverse judgment, plaintiff appeals.

Affirmed.

Decoto & St. Sure and J. Paul St. Sure, all of Oakland, for appellant.

H. Albert George, City Atty., City of Alameda, and Breed, Burpee & Robinson, all of Oakland, for respondents.

WARD, Justice pro tem.

The question presented by this appeal from a judgment denying a petition for a peremptory writ of mandate is whether appellant, a retired police officer of the city of Alameda, is entitled to a pension of one-half or two-thirds of his salary.

On April 26, 1932, appellant on active duty sustained injuries which resulted in functional disability consisting of limitation of motion in the use of his left arm. On October 5, 1932, he applied for a pension under section 3 of the then effective ordinance No. 276, New Series, which provided for the retirement of members of the police and fire departments at a monthly amount equal to two-thirds the salary paid to members of the same rank at the time of such retirement. This application was denied without prejudice to renewal. In March, 1933, the ordinance was amended in part as follows (No. 503, N. S.): "* * * The person thus retired shall thereafter be paid from said fund during his lifetime, a monthly pension equal to one-half the salary paid to members of the rank which he held at the time of receiving such retirement * * *." On July 26, 1935, appellant renewed his application and was granted and paid a pension of two-thirds the salary attached to his rank. On December 16, 1936, the pension board determined to review its order of July 31, 1935, and on February 3, 1937, declared by resolution that appellant "* * * has been paid the sum of $465.88 in error, and is indebted to the Pension Fund of the City of Alameda in that amount". Appellant did not refund the amount and respondents directed, by order, a credit on the books of the pension board from subsequent monthly pension payments of the indebtedness found to exist.

[1, 2] An ill or injured officer or employee is not entitled as a matter of right to a pension from the government unless the government contracts expressly or impliedly to bring about the efficacious results which a pension produces. Douglas v. Pension Board of City of Sacramento, 75 Cal. App. 335, 242 P. 756. Only upon the occurrence of the contingencies prescribed in a pension statute does the right to a pension become vested. Klench v. Board of Pension Fund Commissioners, 79 Cal.App. 171, 182, 249 P. 46.

[3] The conditions set forth in the ordinance and amendment thereto under consideration are (a) service in a fire or police department; (b) bodily injury or illness peculiar to the rank in the particular department; (c) physical disability as a direct result of the injury or illness; (d) the order for the retirement upon a request on behalf of the person, or without such request if deemed "for the good of the service". This is not a case in which the government actually or inferentially agreed that if the officer served a definite period of time he would be entitled to a pension, nor is it a case in which the officer died as the result of an injury received in the line of official work, but this case is based upon such facts and such provisions of the ordinance as require appellant, though retired from actual work, to remain a member of the department, subject to recall and restoration to active duty. The restoration depends upon the condition and continuance of disability. The disability may be in whole or in part; the illness, disease or injury may be of slight or grave importance in determining the ability of the officer to continue on duty with work that may be performed by one of his rank. An injury disabling a fireman from duty might not be sufficient to disable a policeman, or vice versa. The size of the department and the work that may be assigned to one of the same rank are matters to be taken into consideration. A traffic officer standing for hours at a busy intersection of streets might be disabled from performing such work, and still completely and effectively patrol a beat on foot, drive a vehicle or do other work performed by the officers or employees of the same rank. If the officer or employee is disabled to the extent that he is unfit to perform the duty of the rank to which he may be assigned, then he should be retired. The determination of this question is left under this ordinance to the discretion of the pension board and should not be disturbed unless the exercise of such discretion is abused.

[4] Upon the hearing of the petition for a writ of mandate in the present case the court found that at no time prior to the March, 1933, amendment did petitioner be-

come physically disabled from the performance of his duties, etc. This finding is supported by testimony that appellant, after the accident, was actually doing police work in the department as a traffic officer, an investigator of violations of the law, and certain clerical work. There is no evidence in the record to show that this class of work was not performed by officers of equal rank. In People ex rel. Metcalf v. McAdoo, 184 N.Y. 268, 272, 77 N.E. 17, 18, the court said: "Fitness for police duty means the ability to discharge with average efficiency the duty of the grade to which the member belongs."

Appellant relies upon the case of Simmons v. Policemen's Pension Comm. of Borough of Deal, 111 N.J.L. 134, 166 A. 925, wherein the court said [page 926]: "If a policeman is unable to perform the ordinary every day duties of a policeman, and is permanently unfitted therefor, he is under permanent disability, and it is no answer to say that the statute does not entitle him to retire, because he is able to sit at a desk and make entries in a book. * * * We think the theory of our statute is that a fireman is a fireman, a policeman a policeman, and neither a desk clerk." We cannot adopt the holding in the Simmons Case. If clerking at a desk is a class of work to which some members of the same rank are assigned, and the member of the department has the ability to discharge with average efficiency the duties thereof, then the officer or employee is fit for duty within the grade to which the member belongs.

As was said in People ex rel. Metcalf v. McAdoo, supra: "A large police force must have some members of unusual ability, who are peculiarly fit to discharge the duties of their positions. It must have some of a low degree of efficiency, who are barely able to fill the requirements of the office. The statute refers to neither of these classes, but to the great mass of the force, representing its average efficiency."

Clark v. Board of Police Pension Fund Commissioners, 189 Wash. 555, 66 P.2d 307, is a case in which a pensioned police officer was directed to return to duty. Similar questions were involved as in the present case. The court affirmed the judgment. In the decision the court commented upon Simmons v. Policemen's Pension Fund Comm. of Borough of Deal, supra, and People ex rel. Metcalf v. McAdoo, supra, and adopted the rule that if the member of the department is reasonably able to perform the ordinary duties of a police officer he should be restored to service.

Appellant was not eligible for a pension before the date of the amendment to the ordinance. He had failed to prove one condition, namely, that he was disabled. Subsequently he petitioned for retirement, alleging disability. The pension board granted this petition. Appellant does not question the sufficiency of the evidence regarding disability upon the date that the retirement order became effective, but contends that appellant's rights cannot be affected by legislation enacted subsequent to the time of injury but prior to the time of retirement.

In Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 579, 59 P.2d 104, 106, the court said: "It has been clearly held that the pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensable part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by an applicant."

[5] In passing it may be well to note that it is not the illness or injury, but the result therefrom, namely, the inability to perform the work, that is the controlling factor in forcing the government to recognize the express or implied contract with its employee. If the employee holds a vested right, it is only the right to a pension, reasonable in amount, in accordance with the circumstances and the time that the pension becomes operative by the retirement of the employee.

In Murphy v. City of Piedmont, 17 Cal. App.2d 569, 574, 62 P.2d 614, 616, 64 P.2d 399, the court said: "But, assuming that some rights are vested it is settled law that a pensioner has no right to a specific sum as a pension, but that sum may be increased or decreased as the circumstances demand. Casserly v. Oakland [6 Cal.2d 64], 56 P.2d 237." See, also Klench v. Board of Pension Fund Commissioners, supra; Aitken v. Roche, 48 Cal.App. 753, 192 P. 464; Rumetsch v. Davie, 47 Cal.App. 512, 190 P. 1075.

[6, 7] The rignt to a pension is a vested right; the amount of the pension may not always be ascertained until the last contingency has occurred. In this case the amount was fixed by ordinance as an amount "equal to one-half the salary paid

to members of the rank which he held at the time of receiving such retirement". Respondents, through a mistake of fact and a mistake of law, made payments in excess of the amount due appellant. Directing by proper resolution a credit on the books was a correct method of recovery. Foster v. Pension Board of City of Alameda, 23 Cal. App.2d 550, 555, 73 P.2d 631.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



30 Cal.App.2d 208

CARR v. FIRE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10621.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1938.

Hearing Denied by Supreme Court Feb. 23, 1939.

1. Municipal corporations ⇐194

Where, after fireman was raised to rank of captain, new charter of City and County of San Francisco became effective which provided that fire department could carry in service only the number set forth in salary ordinance and fireman was one of those exceeding number specified in the ordinance, board of fire commissioners had power to return fireman to rank of lieutenant. St. 1931, p. 2989, § 20.

2. Officers ⇐94

The right to a pension is a continuing right but the pensioner has no right to specific sum and the amount may be reasonably increased or decreased.

3. Officers ⇐94

The right to a pension accrues upon the happening of an event.

4. Officers ⇐94

An employee may be required to hold a position for a fixed period of time before he is eligible for a pension.

5. Municipal corporations ⇐176(3)

The charter provision that pension of San Francisco firemen would be fixed in accordance with salary attached to the rank held by firemen three years prior to date of retirement was valid.

6. Officers ⇐94

A pension law may be changed or modified so long as the vital contingency has not happened upon which an employee may predicate his right to a pension.

7. Municipal corporations ⇐200

Where a lieutenant in the fire department of the city of San Francisco was raised to a captaincy and under terms of new charter adopted in interim was returned to the rank of a lieutenant and retired thereafter with a pension attached to such rank, plaintiff was not entitled to claim a retirement pension as a captain where he had not held such position for three years as required by the terms of the new charter, as against plaintiff's contention that his pension rights constituted a contract and a vested right of which he could not be deprived by a subsequent enactment of a different provision in the new charter. St. 1931, p. 2989, § 20.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action for declaratory relief by Hugh J. Carr against the Fire Commission of the City and County of San Francisco and others to determine plaintiff's right to retire from the fire department of the City and County of San Francisco with the rank of captain or the rank of lieutenant. From the judgment, plaintiff appeals.

Affirmed.

Joseph T. Curley, of San Francisco, for appellant.

John J. O'Toole, City Atty., City and County of San Francisco, and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for respondents.

PER CURIAM.

This is an action for declaratory relief to determine the right of the plaintiff to retire with the rank of captain, or the rank of lieutenant, from the fire department of the City and County of San Francisco.

On the 11th day of June, 1931, plaintiff was an eligible for appointment as a captain on a civil service list which would expire within two days. The budget appropriation covering the position of captain

made financial provision for eighty captains. Plaintiff, with four other lieutenants, was raised to a captaincy and the budget appropriation increased for a period of one year. A new charter became effective during the interim. Under its provisions the department was permitted to carry in service only the number set forth in the salary ordinance. Plaintiff was the first in a list of three to exceed the number specified in the budget ordinance and was returned by appropriate resolution to the civil service captains' eligible list.

[1] Assuming, though not deciding, that plaintiff's assignment was effective in placing him in a legally created position of captain, his subsequent return to the rank of lieutenant by the board of fire commissioners was in compliance with the provisions of the charter empowering the board to reduce the force in conformity with the needs of the work in the department. Sec. 20, New Charter of the City and County of San Francisco, effective Jan. 8, 1932; Stats. 1931, 2973, 2989, 2990.

The facts in this case are not similar to the facts presented by appellant in the cases cited in his brief, wherein employees were arbitrarily reduced in rank and pay and others substituted in their particular positions. The reason set forth in the resolution returning the last three captains appointed, who stood lowest on the eligible list, to the rank of lieutenant was "to comply with the budget requirements" Whether the work could and should be performed by employees of a lower rank was a question left to the reasonable discretion of the proper authorities. The record in this case shows that the work was performed by plaintiff as a lieutenant prior and subsequent to his acting captaincy. If money was not available to pay the three extra captains, the need for work of the employees as captains ceased, though the work might be performed by others of a lower rank.

Plaintiff was retired on April 1, 1933, with a pension attached to the rank of lieutenant and has never been restored to active duty. At the time he was named a captain, the old charter of the City and County of San Francisco was in effect. Section 4 of chapter VII of article IX provided that for disability a member could be retired on a pension "equal to one-half the amount of the salary attached to the rank held by him at the time of retirement". At the period of his retirement, the new charter was in effect, which provided that the amount of the pension should be one-half of the salary held three years prior to the date of retirement. Plaintiff contends that the pension rights entered into the contract of employment between the city and county and plaintiff at the time of employment, and therefore became a vested right, and that he cannot be deprived of it by subsequent enactment of a different provision in the new charter.

[2, 3] The right to a pension is a continuing right (Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 581, 59 P.2d 104), but the pensioner has no right to a specific sum, and the amount may be reasonably increased or decreased. Murphy v. City of Piedmont, 17 Cal.App.2d 569, 574, 62 P.2d 614, 64 P.2d 399. The right to a pension accrues upon the happening of an event. Klench v. Board of Pension Fund Commissioners, 79 Cal.App. 171, 184, 249 P. 46; Brooks v. Pension Board of the City of Alameda, 85 P.2d 956, decided by this court December 22, 1938.

[4-7] The first contingency in this case was the disability of the plaintiff, which occurred when he occupied the position of a lieutenant. The second contingency was that he present proof that he had been a member of the department for a period of three years. If he had been raised in position and salary, then his pension, throughout his life, would be fixed in accordance with the salary attached to the rank held three years prior to the date of retirement. It is not unreasonable to require that an employee should hold a position for a fixed period of time before he is eligible for a pension. This condition was fair and just to appellant, who had actually served the allotted period. Pennie v. Reis, 80 Cal. 266, 269, 22 P. 176. A pension law may be changed or modified so long as the vital contingency has not happened upon which an employee may predicate his right to a pension.

The judgment is affirmed.

ABBOTT v. LIMITED MUT. COMPENSATION INS. CO.

Civ. 10532.

District Court of Appeal, First District, Division 1, California.

Dec. 23, 1938.

Rehearing Denied Jan. 21, 1939.

Hearing Denied by Supreme Court Feb. 20, 1939.

1. Pleading ⇐327

Where attorney's complaint charged two defendants with a joint and several debt for certain services, and bill of particulars segregated indebtedness as to each defendant, bill of particulars amplified complaint as if incorporated therein and limited attorney's recovery to the claims therein stated.

2. Dismissal and nonsuit ⇐25

In action on a contract when it appears from the pleadings or the evidence that any defendant is not liable or necessary to the determination of the controversy, he may be dismissed from the action at any time before submission of the case to the jury, provided a remaining defendant is not thereby prejudiced.

3. Pleading ⇐229

Where an amendment to pleadings can be made in furtherance of justice without jeopardizing the rights of an adverse party, it should be allowed, since liberality in the allowance of an amendment to pleadings is the rule.

4. Pleading ⇐248(1)

The rule of liberality in the allowance of an amendment to a pleading assumes that neither the cause of action nor the issues involved therein will be radically changed by the proposed amendment.

5. Account, action on ⇐21
Parties ⇐65(1)
Pleading ⇐249(4)

Where attorney's complaint charged two defendants with a joint and several debt for certain services which bill of particulars segregated as to each defendant, allowance of an amendment by which action was changed from an open book account to a mutual open and current account, and eliminating one of the codefendants as a party, was proper where effect was to charge remaining defendant with an individual debt instead of a joint and several obligation, and issues tendered were made by the amended complaint to conform to the bill of particulars.

6. Pleading ⇐327

Where attorney's original complaint charged two defendants with joint and several obligations for certain services, and bill of particulars segregated indebtedness as to each defendant, allowance of an amended complaint eliminating one defendant and charging remaining defendant with individual debt in conformance with the bill of particulars was not prejudicial as compelling defendant to defend against its own several obligation when original complaint charged joint and several debt, since bill of particulars gave advance notice of the true nature of attorney's claim.

7. Corporations ⇐448(1)

In attorney's action for services rendered corporation, corporation was not liable to attorney for services performed prior to incorporation at the request of the promoter of the corporation unless corporation adopted such contract after its incorporation.

8. Corporations ⇐448(2)

To prove that a corporation adopted promoter's contract engaging services of an attorney before corporation was incorporated, evidence must show some affirmative act by the corporation from which adoption may be inferred, and receipt of benefits from the performance of the contract without actual knowledge of its terms, or knowledge of a director directly interested in the contract, is insufficient to charge the corporation.

9. Corporations ⇐428(9)

Knowledge of a promoter who subsequently becomes a director cannot be imputed to a corporation to charge corporation with adoption of contract made by the promoter prior to incorporation of the corporation.

10. Corporations ⇐448(2)
Evidence ⇐471(2)

In attorney's action for services rendered corporation, testimony of director, who had been a promoter, that, when attorney brought up subject of remuneration, directors reiterated their position that when there were sufficient funds for the purpose attorney would be compensated for his services, was incompetent as a conclusion, but, in absence of objection to testimony, it was sufficient to establish corporation's adoption of promoters' hiring of attorney.

11. Pleading ⇐327

In attorney's action for services rendered corporation, use of word "incorpora-

tion" in one item of bill of particulars did not mislead corporation and show that services included therein were performed in formation of corporation and so fell within the same category as those covered in another item for services rendered in organization before incorporation, where attorney in support of item testified concerning services performed after incorporation without objection that testimony related to services not included in item.

12. Appeal and error ⇐1011(1)

Whether attorney seeking to recover for services rendered corporation exaggerated importance and value of his services and whether his receipt of a monthly retainer and amount of bills rendered fully paid him were for trier of facts under conflicting evidence.

13. Attorney and client ⇐158

Where corporation admitted that there was certain sum due attorney for retainer and for unpaid director's fees, and attorney's contract was fully performed, and nothing remained but payment of fee, attorney could recover such sums due in action in assumpsit, as against contention that attorney's obligation arose from express contract.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by W. Lindley Abbott against the Limited Mutual Compensation Insurance Company, a corporation, for services as an attorney. From an adverse judgment, defendant appeals.

Affirmed.

For prior opinion, see 82 P.2d 35.

Edgar C. Levey, of San Francisco, and Booth B. Goodman, of Oakland, for appellant.

Jesse H. Miller, of San Francisco, for respondent.

GRAY, Justice pro tem.

Limited Mutual Compensation Insurance Company, a corporation, appeals from the judgment following the verdict which awarded respondent the sum of $3,055 for legal services. Of the numerous grounds urged by appellant for a reversal, only such as are vital will be considered as the facts are unfolded.

The original complaint, in alternative counts of assumpsit, account stated and open book account, alleged that appellant and another defendant, Mutual Management Corporation, were indebted to respondent in the sum of $5,000 for work, labor and services performed by respondent for both defendants and each of them at the special instance and request of both and each of them. The bill of particulars, furnished by respondent, set forth the items of the indebtedness as follows:

(1) April–June 1932; To services rendered in organization of Limited Mutual Compensation Insurance Company before incorporation	$1,000.00
(2) June–1932 to December 1932; To services rendered in actual incorporation matters, Limited Mutual Compensation Insurance Company.....	$1,000.00
(3) April 1932–December 1935; To conferences, consultations and advice, Limited Mutual Compensation Ins. Co.	$1,000.00
(4) August–1933 to May 1934; To services rendered in incorporation of Mutual Management Corp., including reorganization matters, stock issue, attending meetings as a director and otherwise.....	$ 500.00
(5) November 1935; To services rendered in case of Boardman vs. Brown and Mutual Management Corp.	$1,000.00
(6) May–November 1935; To services rendered Mutual Management Corp. in connection with 'Piver Loan'..	$ 150.00
(7) December 1935; To directors fees unpaid and balance of retainer for December 1935, Limited Mutual Comp. Ins. Co.	$ 55.00
Total	$4,705.00

[1] The complaint charged both defendants with a joint and several debt of $5,000 but the bill of particulars, by segregating the items of the indebtedness as to each defendant, stated that appellant was only severally indebted in the sum of $3,055. The bill of particulars amplified the complaint, as if incorporated therein, and limited respondent's recovery to the claims

therein stated. Millet v. Bradbury, 109 Cal. 170, 41 P. 865; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25.

[2-5] During the presentation of his evidence, respondent, by amendment, changed his third cause of action from an open book account to a mutual, open and current account. At the conclusion of his case, respondent, by leave of court granted over appellant's objection, dismissed the action as to the codefendant Mutual Management Corporation, and filed an amended complaint, which alleged, in alternative counts of assumpsit and a mutual, open and current account, that appellant was indebted in the sum of $3,055 for work, labor and services rendered to it at its special instance and request. In an action on a contract, when it appears from the pleadings or the evidence that any defendant is not liable or necessary to a determination of the controversy, he may be dismissed from the action, provided a remaining defendant is not thereby prejudiced. 18 Cal.Jur. 1164. Such dismissal may be allowed at any time before the submission of the case to the jury. Brown v. Harter, 18 Cal. 76. Liberality in the allowance of an amendment to a pleading is the rule rather than the exception; and in a case where such an amendment can be made in furtherance of justice without jeopardizing the rights of an adverse party, it should be allowed. This, of course, assumes that neither the cause of action nor the issues involved therein will be radically changed by the proposed amendment. Mackroth v. Sladky, 27 Cal.App. 112, 148 P. 978. The amended complaint differs from the original, as previously amended, only in the abandonment of the second cause of action upon an account stated, in the elimination of the codefendant as a party and in a decrease in the amount of appellant's indebtedness. In effect it charges appellant with an individual debt instead of a joint and several obligation. The issues tendered by the amended complaint conform to the bill of particulars. Similar amendments have been held not to change the cause of action. United States Farm L. Co. v. Bennett, 55 Cal.App. 299, 203 P. 794; Bryant v. Wellbanks, 88 Cal. App. 144, 263 P. 332.

[6] Appellant argues that the change in the issues was prejudicial, because the original complaint compelled it to defend against a joint and several debt of itself and codefendant, whereas the amended complaint forced it to meet its own several obligation. But it could not have been so injured as the bill of particulars gave it advance notice of the true nature of respondent's claim. Ames v. Bell, 5 Cal. App. 1, 89 P. 619. The dismissal and amendment simplified the issues to its benefit. It further argues that respondent, prior to the amendment, so presented his evidence as the rendition of services to both defendants that it was impossible for the jury, in obedience to the court's order striking out the testimony as to the codefendant, to segregate from the whole such portion as affected it alone, and therefore it must have included in its verdict an allowance for services for which it was not liable. The verdict conforms exactly to the total of the first, second, third and seventh items of the bill of particulars, which are charged against appellant. Respondent's testimony segregates his services in conformity with the bill of particulars.

[7-9] The first item of the bill of particulars amounting to $1,000 is clearly for services rendered prior to appellant's coming into being by incorporation. The undisputed testimony shows that such services were performed at the request of a promoter of the corporation and upon his promise, with the knowledge and acquiescence of another promoter, that the corporation, as soon as it was financially able so to do, would pay their reasonable value. These promoters with respondent subsequently became members of appellant's board of five directors. Appellant is not liable to respondent upon such promoters' contract unless it adopted such contract after its incorporation. Biggart v. Lewis, 183 Cal. 660, 192 P. 437. To prove such adoption, the evidence must show some affirmative act by the corporation from which it may be inferred. Receipt of benefits from the performance of the contract without actual knowledge of its terms is insufficient. Knowledge of a director directly interested in the contract is insufficient to charge the corporation. Rideout v. National Homestead Ass'n, 14 Cal.App. 349, 112 P. 192. Knowledge of a promoter, who subsequently becomes a director, cannot be imputed to the corporation. Kiefhaber Lumber Co. v. Newport Lumber Co., 15 Cal.App. 37, 113 P. 691. Respondent did not seek to prove adoption of the contract by formal corporate action, but by knowledge and acquiescence of its directors.

[10] Respondent and the director, who, as promoter, had originally hired him, each stated that the former, at an informal meeting of the five directors, requested consideration of his claim for past services. Respondent further testified that, in response to this director's inquiry, he had given his opinion of a reasonable fee, and that thereupon "they said, 'We think that is reasonable * * * when we make enough money we will pay you * * *'", and that the directors signified the arrangement was satisfactory. The force of this later statement was weakened by his answer to a query as to the manner in which the directors signified their satisfaction, that he remembered the director who had been the other promoter saying that is fair enough. On cross-examination, he further stated: "The idea was I was to be compensated for my services in a substantial manner, for the work I had done * * *". The first director testified: "Mr. Abbott again brought up the subject of his remuneration and we again reiterated our position at that time that at the time the corporations had begun or had functioned for a sufficient period to have accumulated sufficient funds for the purpose—that Mr. Abbott would be compensated for his services." The second director did not remember any discussion of respondent's compensation. This testimony was incompetent, as the witnesses' conclusions, but there having been no objection thereto, is sufficient to establish the corporation's adoption of the promoters' hiring of respondent. Williams v. Hawley, 144 Cal. 97, 77 P. 762; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 168 P. 1037.

[11] Appellant contends that the use of the word "incorporation" in the second item of the bill of particulars shows that the services therein included were performed in the formation of the corporation, and therefore fall within the same category as those previously covered in the first item. Although there is a distinction between the words "incorporation" and "corporation" in that the former means the act by which the latter is created, yet the words are frequently confused in use. Toledo Bank v. Toledo, 1 Ohio St. 622, 642. But the specification of a period subsequent to appellant's incorporation as the time during which the services were performed indicates that such services were not rendered in the creation of the corporation, but to it afterwards. However, respondent, in support of this item, testified as to services performed for the corporation, after its incorporation, without any objection from appellant that such testimony related to services not included within this item of the bill. It is clear, therefore, that appellant was not misled as to the sense in which the word "incorporation" was used.

[12] Approximately a year after appellant's incorporation the same promoters caused the incorporation of Mutual Management Corporation, which, under contract, managed the affairs of the former. Both corporations had the same directors, shared the same offices and employed respondent as attorney. The latter had his offices in the corporations' building. The relation between the corporations necessarily caused their affairs to be interwoven. Respondent constantly advised each as to legal matters in which each was interested. The third item in the bill of particulars relates to legal services of such nature. Respondent, while admitting difficulty in allocating his charges between the two corporations, did enumerate numerous items of services performed for appellant. To reiterate this testimony would unprofitably extend this opinion to tedious lengths. Appellant also claims that respondent exaggerated the importance and value of his services and that his receipt of a monthly retainer and the amount of bills rendered fully paid him. These claims present questions of fact and not of law. It is futile to review the evidence relative thereto as it would only develop a conflict in the testimony upon which the verdict is conclusive.

[13] Appellant admits that the evidence establishes that there is due respondent the sum of $30 for unpaid director's fees and the sum of $25 as balance on his monthly retainer, but it argues that, as these obligations arise from express contracts, they cannot be recovered in assumpsit. Since the contracts have been fully performed by respondent and nothing remains but payment of his fee, he need not declare on the contract but may recover in assumpsit. Castagnino v. Balletta, 82 Cal. 250, 23 P. 127.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

NEW YORK CASUALTY CO. et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10957.

District Court of Appeal, First District, Division 2, California.

Dec. 22, 1938.

As Amended on Denial of Rehearing Jan. 13, 1939.

Hearing Denied by Supreme Court Feb. 20, 1939.

1. Appeal and error ⇐917(1)

Where respondent court made no return other than by demurrer to petition to review orders of court, appellate court could take facts pleaded in the petition as true.

2. Depositions ⇐11

Where in injured guest's action against driver and insured automobile owner, issue regarding whether driver was operating automobile with owner's permission had been determined in favor of guest as to both driver and owner, order permitting guest to take depositions to perpetuate testimony on such issue as necessary in connection with guest's action against insurer was improper, since evidence had been perpetuated in record. Code Civ.Proc. §§ 2083–2086.

3. Depositions ⇐58

Where injured guest recovering judgment against driver and insured automobile owner sought to take depositions to perpetuate testimony on issue whether driver was operating automobile with owner's permission, order requiring insurer to produce its confidential reports and investigation of accident was beyond judicial limits of court, where documents had been procured for special use of insurer's attorney and were in attorney's possession at time order was made. Code Civ.Proc. §§ 1881, subd. 2, 2083–2086.

4. Depositions ⇐19

Proceedings to perpetuate testimony will not lie when the action is already pending and depositions can be taken under statute authorizing taking of depositions in an action after service of summons. Code Civ. Proc. §§ 2021, 2083–2086.

5. Insurance ⇐616½

Where injured guest's action against insured owner of automobile raises issue whether driver was operating automobile with owner's permission, a final judgment against owner is conclusive against insurer on that issue.

6. Depositions ⇐19

Where it appeared that injured guest had recovered judgment against driver and against insured owner in action involving issue whether driver was operating automobile with owner's permission, that judgment against driver had become final, but that owner had appealed, remedy of guest who had instituted action, based on judgment against driver, against insurer and who desired to obtain further evidence on issue of permissive use was by way of inquiry under statute authorizing the taking of depositions in action after service of summons and not by way of proceedings to perpetuate testimony. Code Civ.Proc. §§ 2021, 2083–2086; St.1935, p. 153, § 402(a); Const. art. 1, § 19.

Petition by the New York Casualty Company and others against the Superior Court of the state of California, in and for the City and County of San Francisco, to review orders of the respondent court directing petitioners to answer certain questions and to produce private documents on the taking of their depositions, and claiming them for contempt of court in failing to do so.

Orders annulled.

Charles V. Barfield and Joseph G. De Forest, both of San Francisco, for petitioners.

Bronson, Bronson & McKinnon, of San Francisco, amici curiæ in behalf of petitioners.

J. Francis Shirley, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The petitioners seek a review of the orders of the respondent court directing them to answer certain questions, and to produce private documents, upon the taking of their depositions, and citing them for contempt of court in failing to do so.

[1] The respondent has made no return other than by demurrer to the petition, and we may therefore take the facts there pleaded as true. One Burford was injured in a collision with an automobile owned by Juett and operated by Huesby. Burford sued both for damages and had judgment against both. Juett appealed from the judgment against him, but that against Huesby has become final. At the time of the injuries, Juett held a policy of public liability insurance issued by the Cas-

ualty Company. Burford has sued the Casualty Company on the Huesby judgment, and that action is pending trial.

On the representation that their testimony was necessary in connection with an action he "expected" to bring, Burford started proceedings to "perpetuate" testimony under sections 2083-2086 of the Code of Civil Procedure. One of the witnesses subpœnæd was an officer of the Casualty Company. He was ordered to bring with him his private and confidential papers in reference to the action for the "inspection" of his adversary. He protested that all these documents were in the hands of the attorney for the Casualty Company and were confidential communications made for the purpose of preparing a defense to the litigation. The witness Juett was asked the same questions which were put to him and answered in the main action, and which are fully "perpetuated" in the record on appeal. The entire deposition proceedings are obviously taken in bad faith and for no legitimate purpose. They can result in nothing but oppression to the witnesses and an invasion of the legal rights of the parties. The particular order here under attack must be annulled as in excess of the jurisdiction of the trial court. That this opinion should not be too long, we limit to three the statement of our reasons for the judgment.

[2] (1) The facts "necessary" to be proved, as stated in the application to take testimony, are the circumstances relating to the use of the automobile at the time of the accident. To hold Juett and his insurer, the plaintiff Burford must contend that Huesby was operating the car with the owner's permission. This was the main issue in the trial heretofore had. It has been determined in favor of Burford as to both defendants; with the Huesby judgment it is final. As to Juett, the cause is on appeal, but all this testimony was taken and heard in open court and has already been "perpetuated" in the record. There is, therefore, no necessity for taking these depositions to perpetuate testimony.

[3] (2) The order of the trial court went beyond judicial limits when it required the insurance carrier to produce its confidential reports and investigation of the accident. These had all been procured for the special use of the attorney for the company, and were in his possession at the time the order was made. These documents are just as much privileged when in the possession of the attorney for the insurer as is the information which the attorney for the plaintiff obtains from his client in the presentation of his case. In a closely similar case this question was covered in Re Klemann, 132 Ohio St. 187, 5 N.E.2d 492, 494, 495, 108 A.L.R. 505, where the Ohio court says: "In order for a document to constitute a privileged communication, it is essential that it be brought into being primarily as a communication to the attorney. * * * The report thus required, when furnished, becomes the property of the insurance company, and when the original or copy thereof is transmitted by the insurance company, either directly or through an agent, to its attorney, on the authority of Ex parte Schoepf, 74 Ohio St. 1, 77 N.E. 276, 6 L.R.A.(N.S.) 325, it constitutes a communication from client to attorney, and, as such, it is protected as a privileged communication under section 11494, General Code, and its production and disclosure cannot be compelled by subpœna duces tecum."

Section 11494 of the Ohio General Code, upon which the decision is based, is almost identical with section 1881, subdivision 2 of our Code of Civil Procedure which reads: "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment * * *." In the Klemann Case the papers had been given to the attorney, and the manager of the insurance carrier was ordered to produce them on his deposition. In holding that the papers were privileged and that the manager could not be compelled to produce them, the Ohio court followed the spirit of the law as announced in the first clause of our Code section which reads: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate."

[4-6] (3) Proceedings to "perpetuate" testimony will not lie when the action is already pending and depositions can be taken under section 2021 of the Code of Civil Procedure. Here the sole issue between these parties is whether Huesby was operating the car at the time of the injuries with the permission, express or implied, of Juett, the car owner, so that he may be held liable for the injuries under section 402(a) of the Vehicle Code, St. 1935, p. 153. This issue has been tried in the action against Juett and Huesby. A

final judgment against Juett in that action will be conclusive against the insurance carrier in that issue. Lamb v. Belt Casualty Co., 3 Cal.App.2d 624, 631, 40 P.2d 311. In the action now pending against the Casualty Company on the Huesby judgment that issue will be vital, but proof can be made without these depositions. There is nothing in Christ v. Superior Court, 211 Cal. 593, 296 P. 612, contrary to this view. There the deposition proceedings originated in the Guatemala courts and were shown to be necessary in connection with an expected action in those courts. It was held that the proceedings were not affected by the pending of similar actions in our state court. But here there is no action contemplated which is or can be one particle different from that now pending. If the judgment against Juett is affirmed, the matter is ended. If it is reversed, the plaintiff therein may desire to produce further testimony on the issue of permissive use. But the questions which the witnesses have been ordered to answer here have already been asked and answered in the trial heretofore held. Burford's remedy for further inquiry is under section 2021 and not under section 2083. These observations are pertinent to the rights guaranteed all parties against unreasonable searches and seizures by section 19 of Article 1 of the Constitution which are fully discussed in Kutner-Goldstein Co. v. Superior Court, 212 Cal. 341, 346, 298 P. 1001.

The orders are annulled.

We concur: STURTEVANT, J.; SPENCE, J.



30 Cal.App.2d 251

SMITH v. SCHUMACKER et al.

Civ. 5980.

District Court of Appeal, Third District, California.

Dec. 31, 1938.

Rehearing Denied Jan. 30, 1939.

Hearing Denied by Supreme Court Feb. 27, 1939.

1. Master and servant ⇐250¼

In employee's action against railroad under Federal Employers' Liability Act, rule of federal practice as to sufficiency of evidence to raise jury questions applied. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59.

2. Appeal and error ⇐989

The function of the reviewing court is not to weigh the evidence, but only to determine whether there is substantial evidence to sustain the verdict.

3. Evidence ⇐597

A verdict must be based on substantial evidence and not on surmise, conjecture, or speculation, but, if reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as "substantial evidence."

[Ed. Note.—For other definitions of "Substantial Evidence," see Words & Phrases.]

4. Master and servant ⇐278(7)

In brakeman's action against railroad under Federal Employers' Liability Act for injuries sustained when brakeman tripped over an angle bar partially buried in ballast of roadbed, evidence sustained jury's finding that angle bar was present in roadbed. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59.

5. Master and servant ⇐286(15)

In brakeman's action against railroad under Federal Employers' Liability for injuries sustained when brakeman tripped over an angle bar partially buried in ballast of roadbed, question whether railroad was negligent in having failed to furnish brakeman with a safe place wherein to work was for jury. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59.

6. Master and servant ⇐101(9)

A railroad is under a duty to use ordinary care to provide its employees with a safe place wherein to work. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59.

7. Trial ⇐140(1)

Credibility of witnesses is for jury.

8. Damages ⇐33

An accident which aggravates a pre-existing disease may constitute a cause of action for damages, in which case plaintiff may recover all damages for the aggravation.

9. Damages ⇐185(1)

In action for injuries, where medical witnesses for plaintiff testified directly that the accident aggravated a previous, dormant condition which resulted in amputation of

both plaintiff's legs, evidence justified plaintiff's recovery of damages from such aggravation, on the ground that the accident had aggravated a pre-existing disease.

Appeal from Superior Court, Butte County; H. S. Gans, Judge.

Action under the Federal Employers' Liability Act by Victor Edward Smith against Thomas Schumacker and others, Trustees of the Western Pacific Railroad Company, and the Western Pacific Railroad Company to recover for injuries allegedly caused by defendants' negligence and which resulted in amputation of both of plaintiff's legs. Judgment for plaintiff for $25,000, and defendants appeal.

Affirmed.

C. W. Dooling and Edwin V. McKenzie, both of San Francisco, and J. M. McPherson, of Chico, for appellants.

Sheridan Downey, of San Francisco, Clifton Hildebrand, of Oakland, Louis E. Goodman and Louis H. Brownstone, both of San Francisco, and J. R. King, Jr., of Oroville, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action by plaintiff under the Federal Employers' Liability Act (45 U.S.C.A. §§ 51–59), against the Western Pacific Railroad Company, a California corporation, and its trustees in reorganization, for damages for personal injuries alleged to have been sustained by the negligent acts of the employer.

It is admitted that this action is properly maintained under the terms of the act for the reason that both appellants and respondent were engaged in interstate commerce and transportation at the time the accident is claimed to have occurred, and it was as a result thereof, that both respondent's legs were amputated at a point between the knee and the hip. No question is raised as to the amount of the verdict, to-wit: $25,000, but appellants rest this appeal upon the issue of liability and the lack of substantial evidence to support the verdict.

This is the second trial of the action. In the first trial, on motion of defendants, the court granted a directed verdict on the causes of action set forth in the first, second and third counts in the complaint and denied a similar motion on the fourth count. Upon this count the jury found for the plaintiff, and allowed him the sum of $20,000. The trial court then granted a motion for a new trial upon the ground that the evidence was insufficient to sustain the judgment.

In the second trial, confined to the issues raised by the fourth count, a verdict in favor of plaintiff was again returned. Defendants' motions for a directed verdict and for a new trial were denied and judgment was entered on the verdict. This appeal is from that judgment. The fourth count of the amended complaint charges, first, specific negligence, and secondly, aggravation of an existing disease resulting in amputation of the left leg. Later a supplemental cause of action was set up alleging the amputation of the right leg.

This fourth count of the amended complaint in substance sets forth that at Cresta, on the Western Pacific, while in the course of his duties, plaintiff was running to catch a caboose in the early morning of October 5, 1934, when he stumbled and fell over a discarded angle bar, negligently and carelessly placed, imbedded in the dirt between the passing track and the main line, and allowed to remain upon the right of way by the railroad company, and as a result of said fall, inflammation and blood clot resulted and as a proximate result thereof it became necessary to amputate the left leg.

It is further alleged upon information and belief that plaintiff had a preexisting susceptibility to vascular trouble and that said susceptibility prior to the accident was latent and had not manifested itself prior to said accident; and that the negligence of the defendant railroad company caused the latent condition to become active and to be aggravated into a condition of infection and thrombosis of the left leg.

Between the first and second trial plaintiff sought and obtained leave of the court to file a supplement to the fourth cause of action as set forth in the amended complaint, wherein it was similarly alleged it became necessary to amputate plaintiff's right leg above the knee.

The answer denied the foregoing allegations, and as an affirmative defense set up contributory negligence, and assumption of risk.

The record before us consists of a transcript of some 1900 pages, and briefs of approximately 400 pages upon the part of respondent, and approximately the same by

appellant, where is ably presented the contentions of respective counsel. We mention this to show our difficulty in reducing a recital of the facts and an analysis of the law to a reasonable limit in this opinion.

Setting forth, therefore, the facts as succinctly as is possible under the circumstances, we find that respondent Smith, on the 5th of October, 1934, was engaged as a brakeman for the Western Pacific Railroad Company. He had been a railroad man for twenty years, and had been working for appellant railroad company somewhat over ten years. He had been promoted to the rank of conductor, but worked mostly as a brakeman. His average earnings were about $185 a month. During the ten years with the Western Pacific Railroad Company he had never lost any time from work by reason of sickness, and prior to October 5, 1934, had never been in the hospital by reason of sickness or illness. His physical condition was excellent and he had no difficulty at any time in performing his work. He had been active in outdoor life and had often engaged in such strenuous sports as fishing and hunting in the Plumas country. He testified that he had never felt any pain or disability in either of his legs prior to October 5, 1934, excepting that in 1933 he fell from a box car at Greenville and bruised his ankles but they only bothered him for two or three days and he did not spend any time in the hospital by reason of the accident and had had no medical treatment as a result thereof. At the trial, neighbors and business associates of plaintiff testified that they knew Mr. Smith and that they had not seen him limp and as far as they could see plaintiff had no external evidence of any physical trouble. So also, was it testified to by members of the train crew with whom he worked.

About ten o'clock on the evening of October 5, 1934, respondent reported for work as a brakeman on a run going up the Feather River canyon from Oroville to Portola. The train consisted of about sixty freight cars, on which he was the rear brakeman and flagman, and was stationed on the caboose. Among other duties he was to protect the rear end of the train as a flagman while on the main line, and when the train pulled onto a passing track it was his duty to line up the switches and derails. At Cresta, some forty miles east of Oroville, is a passing track or siding, a section house, a trackwalker's house, a house for the section foreman, and bunk houses for the section men. No one lives at this point but employees of the Western Pacific Railroad Company, and there is no roadway or other means of approach but by a roadbed of the railroad. On this particular evening this train was ordered to meet a west bound passenger train at Cresta. After the passenger train had passed, respondent, as was his duty, checked the switches including the derail switch, which was about 110 feet east of the caboose. In order to expedite the movement of the trains it was the custom for the freight train to slowly start as soon as the main line was clear. This required plaintiff to run for the caboose. The most natural place for him to run was between the two tracks, the main track and the passing track, because it was smoother there than between the rails. While so running at this time plaintiff alleges that he tripped over a discarded angle bar, which was imbedded in the ground between the two tracks, causing him to fall forward prone upon the ground. An angle bar is a piece of steel about two feet long so formed to fit against the rail and it is used to connect the ends of the rails together.

The evidence reveals that the section foreman inspected the track during daylight hours for a distance of five miles every Sunday and Thursday, which beat included the tracks at Cresta. In addition to the inspection by the section foreman a regular trackwalker made a night inspection of the roadbed and the equipment each night. Both these men testified that it was their duty to look for such obstructions as here involved and stated that they never saw the particular bar in question. The section foreman testified that if such a bar was imbedded as testified by plaintiff it would have to have been there a long time.

Respondent further testified that after his fall he raised himself from the ground, picked up his lantern and proceeded to overtake the caboose. Just after the fall he had a very severe pain in the calf of his left leg and the instep just at the base of the toes and from there up to about his ankle. After he got on the caboose platform the pain still continued. He then told Lawrence, a fellow brakeman, that he had fallen and hurt his leg, and Lawrence then massaged the leg, and later, to assist him, his fellow employees lined up the switches for respondent. Lawrence denied, although rather inconclusively, that

Smith told him he had received an injury, although admitting he massaged the leg and that he later lined up the switches for Smith. An examination of the left leg did not indicate an injury except for a bruise about six or eight inches below the knee on the outside of the calf. Respondent, although having fallen and suffered this pain, did not file an accident report,—his reason for not doing so was that he thought the injury did not amount to much and would soon heal. Furthermore he did not want to be compelled to lay off as he wanted to keep on working. On October 9th, however, he went to see the company doctor who told him it was nothing serious. Respondent also gave as his reason for not reporting the accident that he was personally acquainted with the section foreman, and a complaint might cause the foreman to lose his job. On the next morning when the respondent returned on the run he saw the angle bar imbedded where it was when he tripped the night before. He saw it from the caboose platform as they were passing Cresta.

There was a further reason for not reporting the accident. Plaintiff testified that after a few days the members of the train crew became very much worried about their failure to file an accident report as required by rules 1184 and 1185 of the railroad. These rules require prompt report of accidents and detailed forms to be made out. The rules of the company were very strict about failure to report accidents in such manner. It was testified, however, by at least one member of the crew that many times if a man was superficially hurt he would say nothing about it in order to avoid the necessity of the crew making the elaborate reports, and that railroading was a rough employment, and if a man got a trivial injury he ordinarily did not make any fuss about it. At the trial the members of the crew denied, or were vague about any injury sustained by Smith, but it is argued by counsel, and perhaps plausibly so, that having failed to make the report, the train crew would be subject to penalties if they knew of an accident and had failed to report the same. In fact it might easily result in their dismissal from the railroad service. So also would an admission by the section foreman or the trackwalker of the presence of the angle bar on the roadbed.

The pain in the foot continuing, respondent went to the company hospital at Portola on October 9th, and called on Drs. McKnight and Coulter, and told Dr. Coulter that he had fallen while running for the caboose. At that time Dr. Coulter apparently did not consider the matter very serious, and told him it was probably a sprain of the muscles. The next day respondent saw Dr. Kusel, another railroad doctor, at Oroville. He told Dr. Kusel that he had fallen while running for the caboose and had immediately thereafter suffered some pain. Dr. Kusel told him he did not think it amounted to a great deal. He called on Dr. Kusel October 18th, 19th, 22nd, and 23rd. The doctors' reports were somewhat vague in regard to the history given them by respondent, and they were not very certain as to what information they had from Smith. Dr. Coulter diagnosed the trouble at that time as "questionable Raynaud's disease".

Respondent continued to work from the 5th to the 17th of October, during which time the members of the train crew assisted him as much as they could in his duties, but on October 18th, the pain became so intense that he was unable to report for duty. On October 25th, he went to the hospital at Portola where he again saw Dr. McKnight and Dr. Coulter. They then arranged for him to enter the railroad hospital in San Francisco. They also instructed the porter of the train in Smith's presence, to keep his leg in a bucket of chipped ice on the way to San Francisco. Upon arriving at St. Joseph's Hospital in San Francisco, plaintiff there met Dr. Kilgore, and gave him the history of his fall on the right of way. He was assigned to a room. Smith at that time was the holder of an accident insurance policy, and asked the doctor to report the same for him, but Dr. Kilgore told him he thought his condition was due to some disease and not accident, and refused to sign the blanks for an accident policy. Due to Smith's need for immediate funds, so he testified, he finally accepted the theory of Dr. Kilgore and filed his insurance policy for illness and not accident. It should be noted that the several doctors denied having received any history from Smith as to a fall, as Smith said he did, but that merely created a conflict in the evidence which the jury resolved in favor of plaintiff.

In regard to the history which was obtained at the hospital, the interne whose duty it was to take the case history of the patient, testified he did not take down ver-

batim what was stated to him by Smith but took down such things as would be of medical interest and not for a legal record. He had an entry of a sprained ankle some two years previously, but did not know how the injury was occasioned. Nor did he have anything in the record to indicate whether or not the pain was caused by the falling over an angle bar or the falling off of a caboose, or how it happened. As he said all he was concerned with at the time was the record of the pain, and was not interested in what may have brought it about.

Upon arriving at the hospital the pain was confined to respondent's left leg. His condition, however, did not improve. Gangrene set in, and the left leg was amputated on November 26, 1934, about nine inches below the hip. A dissection of the popliteal artery of the amputated left leg showed almost black blood clots of about the consistency of new rubber, definitely stopping the flow in that artery. From this dissection and his prior study of the case, Dr. Kilgore diagnosed the case as one of "Buerger's disease", and came to the conclusion that the plaintiff had been suffering from such a disease for about one and a half years, and that he was definitely suffering from that disease on October 5, 1934.

Dr. John P. Degnan, a witness called by defendant, testified that he first saw plaintiff in November, 1934. That he had been retained by some of the railroad men at Portola to examine the leg of Mr. Smith. At that time the patient was under the influence of opiates and in very severe pain, and he could not get a complete history, but was able to learn that he had fallen and hurt his left leg in the region of the knee, and immediately afterward it had so pained him that he had to quit work shortly thereafter. He also told the doctor that he had stumbled over an iron on the right of way. It was the opinion of this doctor that Smith's condition was due to an injury which had caused the blood vessels to be blocked, and if the patient did have Buerger's disease prior to October it was quiescent, and an injury of the kind described by the plaintiff would excite the condition, and the injury would be the exciting cause of clot formation and blockage.

After the amputation of the left leg respondent left the hospital about the middle of December, 1934. He then applied for a job with the railroad company, and he was given temporary work in a watch tower in Oakland. The distance he had to walk to his work and the climbing to work in the tower so irritated the stump of his leg that after about three weeks he was compelled to quit. Also the pain at night kept him awake so that he was in danger of falling asleep on his job and he did not want the responsibility of being in a watch tower under those conditions.

About April, 1936, plaintiff testified that he began to have trouble with his right leg, starting with pain in the bottom of the right foot which gradually extended up into the leg. He entered the Providence Hospital in Oakland on April 24, 1936, and on June 27, 1936, his right leg was amputated. Dr. Ruedy, who performed the operation on the right leg in the Oakland hospital described in some detail the characteristics of Buerger's disease and explained it was a disease which involved both legs; in other words, it was bi-lateral, and that the loss of the right leg was due directly to the disease which developed in the left leg.

It will be recalled that Dr. Coulter, in his original diagnosis of the case in October, 1934, classified it as "questionable Raynaud's disease". Raynaud's disease is one that embraces circulation and is functional rather than organic. It is due to a cerebral disturbance, acting on the vascular constrictors and vascular dilators. It involves constriction of the blood vessels and may be transitory if the causative mental factor is removed. In this disease if an emotional person was subject to extreme worry, it would have a constrictive effect upon the arteries. An illustration of this as cited by the doctor was the blanching of a person's face when confronted with a sudden danger, which took place without any physical contact or physical injury, but was a natural and emotional response by constriction. Buerger's disease is an inflammatory infectious disease of the blood vessels, and when occurring in the legs affects both.

The evidence reveals long and involved hypothetical questions asked of the various medical witnesses, which are too long to be here set forth or even summarized. The deductions of the medical witnesses called by the plaintiff, however, were to the effect that an injury such as that sustained by plaintiff, if such an injury was sustained, would have a direct effect upon an existing Buerger's disease. A person might

have Buerger's disease, they testified, but had developed a collateral system of circulation around the diseased point in the artery. Such secondary or collateral system of circulation would be entirely adequate, unless or until some outside cause interfered with such secondary system, blocking adequate circulation, causing gangrene. Such an injury would then be, and in this case was, they testified, the primary, direct causative factor of the painful symptoms and conditions of Buerger's disease in the left leg, and later extended to the arteries in the right leg.

Many pages of the briefs and considerable time on oral argument were devoted to a learned and technical discussion of Buerger's disease and of Raynaud's disease, and while of great assistance to the court to a better understanding of the theory of counsel, we need not here go into that feature of the case in greater detail.

[1] Let us turn to a consideration of the law. The principal contention of appellant is that the evidence was insufficient to support the verdict, and although the rule of federal practice is here applicable we can see little difference between the federal rule and the familiar rule in such situations as is applied by the courts of California. In Gajda v. Reick-McJunkin Dairy Co., 6 Cir., 18 F.2d 279, the federal rule is given and is essentially the same as under our state practice.

"In determining the propriety of the directed verdict for defendant, we must take that view of the evidence, and the inferences reasonably and justifiably to be drawn therefrom, most favorable to the plaintiff, and determine whether or not, under the law, a verdict might be found for the plaintiff. * * * Neither we nor the trial judge can rightly pass upon conflicting testimony, or determine the credibility or preponderance thereof." [page 280.]

[2, 3] In other words it is not the function of the court to weigh the evidence, but only to determine whether or not there is substantial evidence to sustain the verdict. Of course a verdict must be based on substantial evidence and not on surmise, conjecture or speculation. But if reasonable men may fairly differ as to whether certain evidence establishes a fact in issue then such evidence must be considered as substantial.

[4] Plaintiff testified he tripped over an angle bar, partially buried in the dirt and ballast of the roadbed. He testified he saw it immediately after he fell, and again the next morning from the caboose on the return trip. It is true the section foreman and the trackwalker testified they had never seen such a bar there, and if it were there it would have been their duty to remove it. The jury have concluded it was there and accepted the testimony of plaintiff. We are bound to assume that it was there as there was substantial evidence of that fact in the record.

[5, 6] There is no proof that the railroad company had actual knowledge of the existence of the angle bar upon the right of way, so plaintiff must establish the same by constructive notice. To do that it was testified to by plaintiff that the bar was imbedded in the ballast—that it was rusty —that it was found in a place not frequented by strangers, far from any highway, camps or dwellings of persons not connected with the railroad, and not frequented by travelers of any kind. The section foreman testified that if it was there and imbedded in the gravel as described by Smith, it would have had to have been there a very long time. Those facts would tend to indicate negligence on the part of the railroad in failing to furnish plaintiff with a safe place wherein to work. A railroad is under a duty to use ordinary care to provide its employees with a safe place wherein to work. Thomas v. Southern Pac. Co., 116 Cal.App. 126, 2 P.2d 544; Haskins v. Southern Pacific Co., 3 Cal.App. 2d 177, 39 P.2d 895.

Appellant claims the presence of the angle bar upon the right of way, lying between the main and passing tracks, was not sufficient to justify a finding of negligence, actual or constructive. In support of this contention they cite and rely, among others, upon Patton v. Texas & P. R. Co., 179 U.S. 658, 21 S.Ct. 275, 45 L.Ed. 361; Ewing v. Goode, C.C., 78 F. 442; Missouri K. & T. R. Co. v. Jones, 103 Tex. 187, 125 S.W. 309; Frebes v. Michigan Central R. Co., 218 Mich. 367, 188 N.W. 424; Matthews v. Southern Pac. Co., 15 Cal.App. 2d 36, 59 P.2d 220; Wright v. Atchison T. & S. F. R. Co., 170 Okl. 48, 38 P.2d 517; Atchison T. & S. F. R. Co. v. Saxon, 284 U.S. 458, 52 S.Ct. 229, 76 L.Ed. 397; Connors v. Cranford Co., 146 App.Div. 530, 131 N.Y.S. 148.

In the Patton Case, supra, a fireman attempted to step from the engine, and because of a loose nut on the step, it turned,

throwing him against the wheels. It appearing, the court said, that the employer furnished suitable appliances in good condition, and it being impossible to explain what caused the step to be loosened, a jury could not conjecture as to the cause for the loosened nut. In Ewing v. Goode, supra, plaintiff produced evidence consistent with an hypothesis that defendant was not negligent, and also that he was negligent; so it was held plaintiff has proven neither. In Missouri K. & T. R. Co. v. Jones, supra, a switchman, getting from an engine, slipped on a large bolt of a type used by car repairers. The court held that it could not be determined from the facts whether some employee had put the bolt there or negligently allowed it to remain, or that it had remained there long enough to raise an inference of a want of care.

In Frebes v. Michigan Central R. Co., supra, the court held there must be either actual or constructive notice of the danger and a reasonable opportunity to remove it before an employer can be charged with actionable negligence. A similar rule was applied in Matthews v. Southern Pac. Co., supra.

In Wright v. A. T. & S. F. R. Co., supra, 38 P.2d 518, the plaintiff testified he saw "what looked * * * like a stake". The court held plaintiff had failed to show there was a stake or that one had been placed upon the right of way by the company. The cause of the accident was open to conjecture. Such also was the situation in Atchison T. & S. F. R. Co. v. Saxon, supra. In Connors v. Cranford Co., supra, where plaintiff was injured by a nail in a plank, it was held there was no evidence from which it could be adduced how long the nail had remained in the plank. The court said "such fault would have been shown had the plaintiff proved that prior to the accident the defendant or his agent had knowledge of the protrusion of the nail, or that it had been in that situation for such a length of time that the defendant should have known of it." 131 N.Y. S. 150.

In the case of Poe v. Illinois Cent. R. Co., 335 Mo. 507, 73 S.W.2d 779, a judgment was reversed on the ground of insufficiency of the evidence to show notice to the defendant of the construction complained of. There, plaintiff fell over a pile of gravel on the right of way but it was not shown how long the gravel had been there. As the court said, it might have fallen from a passing train a very short time before.

Appellants compare the situation at Cresta to that at Lemoore, where Matthews (15 Cal.App.2d 36, 59 P.2d 220) was hurt, but Cresta is a siding in the Feather River canyon, far removed from the public, whereas the switch at Lemoore was in a town near a depot, a packing house, a warehouse, and subject to all the travel a railroad right of way receives under such circumstances.

[7] Appellant also points to the testimony of the trackwalker, the section foreman and the members of the train crew to show that no angle bar was imbedded in the gravel of the right of way, and that no complaint was made by plaintiff to his fellow employees. However, the jury were the judge of the credibility of the witnesses, and they have chosen to accept the statement of the plaintiff and his witnesses. No criticism can be made of that nor the fact that the trial court seems to have been sufficiently impressed with the truth of plaintiff's case to deny a new trial. The jury may have considered the self-interest of the employees sufficient to affect the testimony of the witnesses.

[8, 9] As to the medical phase of the case, the rule is recognized in all jurisdictions that an accident which aggravates a preexisting disease may constitute a cause of action for damages. In such a case plaintiff may recover all damages for such aggravation. We find that rule first laid down in Campbell v. Los Angeles Traction Company, 137 Cal. 565, 70 P. 624, and followed in such cases as Perry v. McLaughlin, 212 Cal. 1, 11, 297 P. 554; White v. Red Mountain Fruit Co., 186 Cal. 335, 199 P. 318; McGeorge v. Nelson Co., 107 Cal. App. 148, 290 P. 75; Deibler v. Wright, 119 Cal.App. 277, 6 P.2d 344. Here the medical witnesses for plaintiff testified directly that the accident aggravated a previous quiescent and dormant condition and caused the chain of circumstances to be set up, which resulted in the amputation of both legs of plaintiff. Such casual connections were accepted in Latky v. Wolfe, 85 Cal.App. 332, 259 P. 470; Ward v. Read, 219 Cal. 65, 25 P.2d 821; Dow v. City of Oroville, 22 Cal.App. 215, 134 P. 197; Groat v. Walkup Drayage etc. Co., 14 Cal. App.2d 350, 58 P.2d 200; Foley v. Northern Cal. Power Co., 165 Cal. 103, 130 P. 1183; People v. Bowers, 2 Cal.Unrep. 878, 18 P. 660.

In Cobb v. Spokane P. & S. R. Co., 150 Or. 226, 44 P.2d 731, the court was considering a situation in many respects similar to the case at bar. It there said [page 732]: "At the time of the accident plaintiff was afflicted with what is known as 'Buerger's disease,' a disease of the veins and arteries, and so affecting circulation, usually in the extremities. Plaintiff was unaware that he had the disease and had never been bothered with it. The disease is bilateral, usually affecting both legs or limbs at the same time, but plaintiff had had no trouble with his left or uninjured foot. It is asserted that a blow is dangerous to one afflicted with this disease and is liable to result in infection or gangrene. Trauma is generally the cause of amputation in these cases, and amputations are much more to be expected when the blow injures a vein or artery."

As first indicated the industry and ability of counsel have raised many questions, and to attempt to analyze all of these collateral questions would extend this opinion to unreasonable lengths. What we have said, we believe, is determinative of this appeal. The case was ably tried, and the testimony, although conflicting, was properly received, and the jury with it all before them, found for the plaintiff.

No error appearing sufficiently serious to justify a reversal, the judgment should be affirmed, and it is so ordered.

I concur: THOMPSON, J.



30 Cal.App.2d 234

PEOPLE v. WILLIAMS et al.

Cr. 3148.

District Court of Appeal, Second District, Division 2, California.

Dec 30, 1938.

Hearing Denied by Supreme Court Jan. 26, 1939.

1. Criminal law ⇐742(2)

In prosecution of defendant members of teamsters' union for conspiracy to commit assault and assault with deadly weapon upon strike breakers, whether witness, one of the accused against whom charges were dismissed, was an accomplice whose testimony required corroborative evidence, was for the jury.

2. Criminal law ⇐1144(13)

In considering whether evidence is insufficient to support conviction, District Court of Appeal is bound to resolve all intendments in favor of upholding the judgment and must view the evidence in the light most favorable to the state.

3. Conspiracy ⇐47

In prosecution of defendant members of teamsters' union for conspiracy to commit assault and assault with deadly weapon upon strike breakers, evidence *held* sufficient to warrant conviction.

4. Criminal law ⇐423(9)

In prosecution for conspiracy, evidence of acts committed after the perpetration of the principal crime for which accused is being tried is admissible where such acts appear to be in furtherance of the general plan of their conspiracy.

5. Criminal law ⇐424(1)

In prosecution of members of teamsters' union for conspiracy to commit assault and assault with deadly weapon, on strike breakers, evidence consisting of a baseball bat, various notes and memoranda found in possession of some of accused, was admissible, notwithstanding that they were discovered by police at a time subsequent to the perpetration of the principal crime, where acts appeared to be in furtherance of the general plan of their conspiracy.

6. Criminal law ⇐528

In prosecution of defendant members of teamsters' union for conspiracy to commit assault and assault with deadly weapon on strike breakers, admissions and confessions of conspirators made after the termination of their conspiracy, and admitted only as against the conspirator making the admission or confession, was proper.

7. Criminal law ⇐423(3)

In prosecution of defendant members of teamsters' union for conspiracy to commit assault and assault with deadly weapon upon strike breakers, where there was sufficient evidence to connect all of the accused with the conspiracy, testimony concerning acts and declarations of coconspirators was admissible against conspirator.

8. Criminal law ⇐637

In prosecution of defendant members of teamsters' union for conspiracy to commit

assault with deadly weapon on strike breakers, order remanding conspirator to custody was not error where argument on motion to remand to custody and order thereon was not made in the presence of the jury. Pen. Code, § 1129.

9. Conspiracy ⇐48

In prosecution of defendant members of a teamsters' union for conspiracy to commit assault and assault with deadly weapon on strike breakers, where no issue was presented as to the right of union labor to strike, picket, or declare a boycott, accused were not entitled to an instruction on that subject.

10. Criminal law ⇐768(1)

In prosecution of members of teamsters' union for conspiring to commit assault and assault with deadly weapon on certain strike breakers, refusal to give instruction that fact that certain of the conspirators were negroes should not influence jury, was not prejudicial.

11. Criminal law ⇐776(3)

In prosecution of members of teamsters' union for conspiracy to commit assault and assault with deadly weapon on certain strike breakers, where evidence was offered on issue as to conspirators' reputation for peace and quiet, refusal of instruction to effect that they were men of good moral character was not erroneous, since such trait was not in issue.

12. Criminal law ⇐829(1)

Where requested instructions were adequately covered by the instructions given, refusal to give requested instructions was not error.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

William B. Williams, Roscoe Williams, Jack Lyndes, and Elmer C. Naylor were convicted of conspiracy to commit an assault, and of assault with a deadly weapon, and they appeal.

Affirmed.

C. B. Conlin and L. J. Seay, both of Los Angeles, for appellants William B. and Roscoe Williams.

Bayard R. Rountree and Rosecrans & Emme, all of Los Angeles, for appellants Jack Lyndes and Elmer C. Naylor.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

CRAIL, Presiding Judge.

Appellants have taken this appeal from judgments of conviction on one count of conspiracy to commit an assault and another count of assault with a deadly weapon, and from an order denying a motion for a new trial.

The evidence discloses that at the time when the acts charged in the information were committed, the automobile salesmen's union was conducting a strike at the Thompson Nash Company in Los Angeles, which strike was being partially financed and otherwise aided by the teamsters' union. Appellant Lyndes was an official in the salesmen's union and the other appellants were members of the teamsters' union.

On the evening of December 22, 1937, one Hogue, a salesman for the Thompson Nash Company, who had refused to go out on the strike, was struck on the head as he was about to enter an apartment house shortly after leaving his place of employment. An eyewitness testified that Hogue's assailant was a negro who resembled appellant William B. Williams and who wielded a baseball bat in making the assault. Hogue, who was rendered unconscious by the blow, testified that just prior to the assault, as he was parking his car in front of the apartment, a 1931 Ford Victoria coupe, occupied by two negros, stopped immediately behind him; that the two negros were quite similar in appearance to appellants, William B. Williams and Roscoe Williams. A 1931 Ford Victoria coupe, owned by Roscoe Williams, was identified by Hogue as closely resembling the car that he had seen on the night of the assault. Hogue further identified a tan coat belonging to William B. Williams as being very similar to the coat worn by one of the two negros whom he had seen that night. Police officers found a baseball bat in the home of William B. Williams, the presence of which was explained by conflicting stories. A spot of blood was discovered upon the bat, but experts were unable to determine whether or not it was animal or human blood.

On December 10, 1937, William B. Williams caused an automobile which he was driving to collide with a motorcycle which was being operated by the complaining witness, Edmond Hartup, who at that time was employed by the Thompson Nash Company. At the time of the collision, Williams grabbed Hartup and threatened to kill him. The charges against George W. Evans, one

of the defendants in the trial below, were dismissed and he thereafter testified as follows on behalf of the prosecution: That he was formerly an employee of the Thompson Nash Company, but that during all of the times herein mentioned was out on a strike, acting as one of the pickets. Appellant Naylor, with whom Evans was quite friendly, was in charge of the picket line. On one occasion, at the request of Naylor, Evans drove Naylor to the home of William B. Williams. Naylor, going into the house alone, returned with William B. Williams and the three returned to the picket line. During the return trip, Williams stated that he had overturned a truck in a previous strike and otherwise boasted of similar acts which he had performed and of the fact that it was difficult to identify him because of the similarity in the appearance of negros. During the three days subsequent to the assault on Hogue, William B. Williams called Evans several times and asked whether or not appellant Lyndes had left any money for him. On the night of the assault, William B. Williams and another negro who looked very much like Roscoe Williams drove up in a 1931 Ford Victoria coupe and inquired of Evans if Lyndes had left any money for William B. Williams; that the latter, who at that time had in his possession a bat similar to that which was later found at his home, made the statement that, "We have got to do a job tonight." During the same evening, at a time when the salesmen were going home, Evans saw the same two negros in the Victoria coupe in front of the Thompson Nash Company; that when Hogue left to go home, the men in the Victoria coupe started to follow the car in which Hogue was riding. A few days after the assault on Hogue, Lyndes gave William B. Williams a check for $9 and promised to give him $5 in a few more days.

A memorandum containing the names and addresses of Hogue and another strike breaker was found on the person of Naylor, who admitted that he intended to take some action against the two and that Lyndes had instructed him "to get somebody to fix Norman (another strike breaker) up", and that in accordance with the instruction, he got William B. Williams "to slap him (Norman) down". As a matter of fact, Norman was never assaulted. It further appears that acts of sabotage were committed upon Hogue's automobile with the consent and approval of Naylor.

Appellant Lyndes admitted that he had paid William B. Williams the sum of $10 within five days after the assault on Hogue and that he had promised him an additional $5, claiming, however, that this money was for gasoline and other expenses incurred by Williams. Lyndes stated that when a portion of this money was paid to William B. Williams, another negro who looked like Roscoe Williams was present. Lyndes was aware and approved of the fact that William B. Williams was employed by the teamsters' union and that he had been hired "to do the dumping and rough stuff", as well as, "to fix somebody up".

[1] As a basis for their claim that the evidence is insufficient to support the verdicts, appellants contend that the witness Evans was an accomplice as a matter of law and that there was insufficient corroboration of his testimony to establish the conspiracy. This question was one which was within the province of the jury to decide (People v. Compton, 123 Cal. 403, 56 P. 44) and, since proper instructions on this subject were given by the court, we must conclude that the jury by its verdict found that Evans was not an accomplice. People v. Seiffert, 81 Cal.App. 195, 253 P. 189.

[2, 3] In our consideration of the contention that the evidence is insufficient to support the verdicts, we are bound to resolve all intendments in favor of upholding the judgment of the trial court and accordingly must view the evidence in the light most favorable to the respondent herein. People v. Shannon, Cal.App., 83 P.2d 302. Examining the evidence in this light, we are of the opinion that there is substantial evidence to support the verdicts.

[4] Appellants contend that it was error for the court to admit evidence of the payment of money by Lyndes to Williams at a time subsequent to the assault on Hogue, on the theory that the conspiracy terminated at the time of the assault. With this contention we are unable to agree, for it clearly appears that the conspiracy was not one to commit a single assault but rather to commit a series of assaults and other intimidating acts against strike breakers during the continuance of the strike. The strike was still in progress at the time of the payment of the money. In the case of a continuing conspiracy, evidence of acts committed after the perpetration of the principal crime for which accused is being tried is admissible where, as in the instant

case, such acts appear to be in furtherance of the general plan of the conspiracy. People v. Schmidt, 33 Cal.App. 426, 165 P. 555; People v. Sampsell, 104 Cal.App. 431, 286 P. 434.

[5] Certain appellants claim that various exhibits introduced in evidence (including the baseball bat, various notes and memoranda found in the possession of some of the defendants) were inadmissible as against them because they were discovered by the police at a time subsequent to the assault on Hogue and therefore, appellants argue, after the termination of the conspiracy. Our disposition of the preceding point sufficiently answers this contention.

[6] The appellants Williams have raised the point that testimony of certain admissions and confessions of the other conspirators made some months after the assault on Hogue was inadmissible as against them because such admissions and confessions were made after the termination of the conspiracy. This would be true had the testimony been admitted against them, but it was not. When the testimony was given, it was admitted only as against the person making the admission or confession. At the close of the trial the prosecution moved that all testimony of any conversations, acts, etc., of any of the defendants up to the date of the assault on Hogue be admitted as against all of the defendants. This motion was granted, the court stating specifically that any admissions or confessions made subsequent to that date would be considered only as against the defendant making such statements. The point is not well taken. This likewise disposes of the objection of these appellants to the refusal of the court to grant their motion to strike the above evidence, since it was never admitted against them.

[7] The contention of appellant Lyndes that evidence of the statements and admissions of the other appellants was inadmissible against him for the reason that there was no other evidence connecting him with the conspiracy is without merit. Elsewhere in this opinion we have concluded that there was sufficient evidence to connect all of the appellants with the conspiracy and have set forth the evidence rather fully. We see no reason to change that conclusion with regard to Lyndes. This being so, all of the statements, admissions and acts of the other conspirators relating to the conspiracy were admissible against Lyndes. People v. Schmidt, 33 Cal.App. 426, 165 P. 555.

[8] During the course of the trial the court made an order remanding Lyndes to custody. This action is now assigned as error. Neither the argument on the prosecution's motion to remand to custody nor the order thereon was made in the presence of the jury. That the court had the power to make such an order is beyond question. Pen.Code, § 1129. While it is true that the court may abuse its discretion in making such an order, appellant has failed to point out, and we have been unable to find, any abuse of discretion which would amount to prejudicial error.

The refusal of the court to give certain requested instructions is assigned as error. An instruction to the effect that Evans was an accomplice as a matter of law was requested and refused. Elsewhere in this opinion we have held that Evans was not an accomplice as a matter of law, therefore the instruction was properly refused.

[9] An instruction relative to the right of union labor to strike, picket and declare a boycott was properly refused. In fact the court did instruct the jury on that subject, but since no issue was presented as to the right of union labor to strike, picket or declare a boycott, appellants were not entitled to an instruction on that subject. People v. Shannon, Cal.App., 83 P.2d 302. The instruction given was in no way prejudicial.

[10, 11] By no stretch of the imagination could the appellants Williams have been prejudiced by the refusal of the court to instruct the jury that it was not to be influenced by the fact that they were negros; nor could they have suffered prejudice by the refusal of the court to give an instruction to the effect that they were men of good moral character, for such trait was not in issue and no evidence thereon was offered. The evidence which was offered was on the issue as to their reputation for peace and quiet.

[12] Instructions upon the following subjects were requested and refused: Corroboration of testimony of an accomplice, reasonable doubt, circumstantial evidence and that the testimony of William B. Williams was to be considered by the same rules as that of any other witness. These subjects were fully and adequately covered in other instructions which were given by the court, and therefore there was no error

in refusing to give the requested instructions.

For the foregoing reasons the judgments and orders appealed from are affirmed.

We concur: WOOD, J.; McCOMB, J.



33 Cal.App.2d Supp. 760

PEOPLE v. TAYLOR et al.

No. 94248.

Appellate Department, Superior Court, San Diego County, California.

Dec. 31, 1938.

1. Counties ⇐21½
Municipal corporations ⇐590, 592(1)
Towns ⇐15

The constitutional provision authorizing any county, city, town, or township to make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws, delegates directly to inferior governmental agencies the police power in their respective localities, and the power so delegated is as broad as that of the legislature itself, provided only that its exercise by any city or other agency must be confined to that city or agency and must not conflict with the general laws of the state. Const. art. 11, § 11.

2. Municipal corporations ⇐622

A city council may in the exercise of its police power inhibit the defacing of property by affixing to it posters, circulars, or notices and may forbid the depositing of dodgers, notices, circulars, or other matter having a tendency to create an accumulation of rubbish on sidewalks, streets, or other public places or on private property. Const. art. 11, § 11.

3. Municipal corporations ⇐627

A city ordinance attempting to prohibit the mere handing of advertising matter to persons on the streets or in other public places is an unlawful and unwarranted invasion of private rights and is beyond any legitimate exercise of the police power. Const. art. 11, § 11.

Appeal from Municipal Court of San Diego; Phillip Smith, Judge.

Dan Taylor and others were charged with violating an ordinance of the City of San Diego by willfully and unlawfully distributing to and among pedestrians, along a public street and in a public place, handbills, dodgers, circulars, and other advertising matter. After pleas of not guilty, but before trial, the case was dismissed on motion, and the People appeal.

Affirmed.

Dayton L. Ault, City Atty., of San Diego, for the People.

Wilmer Breeden, of San Diego, for respondents.

HAINES, Presiding Judge.

The defendants were charged with a violation of Ordinance 10731 of the City of San Diego, alleged to have been committed in said city on the 5th day of August, 1938, "in that they did then and there willfully and unlawfully distribute to and among pedestrians along a public street, to wit: 'C' Street, and in a public place, to wit: the Savoy Theatre, handbills, dodgers, circulars and other advertising matter."

After pleas of not guilty, but before trial the case was dismissed on motion upon the ground that the ordinance referred to violates the freedom of speech and of the press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, U.S.C.A.Const. Amends. 1, 14, and Section 9 of Article 1 of the Constitution of the State of California. The People appeal.

[1] Counsel for respondents correctly say that Article 11, Section 11, of the State Constitution delegates directly to inferior governmental agencies the police power in their respective localities and that the power so delegated is as broad as that of the legislature itself provided only that its exercise by any city must be confined to such city and must not conflict with the general laws of the state. Pasadena School District v. Pasadena, 166 Cal. 7, 134 P. 985, 47 L.R.A.,N.S., 892, Ann.Cas.1915B, 1039. There being here no question of conflict with any general law, the question to be decided is not one of the relative functions of the legislature and the city council in undertaking to exercise the police power but of the legitimate extent of that power itself.

We think that the judgment must be sustained. Though the case was not tried upon the facts there is in the record what the parties stipulate is a copy of the matter circulated. It is a mimeographed publication of a radical but not incendiary nature, mainly devoted to political discussion but containing certain advertising matter. The statement on appeal contains no copy of the ordinance involved, but what purports to be a copy of the provisions relied on appears in appellant's brief and no question of their accuracy being raised in the brief for respondents we shall assume them to be correctly set out. They are as follows: "That it shall be unlawful to deposit upon any sidewalk, street or in or on any motor vehicle parked upon any street in the City of San Diego, California, any handbill, dodger, poster, circular, notice or other advertising matter, or to post or tack any advertising matter upon any electrical, telegraph or telephone pole, or to deposit any advertising matter in or upon any vacant lot or to distribute to or among pedestrians along any public street, park or other public place, or to distribute to the passengers in any street car, or throw upon or in any street car, or post or affix to any curb or public street, or to any tree or structure within a public park, or upon any fence or gate within such park within the City of San Diego, California, any advertising matter."

[2, 3] We do not question the right of the Council to inhibit the defacing of property by affixing to it posters, circulars or notices, nor do we question the council's right to forbid the depositing upon sidewalks, streets or other public places, or for that matter the unauthorized depositing on private property of dodgers, notices, circulars or other matter having a tendency to create an accumulation of rubbish. Such inhibitions are manifestly proper uses of the police power and have often been so held. See e. g. Sieroty v. City of Huntington Park, 111 Cal.App. 377, 295 P. 564; People v. St. John, 108 Cal.App.Supp. 779, 781, 288 P. 53; San Francisco Shopping News v. City of South San Francisco, 9 Cir., 69 F.2d 879. It is true that a portion of the San Diego ordinance under review is directed against that evil. This, however, is not the portion of the San Diego ordinance under which the charge before us is laid. What is charged is a mere personal distribution of advertising matter to pedestrians on a public street and to persons in another public place. There is no charge that such matter was forced upon persons not willing to receive the same or that there was anything in the distribution tending to disturb the peace or public order or to cause any littering of the streets or of any public place. The attempt to prohibit the mere handing of advertising matter to persons on the streets or in other public places has often been held to be an unlawful and unwarranted invasion of private rights and therefore to be beyond any legitimate exercise of the police power, and we are in accord with that view. People v. Armstrong, 73 Mich. 288, 41 N.W. 275, 2 L.R.A. 721, 16 Am.St.Rep. 578; Chicago v. Schultz, 341 Ill. 208, 173 N.E. 276; People v. Johnson, 117 Misc. 133, 191 N.Y.S. 750; Ex parte Pierce, 127 Tex.Cr.R. 35, 75 S.W.2d 264. See also Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949.

The judgment is affirmed.

MUNDO and TURRENTINE, JJ., concur.

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SECOND SERIES

ATCHISON, T. & S. F. RY. CO. v. SUPERIOR COURT IN AND FOR CONTRA COSTA COUNTY et al.

S. F. 16084.

Supreme Court of California.

Jan. 9, 1939.

Rehearing Denied Feb. 6, 1939.

1. Master and servant ⇐111(1), 204(2) Negligence ⇐101

Where there is a violation of Federal Safety Appliance Act, liability is absolute, rather than dependent on negligence, assumption of risk is not a defense, and contributory negligence of employee does not reduce damages. Federal Safety Appliance Act, 45 U.S.C.A. §§ 11–16.

2. Master and servant ⇐204(1) Negligence ⇐101

Where claim of liability under Federal Employers' Liability Act rests on common-law negligence, assumption of risk is a defense and contributory negligence reduces damages. Federal Employers' Liability Act, §§ 3, 4, 45 U.S.C.A. §§ 53, 54.

3. Appeal and error ⇐1210(1)

Generally, a retrial in civil actions may be had following reversal without express provision therefor in appellate court's judgment.

4. Appeal and error ⇐1210(1)

A judgment of Supreme Court reversing judgment for plaintiff after reversal by United States Supreme Court, with directions to enter judgment for defendants for amount of costs in United States Supreme Court and costs on appeal, did not deny right to retrial.

5. Courts ⇐400

As respects plaintiff's right to retrial after reversal of judgment in his favor by the United States Supreme Court, the law favors decision of cases on their merits.

6. Appeal and error ⇐1180(1)

The effect in general of a reversal is to set the case at large as if it had never been tried.

7. Election of remedies ⇐11

Where, after claim under common-law negligence was abandoned, United States Supreme Court decided that plaintiff misconceived his remedy in proceeding under Safety Appliance Act, doctrine of election of remedies did not defeat right to retrial on theory of common-law negligence. Federal Safety Appliance Act, 45 U.S.C.A. §§ 11–16; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

8. Election of remedies ⇐9

A mere mistake of judgment should not result in depriving one of valuable rights.

9. Courts ⇐400

Where, in action under Federal Employers' Liability Act based on both common-law negligence and Safety Appliance Act, claim under common-law negligence was abandoned, judgment of United States Supreme Court reversing judgment for plaintiff on ground that Safety Appliance Act was inapplicable did not preclude retrial. Federal Safety Appliance Act, 45 U.S.C.A. §§ 11–16; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

In Bank.

Proceeding by the Atchison, Topeka & Sante Fé Railway Company against the Superior Court in and for the County of Contra Costa, and another for a writ of prohibition to prevent a second trial of an action against petitioner.

Writ denied.

Rehearing denied; EDMONDS, J., dissenting.

Prior opinion, 79 P.2d 740.

Robert Brennan, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for petitioner.

Clifton Hildebrand, of Oakland, and James F. Hoey, of Martinez, for respondents.

Clifton Hildebrand, of Oakland, for intervener.

SEAWELL, Justice.

The petitioner Atchison, Topeka & Sante Fé Railway seeks a writ of prohibition to prevent a second trial of the action of Scarlett v. The Atchison, Topeka & Santa Fe Railway. The respondent superior court has granted a motion to set said case for retrial.

The action was brought to recover damages for personal injuries sustained by plaintiff, a brakeman, when he fell from a ladder on a freight car in the course of his employment. The first trial resulted in a judgment for plaintiff for $18,000, entered upon a jury verdict. We affirmed the judgment. Scarlett v. The Atchison, Topeka & Sante Fe Railway, 7 Cal.2d 181, 60 P.2d 462. Thereafter the Supreme Court of the United States reversed it. Atchison, Topeka & Santa Fe Railway v. Scarlett, 300

U.S. 471, 57 S.Ct. 541, 81 L.Ed. 748. Petitioner contends that the judgment of the Supreme Court and the judgment of this court entered pursuant thereto preclude a second trial, which should be restrained by writ of prohibition. Lial v. Superior Court, 133 Cal.App. 31, 23 P.2d 795; compliance with appellate court judgment enforced by writ of mandate, Lamb v. Owen, 98 Cal. App. 106, 276 P. 628.

[1, 2] It was plaintiff's theory at the outset of the first trial that the complaint was broad enough to allege a right of recovery for violation of the Federal Safety Appliance Act (36 U.S.Stats. at L. 298, 45 U.S.C.A. §§ 11–16), and for common-law negligence independent of said act. The Federal Employers' Liability Act (35 U.S. Stats. at L. 65, 45 U.S.C.A. § 51 et seq.) imposes liability on the employer for damages to the employee both for violations of the Safety Appliance Act and for common-law negligence. Where there is a violation of the Safety Appliance Act, liability is absolute, rather than dependent on negligence, assumption of risk is not a defense to the employer, and contributory negligence of the employee does not reduce the damages. Scarlett v. Atchison, Topeka & Santa Fe Railway, 7 Cal.2d 181, 185, 60 P.2d 462. But where a claim of liability rests on common-law negligence, assumption of risk is a defense and contributory negligence reduces the damages. 45 U.S.C.A. §§ 53, 54.

Plaintiff contended that he fell from the ladder when his foot came in contact with a round brace rod which was between the ladder and the side of the freight car. This rod braced the side and end of the car and ran in a diagonal position back of the ladder. In view of the fact that plaintiff originally relied on the claim of common-law negligence as well as on a violation of the Safety Appliance Act, his contention was two-fold: (1) that by reason of the presence of this type of brace rod, the ladder was not "secure" in use within the meaning of the Safety Appliance Act, which requires cars to be equipped with "secure" ladders (45 U.S.C.A. § 11); and (2) irrespective of said act, the use of cars with this type of rod constituted common-law negligence.

In its defense the defendant railroad offered testimony bearing on the defense of assumption of risk, which was available to defendant in claims based on common-law negligence. Counsel for plaintiff requested a recess to consider whether to base plaintiff's claim solely on the Safety Appliance Act, with a view to excluding testimony bearing on the assumption of risk. After said recess counsel for plaintiff stated that it had been decided "to base his case squarely upon the Safety Appliance Act", and that he abandoned any claim for common-law negligence. This action by plaintiff resulted in the exclusion of the evidence in question.

In the trial court and on appeal defendant contended that as the brace rod and ladder had a clearance of more than 2½ inches, there was a compliance with a rule of the interstate commerce commission in that regard, and as a matter of law that ladder must be held to be "secure". In affirming the judgment for plaintiff we held that the clearance rule was not intended to govern and to legalize the situation where the clearance space between car side and ladder although greater than 2½ inches, contains a hazardous diagonally placed round brace rod. We further held that since the rule of the commission did not cover the situation, it was for the jury to determine whether the ladder was "secure" within the meaning of the Safety Appliance Act. We defined a "secure" ladder to mean "safe for use in the purpose for which it is intended." 60 P.2d 464. Davis v. Reynolds, 4 Cir., 280 F. 363, 366. We rejected the contention of the defendant that the ladder could not be held to be "insecure" by virtue of the presence of this type of rod for the reason that the brace rod was no part of the ladder. We declared that "the act [Safety Appliance Act] contemplates not only that an appliance shall be without defect or secure as to its construction but also that it shall be secure in matters pertaining to its location, installation, maintenance, and intended use", and that "the injection of a foreign article [the brace rod] which is no part of an appliance would be as likely to render the appliance insecure as a direct defect in the appliance itself".

The Supreme Court of the United States reversed our judgment, holding that there was as a matter of law no violation of the Safety Appliance Act. The court said, 57 S. Ct. 543: "We do not see how it reasonably can be said that the brace rod constitutes a part of the ladder. In itself it was a contrivance separate and distinct from the ladder, designed and used for a purpose entirely apart from the use of that appliance. The right of recovery, if any, must therefore rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. The law to be applied to

that situation is the common-law rule of negligence, and not the inflexible rule of the Safety Appliance Act; and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company and, if so, whether Scarlett assumed the risk. [Citing cases.] *In that view, Scarlett in abandoning his claim under the common-law rule of negligence abandoned the only possible ground of recovery.* [Italics ours.]

"Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion."

The petitioner herein relies on the italicized sentence as tantamount to a declaration that the action shall not be retried on the issue of common-law negligence, but a final judgment should be entered that plaintiff Scarlett take nothing. Upon receipt by this court of the mandate from the Supreme Court of the United States we entered a judgment as follows: "It is ordered that the judgment appealed from is hereby reversed." The defendant railway company petitioned us to modify said judgment by adding thereto the following:

"The Superior Court of the State of California in and for the County of Contra Costa is hereby directed upon the filing of the remittitur in this case to enter judgment for defendant for costs, as above stated [costs in Supreme Court of the United States, as provided by mandate to this court], and also for such costs and disbursements in the courts of this state as may be taxed and allowed."

This modification, if made, would have included trial court costs for the trial theretofore had. A judgment entered pursuant to such a direction would have precluded a retrial, since trial court costs are recoverable only upon entry of the judgment which finally disposes of an action. Monson v. Fischer, 219 Cal. 290, 26 P.2d 6; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 205 Cal. 6, 269 P. 525; Ex parte Burrill, 24 Cal. 350; 7 Cal.Jur. 316. This court did not grant the modification as prayed for, but did modify the judgment on June 10, 1937, to read as follows: "It is ordered that the judgment appealed from is hereby reversed with directions to the trial court to enter judgment in favor of defendants in the sum of Five Hundred and Thirty-three Dollars and forty-three cents $533.43, and costs on appeal."

The sum of $533.43 was the amount of costs in the Supreme Court of the United States. Fearing that the modification made by us might be interpreted as precluding a retrial on the theory of common-law negligence, plaintiff, in turn, petitioned that the reference to costs be stricken and that our judgment expressly provide for a new trial. The matter was placed on the calendar and, after argument, was denied from the bench. The remarks of members of this court made at that time, which remarks were recorded by the court reporter, indicate that this court did not intend thereby to deny a new trial to plaintiff, but, rather, that this court was of the view that the question as to a retrial should be passed on by the trial court.

[3, 4] It is the general rule that a retrial in civil actions may be had following a reversal without express provision therefor in the judgment of the appellate court. Falkner v. Hendy, 107 Cal. 49, 40 P. 21, 386; Heidt v. Minor, 113 Cal. 385, 45 P. 700; Central Sav. Bank of Oakland v. Lake, 201 Cal. 438, 443, 257 P. 521; Harding v. Harding, 148 Cal. 397, 83 P. 434; Erlin v. National Union Fire Ins. Co., 7 Cal. 2d 547, 61 P.2d 756; 2 Cal.Jur. 1057; 5 C.J. S., Appeal and Error, § 1950, page 1476. In view of this general rule and the further fact that in acting on the first petition for modification we refused to provide for trial court costs, our judgment of June 10, 1937, cannot be construed as denying the right to a retrial. Said judgment, in the circumstances, neither affirms nor denies the right to retry the action.

The question to be determined then is whether the judgment of the Supreme Court of the United States precludes a retrial. If that court had been of the view that the only proceeding consistent with its opinion was the entry of a final judgment for defendant without the right of retrial for plaintiff, it would have been a simple matter to state its view clearly and unequivocally in its opinion.

[5] The decision of the Supreme Court must be construed in the light of certain well-established principles. We are not here concerned with the right of plaintiff to bring a second and independent action based on common-law negligence. The decision of the Supreme Court is to the effect that plaintiff misconceived his remedy in proceeding to judgment on the theory of violation of the Safety Appliance Act. It is elementary that the law favors the decision

of cases on their merits. Plaintiff is not seeking a second trial upon other acts of defendant than those relied on in the first trial, but, rather, he now seeks a decision on the question whether said acts constitute common-law negligence.

[6] The effect in general of a reversal is to set the case at large as if it had never been tried. Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 443, 257 P. 521; Erlin v. National Union Fire Ins. Co., 7 Cal. 2d 547, 61 P.2d 756; Estate of Pusey, 177 Cal. 367, 170 P. 846; Heidt v. Minor, 113 Cal. 385, 45 P. 700; Kruk v. Minneapolis, St. Paul & S. M. Ry. Co., 249 Mich. 685, 229 N.W. 479, Id., 257 Mich. 152, 241 N.W. 162; 2 Cal.Jur. 996; 5 C.J.S. Appeal and Error, § 1950, page 1476.

[7, 8] The doctrine of election of remedies does not defeat plaintiff's claim to a retrial. The doctrine of choice between inconsistent remedies presupposes a choice of remedies. Where a party misconceives his remedy, he is not in general precluded thereby from availing himself of the proper remedy. Hinkel v. Crowson, 83 Cal.App. 87, 96, 256 P. 479; Kruk v. Minneapolis etc. Co., supra; Barnsdall v. Waltemeyer, 10 Cir., 142 F. 415, 420; 10 Cal.Jur. 5; 20 C.J. 21; McGibbon v. Schmidt, 172 Cal. 70, 155 P. 460. That the proper basis of plaintiff's claim presents a difficult problem is indicated by the fact that the trial court and this court affirmed his right to proceed under the Safety Appliance Act, while the Supreme Court of the United States ruled otherwise. A mere mistake of judgment should not result in depriving one of valuable rights. Agar v. Winslow, 123 Cal. 587, 592, 56 P. 422, 69 Am.St.Rep. 84.

It has been held that one who proceeds to judgment on a claim of violation of the Federal Boiler Inspection Act (45 U.S.C.A. § 23), a safety statute similar to the Safety Appliance Act, may, upon reversal, be granted leave by the appellate court to amend his complaint to set up common-law negligence. Riley v. Wabash R. R. Co., 328 Mo. 910, 44 S.W.2d 136. In the cited case the plaintiff claimed that his injuries were due to a clinker hook which was out of place on the top of an engine tender, and that by reason thereof the tender was not "in proper condition and safe to operate" [page 140], as required by the Boiler Inspection Act. The court submitted the case to the jury on this theory. The appellate court held that said act had reference to "some mechanical defect in the appliance itself, or a defect in the design, or the construction of the locomotive or tender" (44 S.W.2d 136, 141), and that the case should have gone to the jury on the question whether the misplacement of the clinker hook by an employee of defendant constituted negligence.

If a retrial properly may be ordered by the appellate court on the theory of common-law negligence, as was done in the Riley Case, supra, then we should be loathe to interpret the decision of the Supreme Court in the instant case as denying this right by implication where it is not expressly denied. In the Riley Case the plaintiff did not go to trial on two theories and during the course of the trial, as in the instant case, elect to proceed solely on one theory, and "abandon" the other. But we do not deem this distinction vital. There was an abandonment in the sense of an election when the plaintiff in the Riley Case framed his complaint on one theory to the exclusion of the other.

In Corbett v. Boston & Maine Railroad, 219 Mass. 351, 357, 107 N.E. 60, 62, 12 A. L.R. 683, there was a question whether the Federal Employers' Liability Act or a state statute governed. The court said: "It is a familiar principle that, where inconsistent courses are open to an injured party and it is doubtful which ultimately may lead to full relief, he may follow one even to defeat, and then take another, or he may pursue all concurrently, until it finally is decided which affords the remedy. The assertion of one claim which turns out to be unsound, so long as it goes no further, is simply a mistake. It is not and does not purport to be a final choice, nor an election. A party is not obliged to select his procedure at his peril."

In Kruk v. Minneapolis, St. P. & S. S. M. Ry. Co., 249 Mich. 685, 229 N.W. 479; Id., 257 Mich. 152, 241 N.W. 162, the case was tried solely on the theory that a state law governed. After judgment for plaintiff it was held in another case that said statute did not govern. Thereupon the trial court granted a new trial in the Kruk Case, and over the objection of defendant that plaintiff was estopped from pursuing a different remedy, permitted him to retry his case under the Federal Employers' Liability Act. The decision on this point was without reference to the fact that plaintiff was a minor.

[9] We conclude that it was not the intent of the Supreme Court of the United States to deny to the courts of this state the right to relieve plaintiff of his "aban-

donment" of the claim of common-law negligence; that by its statement to the effect that "Scarlett in abandoning his claim under the common-law rule of negligence abandoned the only possible ground of recovery", the federal court meant no more than that the judgment resulting from the first trial could not be sustained on any theory, since for the purposes of that trial plaintiff had elected to rely on the claim of violation of the Safety Appliance Act, and thereby had abandoned the only possible ground of recovery.

Plaintiff is not seeking to reinstate a cause of action barred by the statute of limitations. Kruk v. Minneapolis, St. P. & S. S. M. Ry. Co., supra; Nash v. Minneapolis & St. Louis Railroad Co., 141 Minn. 148, 169 N.W. 540. He is relying on the same facts as on the first trial, and, indeed, on the same law, the Federal Employers' Liability Law, which imposes liability on the employer for injury both for violations of the Safety Appliance Act and common-law negligence. He desires to retry the same cause of action, the admission of evidence and instructions to be governed by the theory of recovery as announced by the Supreme Court.

The writ is denied.

We concur: WASTE, C. J.; SHENK, J.; HOUSER, J.; CURTIS, J.; LANGDON, J.



12 Cal.2d 543

MERKLEY v. MERKLEY et al.

Sac. 5215.

Supreme Court of California.

Jan. 9, 1939.

1. Action ⇐6

Under statute authorizing action for declaration of rights under an instrument where there is a controversy, a plaintiff must show that conditions exist which will justify court in exercising its discretion to grant relief sought. Code Civ.Proc. §§ 1060, 1061.

2. Action ⇐6

Under statute authorizing action for declaration of rights under an instrument where there is a controversy, courts will not exercise the discretionary power to declare rights which do not give rise to a present controversy. Code Civ.Proc. §§ 1060, 1061.

3. Action ⇐6

Under statute, a former wife could not maintain action for a declaration of rights under contracts, assignments, and transfers relating to former husband's interest in land on the ground that it was necessary to protect her rights and the rights of minor children in event that former husband should at some future time default in payments of alimony or support, since there was no justiciable controversy requiring construction of any instrument. Code Civ.Proc. §§ 1060, 1061.

4. Master and servant ⇐70(1)

Where instrument provided for the payment of $25 per month for general housework on farm and evidence showed that parties contemplated that monthly payments were not to be made unless there were sufficient revenues from the operation of the farm and that revenues in some years were inadequate, and that, as a result, smaller payments were made to the housewife, in view of practical construction by parties, housewife was not entitled to recover balance claimed to be due under instrument.

In Bank.

Appeal from Supreme Court, Yolo County; J. O. Moncur, Judge.

Action by Mary E. Merkley against Wallace S. Merkley and others for declaration of rights and liabilities pursuant to certain contracts, assignments, and transfers, and for other relief. From a judgment for the defendants, plaintiff appeals.

Affirmed.

J. J. Henderson, of Sacramento, for appellant.

Huston, Huston & Huston, J. H. Laugenour, and Arthur C. Huston, all of Woodland, for respondents.

SHENK, Justice.

The plaintiff sued for a declaration of the rights and liabilities of the respective parties pursuant to certain contracts, assignments and transfers, and for other relief including a money judgment for services claimed to have been performed. The trial court denied the declaratory and other relief and rendered judgment for the defendants. The plaintiff appealed from the judgment.

Charles H. Merkley, the father of the defendants Wallace S. Merkley, Alan R. Merkley and Charlotte Merkley Hinkley, died in 1916 leaving about 105 acres of improved farming land in Yolo county of which the defendants became the owners in equal shares. In September of 1917 the plaintiff and the defendant Alan Merkley married. For about ten years following the father's death, an uncle who was made executor of the estate, with the active assistance of Alan Merkley, managed the farm. Their management was not entirely satisfactory and the bank was threatening the foreclosure of mortgages. It became necessary to raise funds to discharge the obligations of the estate arising in part out of the threatened foreclosures and in part required to settle the claims of a widow and minor children of the deceased by a second marriage. For this purpose a loan of $38,000 was procured from a Sacramento bank. The loan was obtained on condition that Wallace Merkley have the management and control of the properties free of any interference by the other members of the family. In order to carry out the condition, Alan Merkley and Charlotte Merkley Hinkley, in November, 1926, assigned and conveyed all of their interest in the property to Wallace Merkley. About the same time, in the course of the administration of the estate, a probate sale of the property to Wallace Merkley, with a stated consideration or purchase price of $30,000, was confirmed by the probate court.

In January, 1927, Wallace Merkley executed a deed conveying two-thirds interest in the property to Alan Merkley and Charlotte Merkley Hinkley, which, together with another executed document, he deposited with Harry L. Huston, an attorney at law. The additional document specified three contingencies upon the happening of any of which the deed should be delivered to the grantees named therein. The first was in the event of Wallace's death; the second, the payment in full of the indebtedness against the lands; and the third, at the expiration of five years provided the second parties assumed or paid two-thirds of such indebtedness. The instrument provided that prior to the happening of any of such events Wallace Merkley should be the owner of the property and be in full control thereof without any interference by the brother or sister. It stated further that Wallace Merkley would exhibit to his brother and sister annual accounts of receipts and disbursements; that he should have the right to pay out, in addition to the usual and necessary expenses and indebtednesses against the lands, $75 per month to himself, $75 per month to Alan Merkley, and $25 per month to Mrs. Alan Merkley, provided each of them continued to render the services then being performed in the operation and conduct of the farm, and that such payments "shall not be made until the other indebtedness is taken care of as provided for in such manner as to insure the operation of said properties in the same manner as they are now being done". The instrument was also signed by the brother and sister of Wallace Merkley.

The record shows that the two brothers and the plaintiff continued to live on the place. The plaintiff's services appeared to consist of boarding Wallace, cooking for hired help, and other general housewifely duties in the home and garden. Wallace Merkley was married in February, 1935, whereupon he moved from the farm. (Wallace Merkley died while the appeal herein was pending, and his administratrix has been substituted as a defendant in his place.)

In June, 1936, the plaintiff herein brought an action for divorce against Alan Merkley, wherein an interlocutory decree of divorce was granted to her on February 5, 1937. By that judgment she was awarded the custody of the three minor children of the spouses and $150 a month for support. She also received personal property consisting of an automobile and household furniture, while the defendant was awarded 200 tier of wood designated as community property. In that action the trial court specifically found that the defendant owned as his separate property a one-third interest in the real property herein referred to, but no adjudication as to this interest was carried into the judgment. No appeal was taken from that judgment and it has become final.

On March 18, 1937, the plaintiff filed the present action. The purpose in bringing the action was two-fold: To obtain a declaration that the defendant Alan Merkley owns a one-third interest in the farm property; and to recover a balance of $1,828.42 alleged to be due for services performed by the plaintiff at $25 per month. The plaintiff depends on the instruments hereinabove described and the circumstances surrounding their execution to establish her right to maintain the causes of action alleged. She contends that the maintenance

of the cause of action for declaratory relief is necessary to protect her rights and the rights of the minor children in the event the defendant Alan Merkley should at some future time default in payments of alimony or support, whereupon by virtue of the declaratory relief, any money judgment which she would recover against Alan Merkley would become a lien upon such property to the extent of his interest therein.

In their answer the defendants pleaded the judgment in the divorce action as a bar to the declaratory relief.

Section 1060 of the Code of Civil Procedure provides that "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract".

[1-3] The plaintiff must show that the conditions exist which will justify the court in exercising its discretion to grant the relief sought. That she has not done so is obvious. There is no instrument under which the plaintiff may make a claim; that is, there is no justiciable controversy existing between the parties plaintiff and defendant and therefore the situation has not developed which would require a construction of any instrument introduced in evidence and relied on by the plaintiff. There is no more than a conjecture or supposition on her part that at some time in the future a controversy may arise wherein she might become interested in having adjudicated the defendant Alan Merkley's interest under those documents. The facts in the record present an academic question only. The courts will not exercise the discretionary power to declare rights which do not give rise to a present controversy. Code Civ. Proc. § 1061; R.C.L., Perm. Suppl., p. 3957; 5 Cal.Jur.Ten.Yr.Suppl., pp. 108 et seq. The trial court did not abuse its discretion in deciding that the plaintiff did not state or prove a cause which would entitle her to declaratory relief.

Inasmuch as the mere ownership of the property did not present a justiciable controversy, any statement of the trial court purporting to find or conclude that the defendant Wallace Merkley was the sole owner of the land described in the complaint should not be deemed to preclude a hearing upon such issue whenever it may be offered in a proper case. Nor should any unfavorable inference be drawn from the finding of the trial court that the judgment in the divorce action constituted a bar. That is to say, because such judgment did not expressly award to the plaintiff a lien for any future unpaid alimony upon the interest found in that action to belong to the defendant, it is not to be deemed to preclude the plaintiff's establishing such lien in an appropriate proceeding.

[4] There is no merit in the plaintiff's contention that the record does not support the trial court's finding and conclusion that there was nothing due to the plaintiff for services alleged to have been performed by her. The record shows checks in varying small sums received by the plaintiff from Wallace Merkley between April 20, 1927, and October 31, 1934, totaling about $677. The plaintiff claimed that for the eight-year period between February, 1927, and February, 1935, there became due to her a total of $2,400, upon which the amounts actually received should be considered as payments on account. The plaintiff relies on Mitau v. Roddan, 149 Cal. 1, 14, 84 P. 145, 6 L.R.A.,N.S., 275, to the effect that the conduct of the parties under a contract will be considered in construing and applying its practical effect. That is, the plaintiff argues that the fact that sums were paid to her apparently pursuant to the understanding outlined in the instrument executed by the brothers and the sister, is evidence of a contract to pay her $25 per month, and also serves to construe favorably to her contentions the somewhat ambiguous language from that instrument above quoted. The same authority, however, is also relied upon by the defendants, and we think, correctly. Indulging all inferences favorable to the plaintiff, it is nevertheless apparent from the written documents and from the conduct of the parties that monthly payment to the plaintiff was not contemplated unless the revenues from the operations of the farm should permit it. The trial court was justified in concluding from the evidence that the revenues in some years were inadequate and that the conduct of the parties indicated that there was no binding agreement to pay the plaintiff for her serv-

ices. The conduct evidenced by the making of smaller payments to her during the greater portion of the period stated, by the fact that there were many months when no payments were made, and by the fact that in 1934 payments ceased altogether without demand or other claim to payment until the present action was filed, serves to indicate the correct interpretation to be placed upon the writing, and furnishes additional support for the conclusion and judgment herein that the plaintiff was not entitled to recover the balance claimed to be due.

Other points do not require discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.; HOUSER, J.



12 Cal.2d 535

PEOPLE v. HINES.

Cr. No. 4191.

Supreme Court of California.

Jan. 6, 1939.

1. Homicide ⇨250

Evidence supported conviction for murder.

2. Constitutional law ⇨221

In prosecution of negro for murder, stipulated evidence, in support of challenge to panel and motion to quash venire, showing that over 7 per cent. of county's population were negroes who were qualified electors, many of whom possessed statutory qualifications entitling them to act as jurors and that no negro had ever been permitted to serve on a jury in county, showed a deliberate exclusion of negroes from service on juries in the county because of race and constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. Pen.Code, § 1058; U.S.C.A. Const. Amend. 14.

In Bank.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Luther Hines was convicted of murder of the second degree, and he appeals.

Reversed and remanded.

Prior opinion, 81 P.2d 1048.

Stephen P. Galvin, of Merced, for appellant.

U. S. Webb, Atty. Gen., Gordon S. Hughes, Deputy Atty. Gen., and F. A. Silveira, Dist. Atty., of Merced, for the People.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate District, 81 P.2d 1048. After further consideration we are satisfied that the following opinion of Mr. Justice Thompson correctly determines the issues, and accordingly adopt it as the opinion of this court:

"The defendant, a negro, was convicted of murder of the second degree for shooting and killing a colored man. His challenge to the panel under the provisions of section 1058 of the Penal Code, on the ground that all negroes were excluded from the venire, contrary to the mandate of the fourteenth amendment of the federal Constitution, was denied. A motion to quash the venire on the same ground was also denied. From the judgment and from an order overruling his motion for a new trial the defendant has appealed.

"It is contended the verdict and judgment are not supported by the evidence; that the defendant was denied due process and equal protection of the law, and that he was not afforded a trial by an impartial jury, which privileges are guaranteed by amendments 6 and 14 of the Constitution of the United States, U.S.C.A.

[1] "The evidence is conflicting, but it satisfactorily shows that the defendant, a colored man, attended a party given by negroes at the Clayton ranch in Merced county on the evening of November 20, 1937. Many of the guests remained until early the following morning. During the progress of the party a quarrel occurred between two other negroes named Banks and Bailey, over a game of craps. In the course of the melee Banks cut Bailey with a knife, after which he fled and hid for a time in an adjoining cotton field. After midnight, Banks returned and entered the south room of the house. Soon thereafter, and about 1 o'clock on the morning following the affray, Hines reappeared

with a revolver in his hand. He was very angry with Banks for cutting his friend Bailey. He cursed Banks in the vilest of language and threatened to shoot him, saying, 'He don't need to live, and cannot live.' With his revolver in hand, he entered the kitchen where he was met by a colored woman who protested with him against shooting Banks. He brushed her aside and entered the south room, where he found Banks standing near the center of the floor. He deliberately shot him three times. One bullet struck his victim in the front right side of the abdomen. Another bullet struck him in the face, fracturing his jaw and lodging in the vertebrae in the back of his neck. Banks fell to the floor and subsequently died from the effect of his wounds.

"The defendant fled from the state. He became a fugitive from justice. Finally he was arrested in Mississippi and was returned to California for trial. He pleaded self-defense, claiming that the deceased made an attack upon him with a knife, and that he shot him believing that he was then in imminent danger of being killed. Evidently the jury did not believe his story that the deceased assaulted him with a knife. They must have believed that armed with a loaded revolver, and threatening to shoot the deceased, the defendant deliberately hunted him up and killed him. The jury found the defendant guilty of murder of the second degree. From the judgment which was accordingly rendered and from an order denying defendant's motion for a new trial he has appealed.

"The verdict and judgment are adequately supported by the evidence.

[2] "Upon the challenge to the panel and the motion to quash the venire, which were filed in writing, before the jury was sworn, evidence was adduced, from which it appears without conflict that all individuals of the negro race were excluded from the venire and from the jury regardless of their statutory qualifications as prescribed by section 198 of the Code of Civil Procedure. The district attorney stipulated to all of the facts offered by the defendant with relation to the exclusion of negroes from the venire and from the jury. No evidence was offered in rebuttal of the showing made by the defense. The stipulated evidence contains statements by the county clerk and three of his deputies, by the county auditor, the official reporter, the district attorney, a judge of the superior court, and an attorney who had practiced his profession in Merced county for twenty-eight years, to the effect that no negro had ever been placed on the venires or called for jury service in criminal cases in Merced county. At least it appears that practice was followed for the period of a generation or more. There is no evidence that a negro ever sat upon a jury in Merced county. It also appears that over eight per cent of the entire population of Merced county are negroes, and that seven per cent of the entire population are negroes who are qualified voters. It specifically appears that at least forty-two of them possess all the qualifications to act as jurors required by section 198 of the Code of Civil Procedure. No attempt was made to justify or excuse the deliberate exclusion of negroes from service on juries in Merced county during all that period of time. The defendant, over his protest, was tried and convicted by a jury consisting entirely of white men and women. Because of the custom which had prevailed in Merced county to exclude from jury service all colored people, the defendant was not afforded the possibility of selecting upon his jury a single member of his own race. This was clearly in conflict with the inhibitions of amendments 6 and 14 of the Constitution of the United States, U.S.C.A. Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567; Hale v. Kentucky, 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed. 1050, April, 1938.

"Amendment 6 of the federal Constitution provides in part that:

"'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.'

"Amendment 14 of the federal Constitution also provides, in accordance with the principle declared in Magna Charta:

"'Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"Clearly the preceding mandates imply that one who is on trial for an alleged crime is entitled to a jury from which individuals of his own race who are otherwise qualified as jurors in the particular case, have not been arbitrarily excluded merely because of their nationality, race or color. That does not mean that an accused is entitled to a jury upon which

there are members of his own race. It only means that qualified jurors must not be excluded from service merely because of their nationality, race or color. The California statutes with relation to the method of selecting and impaneling jurors in criminal cases are fair, impartial and constitutional. The denial of an impartial jury, of due process and equal protection of the laws in the present case are not attributable to the defects of our law, but rather to the custom of the officers to exclude negroes in selecting and impaneling juries in Merced county. In the Norris Case, supra, it is said in that regard [page 580]:

"'Although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the state through its administrative officers in effecting the prohibited discrimination.'

"Part 1, title 3, chapter 1, articles 3 and 4, of the Code of Civil Procedure provide for the method of of selecting and impaneling trial jurors by means of the regular venire. Section 227 of the same code provides for a special venire under designated circumstances. Section 198 of that code specifies the required qualifications of all such jurors. It is declared that such qualified 'men and women' shall be so selected for jury service. That implies they must be selected regardless of their race, color or nationality. The statutes of California do not restrict the selection of jurors to members of the Caucasian race.

"In view of the affirmative showing in the present case, which tends to prove there was a deliberate practice on the part of the officers of Merced county, who are charged with the selection and impaneling of juries, to exclude therefrom under all circumstances all individuals of the negro race, regardless of their statutory qualifications, we are impelled to hold that the challenge to the venire was erroneously denied, and that the defendant was not afforded such equal protection of the law and an impartial jury as are guaranteed by the federal Constitution.

"It appears that over seven per cent of the population of Merced county are negroes who are qualified electors therein, and that many of them possess all the statutory qualifications entitling them to act as jurors. To exclude from jury service, in a criminal case against a colored defendant, all members of his race who are otherwise qualified, merely because of their race or color, is an unconstitutional discrimination against the accused. It may not be reasonably said there is a presumption that an individual lacks intellectual, moral or physical qualifications to act as a juror merely because he belongs to the negro race. In the Neal Case, supra, 103 U.S. 397, Mr. Justice Harlan of the United States Supreme Court said in that regard:

"'It was * * * a violent presumption * * * that such uniform exclusion of that [colored] race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries.'

"The Norris Case, supra, which was decided by the United States Supreme Court in 1935, is decisive of the question presented on this appeal with relation to the unlawful exclusion of negroes from the venire. In that case a negro was convicted in Morgan county, Alabama, of rape and sentenced to be hanged. A challenge to the panel and a motion to quash the venire were made and denied in that case just as they were presented and overruled in this case, upon the same ground and supported by similar evidence. Upon appeal to the Supreme Court of the United States, the judgment was reversed on the ground that the conduct of the officers in excluding from the jury impaneled to try the defendant all negroes regardless of their statutory qualifications, was a violation of the constitutional guaranty of due process, equal protection of the laws and a trial by an impartial jury assured by amendments 6 and 14 of the federal Constitution. In that case a strenuous effort was made to justify the omission of names of colored persons from the jury list. No such effort was made in this case. It appeared that in Morgan county, where the case was tried, about eighteen per cent of the population were negroes. They had never been placed on the jury lists. The statute in Alabama is practically the same as that of California with respect to the qualifications which are required of competent jurors. In the Alabama case the commissioners attempted to justify their exclusion of negroes from jury service by the inherent right of exercising a liberal discretion in determining the qualifications which a competent juror should possess.

In explaining their uniform failure to place negroes on the available jury list one of the commissioners testified that he never knew a negro in that county who possessed the intelligence, integrity, character or judgment which would qualify him as a competent juror. In response to that extravagant statement the court said:

"'In the light of the testimony given by defendant's witnesses, we find it impossible to accept such a sweeping characterization of the lack of qualifications of negroes in Morgan county.'

"The evidence in the present case was evidently offered to conform to the facts disclosed by the record in the Norris Case. It seems to fit the situation presented in that case almost exactly. The same uniform practice existed in Morgan county, Alabama, which was followed in Merced county for a generation or more, to exclude all colored people from jury service without regard to their qualifications. The Norris Case is decisive of this appeal. The court there said:

"'Summing up precisely the effect of earlier decisions, this court thus stated the principle in Carter v. Texas, 177 U.S. 442, 447, 20 S.Ct. 687, 44 L.Ed. 839 [841], in relation to exclusion from service on grand juries: "Whenever by any action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. * * * The principle is equally applicable to a similar exclusion of negroes from service on petit juries. * * * Although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the state through its administrative officers in effecting the prohibited discrimination. * * *

"'That testimony in itself made out a prima facie case of the denial of the equal protection which the Constitution guarantees. * * *

"'For this long-continued, unvarying, and wholesale exclusion of negroes from jury service we find no justification consistent with the constitutional mandate. * * *

"'Upon the proof contained in the record now before us, a conclusion that their continuous and total exclusion from juries was because there were none possessing the requisite qualifications, cannot be sustained.

"'* * * In view of the denial of the federal right suitably asserted, the judgment must be reversed and the cause remanded for further proceedings.'

"On the authority last cited and upon principle, it is apparent the challenge to the panel in this case, and the motion to quash the venire should have been granted for the reason that the constitutional guaranty of equal protection of the laws and of a trial in a criminal case by an impartial jury were not afforded to the appellant for the reason that all persons of the negro race to which he belongs were exempted from the venire and from the jury by which he was tried."

The judgment and the order are reversed and the cause is remanded for a new trial.



12 Cal.2d 476

In re WALLACE'S ESTATE.

O'MARA et al. v. FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES et al.

L. A. 16399.

Supreme Court of California.

Dec. 30, 1938.

As Modified Jan. 17, 1939.

1. Costs ⊂=244

The provision of statute relating to trial procedure in probate court that judgment for costs might be entered as in civil actions did not apply to probate proceedings on appeal, and did not justify incorporation by Supreme Court clerk in remittitur, in absence of any prior order relating thereto, of provision that prevailing parties should recover costs. Probate Code, § 1230.

2. Costs ⊂=244

The statute authorizing superior court or court on appeal in probate proceeding to order costs to be paid expressed legislative

intention to vest in superior court right to determine question of payment of costs on appeal in absence of any exercise by the appellate court of its discretionary authority in that regard. Probate Code, § 1232.

3. Costs ⇐3

The right to recover costs is statutory.

4. Costs ⇐264

Where the Supreme Court on appeal in probate proceeding failed to make any order with respect to costs incurred on appeal, the clerk of court was without authority to insert in the remittitur a provision for allowance of costs to prevailing parties. Probate Code, § 1232; Rules for the Supreme Court and District Courts of Appeal, rule 23; Const. art. 6, § 1a(5).

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

On motion to recall remittitur.

Motion granted.

For prior opinion, see 79 P.2d 1094.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Roy L. Herndon, of Los Angeles, of counsel), for appellants.

Eckman & Lindstrom, of Los Angeles (Morton L. Barker, of Los Angeles, of counsel), for respondent Phoebe A. Boisvert.

Chenoweth & Whitehead, of Los Angeles, for respondent Farmers & Merchants Nat. Bank of Los Angeles.

Richard L. Gray, of Los Angeles, for respondent Jessie W. Buchanan.

PER CURIAM.

Following an appeal from a judgment by which the corpus of a testamentary trust was ordered to be distributed, this court by its decision in Estate of Wallace, 79 P.2d 1094, filed May 31, 1938, reversed the said judgment, without having made any order therein with respect to the costs incurred on said appeal, pursuant to the provisions of section 1232, Probate Code, which purports to vest in an appellate court on an appeal in probate matters, discretionary authority to order costs to be paid by any party to the proceedings or out of the assets of the estate "as justice may require". However, upon the issuance of the remittitur by the clerk of this court, on July 1, 1938, the said clerk added an order thereto to the effect that appellants were to recover costs on appeal.

On July 20, 1938, the respondent Phoebe A. Boisvert, special administratrix of the estate of deceased, filed a motion in this court to have the said remittitur recalled and the same to be corrected by striking therefrom the words, "Appellants to recover costs on appeal", upon the asserted grounds that said provision as to costs sought to be stricken was improperly incorporated by the clerk in said remittitur for the reason that this court had not exercised its discretion in awarding costs in pursuance of the provisions of said section 1232, Probate Code, above referred to; that therefore any provision for costs in said remittitur was unauthorized; that by reason of the failure of this court to so exercise its discretion, the jurisdiction to award costs is vested solely in the superior court; and that until said last-mentioned court has exercised its authority in that regard, no provision or judgment pertaining to the costs in said appeal is proper. As authority for these contentions respondent relies in particular upon the cases entitled. In re Estate of Johnson, 200 Cal. 307, 252 P. 1052; In re Estate of Erickson, 4 Cal. App.2d 602, 41 P.2d 939 and In re Estate of Burnett, 8 Cal.App.2d 363, 47 P.2d 745, which decisions will be hereinafter referred to.

On the other hand, appellants contend that where, as here, the appellate court has reversed the judgment on appeal, without direction as to the costs thereof, under the provisions of rule XXIII of the Rules for the Supreme Court and District Courts of Appeal, appellants are entitled to a provision in the remittitur that they shall recover their costs on appeal; and they assert that this view of the question presented harmonizes with the provisions of the Probate Code relating to costs, especially those of section 1230 of the Probate Code. In effect, appellants concede that although there may be decisions in this jurisdiction to the contrary, the case entitled In re Estate of Marcus, 16 Cal.App.2d 183, 60 P.2d 469, announces the correct rule. In that case the appellate court affirmed a judgment admitting a will to probate in a contest instituted before probate, and there, as in the instant case, the appellate court failed to exercise its discretion with regard to an award of costs on said appeal, the remittitur also being silent in that regard. For the purpose of correction, the District Court of Appeal there

granted a motion to recall the remittitur; and in providing for the issuance of a corrected remittitur to contain a provision for costs to the prevailing party, in its discussion of authorities bearing upon the question presented, said:

"* * * In the Erickson Case, * * * [4 Cal.App.(2d) 602, 41 P.2d 939] the following language was used: 'It has been held that by reason of the fact that the subject of costs in probate proceedings is specially provided for [referring to section 1232 among others in the Probate Code], the general rules concerning costs as set forth in section 1021 et seq., of the Code of Civil Procedure, do not apply to probate proceedings. In re Estate of Olmstead, 120 Cal. 447, 452, 52 P. 804. For like reasons, the general rule 23 should not apply in this case.'"

But the court, in the Marcus Case, went on to say that:

"In the trial of *civil actions* costs are allowed as a matter of course to the successful party upon a judgment in his favor. Code Civ.Proc., § 1032 (as added by St. 1933, p 1901, § 191).

"The allowance of costs where issues are joined in *probate proceedings* is governed, except in rare instances, *by section 1230* of the Probate Code. That is a long section covering the rules of procedure in probate trials and it is entitled 'Trial rules.' The last sentence in the section provides for the allowance of costs and for their allowance as an incident to the judgment. The section being long and the pertinent sentence being short and at the end of the section, it might, by inadvertence, be overlooked. It reads as follows: 'Judgment on the issue joined, *as well as for costs,* may be entered * * * by the court as in civil actions.'

* * * * * * *

"The allowance of costs as an incident to the judgment as in civil actions is so natural that the litigants take such judgments for granted and do not raise the question on appeal when such judgments are rendered. The allowance of costs in any other method is so unnatural and so unusual that, when it is attempted, there is an occasion for appeal. It should be remembered that section 1232 of the Probate Code applies only 'when not otherwise prescribed by this code,' and our Supreme Court has said in effect that the circumstances must be peculiar indeed to justify such an order. In re Estate of Yoell, 160 Cal. 741, 117 P. 1047; In re Estate of Bump, 152 Cal. 271, 92 P. 642.

"The above was the thesis of the last paragraph of the decision of this court in the case of In re Estate of Marcus * * * [14 Cal.App.(2d) 254, 257, 58 P. 2d 385] although it was not so elaborately stated as it has been herein. Obviously, therefore, the decision of this court in the Marcus Case included a judgment for costs on appeal against the losing party as provided in said rule 23, and the failure to enter the item in the remittitur was an inadvertence." (Italics added.)

It is clear that in the Marcus Case, 16 Cal.App.2d 183, 60 P.2d 469, the court was of the view that the provisions of section 1232, Probate Code, were not applicable in the sense that it was erroneous for the clerk of the court to insert in the remittitur a provision for recovery of costs by the prevailing party on appeal, where the decision of the appellate court was silent as to the matter of costs,—but in effect it was there held that by the provisions of section 1230 of the Probate Code, in cases where appellate courts on probate appeals had failed to make an order relating to costs, the general rules relating to costs on appeal in civil actions (an award thereof to the prevailing party) should govern. We cannot agree with the interpretation placed upon those two sections by that decision. Both section 1232 and section 1230 of the Probate Code are found under the caption, "Rules of Procedure". The provisions of section 1232 are preceded by the title "Costs" and read as follows: "When not otherwise prescribed by this code, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require."

But section 1230 is prefaced by the title "Trial rules", and reads as follows:

"All issues of fact joined in probate proceedings must be *tried* in conformity with the requirements of the rules of practice in civil actions. The party affirming is plaintiff, and the one denying or avoiding is defendant. When a party is entitled to a *trial* by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, must settle and frame the issues to be tried. If no jury is demanded, the court must *try* the issues joined, and sign and file its decision in writing, as pro-

vided in civil actions. Judgment on the issue joined, as well as *for costs,* may be entered and enforced by execution or otherwise by the court as in civil actions." (Italics added.)

[1, 2] It is clear that that section has reference to *trial* procedure only, and in no wise can it be interpreted to apply to probate proceedings which have been carried into an appellate court. A reading of that section discloses the fact that the legislature, by its use of the words "the court", in the last line thereof, was referring to the trial court (probate) in proceedings there had, and not to an appellate court. On the other hand, the provisions of section 1232, Probate Code, hereinabove quoted, are clear and certain, and express a legislative intention to vest in the superior court the right to determine the question of the payment of costs on appeal, in the absence of the exercise of the discretionary authority of an appellate court in that regard.

[3, 4] The provisions of section 1232 (it being the only section contained in the Probate Code pertaining to the allowance of costs *on appeal)* are governing in the instant situation. The provisions of rule XXIII do not expressly authorize the insertion in a remittitur by the clerk of an allowance for costs to a prevailing party on appeal where, as here, the Supreme Court has failed to exercise its discretion in the matter of costs. The right to recover costs is statutory (Shaw v. Imperial Mut. L. & B. Ass'n, 4 Cal.App.2d 534, 540, 41 P.2d 574; In re Estate of Olmstead, 120 Cal. 447, 452, 52 P. 804; Henry v. Superior Court, 93 Cal. 569, 29 P. 230; In re Estate of Johnson, 198 Cal. 469, 471, 245 P. 1089), and the Constitution provides (art. 6, sec. 1a, subd. (5) that "rules of practice and procedure for the several courts" shall not be "*inconsistent with laws* that are now or that may hereafter be in force; * * *." (Italics added.)

The conclusion reached herein is supported by decisions both of this court and of the District Courts of Appeal. In Re Estate of Johnson, 200 Cal. 307, 252 P. 1052, it was said [page 1053]:

"On a contest before probate of the alleged will of the decedent the jury found for the contestant and judgment was entered accordingly, including costs to the contestant. On motion of the proponent the trial court entered an order vacating the judgment for costs. The contestant appealed from said order and the order was affirmed. In re Estate of Johnson, 198 Cal. 469, 245 P. 1089. On the going down of the remittitur the clerk of this court inserted therein the words, 'Respondents to recover costs on appeal,' in accordance with the rule governing ordinary civil actions. In due time the contestant filed a notice of motion in this court to recall the remittitur and to strike therefrom the provision for costs on appeal on the ground that the allowance of costs in a contest before probate must abide the final determination of the proceeding. Section 1720, Code Civ.Proc.; [now Probate Code § 1232]; Estate of Johnson, supra. The proceeding is finally determined by the affirmance of the judgment on the main appeal this day decided ([In re Estate of Johnson, [200 Cal.] page 299], 252 P. 1049), wherein this court has in the exercise of its discretion under said section 1720 directed that costs on the main appeal be paid out of the assets of the estate. On the former appeal the court did not exercise its discretion in awarding costs pursuant to said section 1720, and the provision for costs on said appeal was improperly incorporated in the remittitur. This motion is the proper remedy on behalf of the contestant to exclude from the remittitur the unauthorized provision. San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson, 165 Cal. 540, 132 P. 1021. As this court has lost jurisdiction of the former appeal, we may not now exercise any discretionary power in awarding costs therein. An appropriate order may, however, be made by the trial court with reference to the costs on the former appeal in the exercise of its discretion under said section 1720."

Also in Re Estate of Erickson, 4 Cal. App.2d 602, 41 P.2d 939, wherein a judgment revoking a will was reversed on appeal without an order having been made relating to costs, it was held that the remittitur should have contained no direction as to costs, the general rule as to costs on appeal in ordinary civil cases being inapplicable to probate proceedings. The court there pointed out that [page 940] "The subject of costs in probate proceedings is specially provided for * * *" in the Probate Code. See, also, Matter of Estate of Burnett, 8 Cal.App.2d 363, 47 P. 2d 745; In re Estate of Olmstead, 120 Cal. 447, 452, 52 P. 804.

It follows from the foregoing that the motion should be and it is granted; and it

is ordered that the remittitur issued herein by the clerk of this court on July 1, 1938, be recalled and that a corrected remittitur be issued in its place nunc pro tunc, omitting the words "Appellants to recover costs on appeal".



12 Cal.2d 558

LEWIS v. JOHNSON et al.

L. A. 16852.

Supreme Court of California.

Jan. 9, 1939.

Rehearing Denied Feb. 6, 1939.

1. Physicians and surgeons ⇐18(9)

In malpractice action, evidence that fracture was reduced and cast applied about 10 a. m., that doctor visited patient at 11:30 but did not see him again until 8 p. m., that meanwhile patient felt such severe pain that narcotics were administered, and his toes appeared swollen and dark blue in color, that swelling and discoloration continued after cast was partially split until leg was finally amputated was sufficient to go to the jury.

2. Physicians and surgeons ⇐18(8, 9)

In malpractice action, expert testimony that care of fractured leg was not up to standard of care and skill in locality, that physicians improperly failed to arrange for constant observation and care of leg after cast was applied or to arrange for notification of doctor of changes in condition made prima facie case, and cross-examination and conflicting views of physicians' witnesses raised only questions of credibility for jury.

3. Evidence ⇐538

In malpractice action, testimony of physicians from contiguous metropolis of Los Angeles in same county that conduct of surgeon did not constitute due care was improperly excluded on ground that physicians could not testify as to standard of care in Long Beach.

4. Evidence ⇐538

The medical expert must be familiar with standard of care in particular locality in order that standards of widely separate localities with different practices may be excluded, but exclusion should not rest arbitrarily on a geographical line separating two cities of same county with almost identical kinds of medical service.

5. Evidence ⇐20(1)

It was common knowledge that treatment of leg fracture by incasing in a cast was method in use throughout the world.

6. Evidence ⇐558(11)

In malpractice action, where expert testified that patient's leg had been suspended in a "Bohler Fracture Frame" and that his opinion was in part based on book by Dr. Bohler, cross-examination of expert by use of Dr. Bohler's book was improperly refused.

7. Evidence ⇐558(11)

Text-books relied on by an expert may be used as foundation of impeaching cross-examination.

8. Release ⇐7

An agreement not to sue hospital and nurse and to hold them harmless from liability arising out of accident and treatment without waiving claims against physicians constituted a "covenant not to sue" rather than "release."

[Ed. Note.—For other definitions of "Covenant Not to Sue" and "Release," see Words & Phrases.]

9. Release ⇐37

A covenant not to sue one joint tort-feasor does not relieve the others.

10. Dismissal and nonsuit ⇐29

Where patient agreed not to sue hospital and nurse and to hold them harmless from liability arising out of accident and treatment without waiving claims against physicians, clerk's dismissal of hospital and nurse on patient's voluntary request did not amount to a "retraxit" discharging physicians as joint tort-feasors.

[Ed. Note.—For other definitions of "Retraxit," see Words & Phrases.]

11. Judgment ⇐570(3)

A dismissal voluntarily made by clerk's entry is presumptively without prejudice to the bringing of another action.

12. Dismissal and nonsuit ⇐29

A dismissal entered in open court pursuant to stipulation is ordinarily effective as a "retraxit."

13. Dismissal and nonsuit ⇐29

Dismissal of suit does not amount to a "retraxit" in absence of stipulation therefor

entered in open court or motion addressed to the court.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by William E. Lewis against Carl G. Johnson and another for damages for malpractice. From judgment on a directed verdict for defendants, plaintiff appeals.

Reversed.

Prior opinion, 80 P.2d 90.

Taylor, Kolliner, Bolton & Schwartz and Combs, Fritz & Murphine, all of Los Angeles, for appellant.

W. I. Gilbert and W. I. Gilbert, Jr., both of Los Angeles, for respondent Carl G. Johnson.

W. I. Gilbert, Fred O. Reed, and W. I. Gilbert, Jr., all of Los Angeles, for respondent Carl H. Gans.

LANGDON, Justice.

This is an appeal by plaintiff from a judgment based on a directed verdict.

Plaintiff was injured in an automobile accident, and was sent to Seaside Hospital in Long Beach for treatment of fractures in his left leg. The treatment was unsuccessful and the leg was later amputated. Thereafter plaintiff brought the present action for malpractice, against Dr. Carl G. Johnson, Dr. Carl H. Gans, the Seaside Hospital, and Miriam Furlong, superintendent of nurses of the hospital. The complaint alleged negligence of the doctors in using too tight a cast, and negligence of the other defendants in failing promptly to advise the doctors of discovery of this fact.

The case went to trial before a jury on August 13, 1937. While it was in progress, negotiations were commenced between Mr. Quail, claim superintendent for the insurance company representing the hospital and nurse, and Mr. Fritz, one of counsel for plaintiff, the object being to obtain a covenant not to sue said defendants. An agreement was reached to pay $6,000 in consideration of the giving of such a covenant, and on August 23d the money was paid and the instrument delivered. Mr. Fritz then informed Mr. Hunter, counsel for these defendants, that he would give him a dismissal as to them, and accordingly handed him a document entitled "Dismissal", in the usual form of a request to the clerk of the court to enter the dismissal against the said defendants. The attorneys then went to the courtroom, where counsel for the defendant doctors obtained permission to amend their answer to allege that plaintiff had settled with two joint tort-feasors and had thereby released them all. A discussion took place in which Mr. Fritz pointed out that there was no release but only a covenant not to sue. The court called for the document requesting dismissal, and ordered it filed. Thereupon the trial proceeded. On August 27th the motion of defendant doctors for a directed verdict was granted. Judgment for defendants followed, and this appeal was taken.

[1] A review of the record discloses competent evidence sufficient to go to the jury. The fracture in plaintiff's leg was reduced and the cast applied about 10 a. m., Sunday, August 9th. Dr. Johnson visited plaintiff at 11:30 that same morning. He did not see him again, nor communicate in any way, until 8 p. m. When Dr. Johnson left plaintiff on Sunday morning, he gave no instructions to the nurses as to what they should do in an emergency resulting from a tight cast. Meanwhile, in the afternoon, the patient felt such severe pain that narcotics were administered, and his toes appeared swollen and dark blue in color. Dr. Johnson partially split the cast Sunday night, but plaintiff continued to suffer great pain, and the swelling and discoloration continued. The condition of plaintiff's leg became increasingly worse, and required continual treatment with frequent hospitalization, until on June 10th amputation was made.

[2] Dr. Trenery, a properly qualified medical witness for plaintiff, testified in response to a hypothetical question that the care of the plaintiff following the original operation was not up to the standard of care and skill in the locality. He specifically criticized the failure to have constant after-care and observation of the leg when the rigid cast was applied, and testified that provision should have been made to notify the doctor of the changes in condition, which would have made it possible to open the cast much earlier. This expert testimony was enough to make a prima facie case, and the cross-examination and conflicting views of defendants' witnesses raised only questions of

credibility for the jury. See Ross v. Hieronymus, 1934, 2 Cal.App.2d 258, 37 P.2d 837; Thomason v. Hethcock, 1935, 7 Cal. App.2d 634, 46 P.2d 832; McLennan v. Holder, 1 Cal.App.2d 305, 36 P.2d 448.

[3-5] Plaintiff called Drs. Chappell and Grant, two additional medical witnesses, fully qualified, who corroborated the testimony of Dr. Trenery that the cause of the injury was a cast which was too tight. These doctors were also asked hypothetical questions as to whether the conduct of defendant surgeon constituted due care, and an offer of proof was made to the effect that they would testify that it was not. The court sustained objections to the questions on the ground that these doctors were currently practicing in Los Angeles, and could not testify as to the standard of care in Long Beach. We can see no justification for such a narrow view. The cities of Long Beach and Los Angeles are both in the same county; they are contiguous communities, both metropolitan in character, and their business centers are only about 25 miles apart. There is reason in the general requirement that the medical expert must be familiar with the standard of care in the particular locality, in order that the standards of widely separate localities with different practices may be excluded. But to make the exclusion rest arbitrarily upon a geographical line separating two cities of the same county, with almost identical kinds of medical service, would be a misuse of the rules of evidence and an unjustifiable emphasis on empty technicalities. Common knowledge, as well as the testimony of the doctors on both sides, tells us that the method used in treating this particular kind of fracture was one in use throughout the world. And there is the evidence offered by Dr. Trenery (admitted) and Dr. Chappell (excluded), to the effect that long prior practice in Los Angeles county, including Long Beach, showed that there was no difference in the treatment in the two communities. Both on principle and under the authorities we are satisfied that the exclusion of the evidence of Drs. Chappell and Grant was error. See Turner v. Stoker, Tex. Civ.App., 289 S.W. 190; Geraty v. Kaufman, 115 Conn. 563, 162 A. 33; Tennant v. Barton, 164 Wash. 279, 2 P.2d 735; Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170.

[6, 7] We may also note the error that was committed in restricting the cross-examination of defendants' expert, Dr. Terry, who testified that the patient's leg was suspended in a "Bohler Fracture Frame", and that the witness had studied under Dr. Bohler and used his textbook and that his opinion was in part based upon said book. Plaintiff's counsel then sought to cross-examine him by use of Dr. Bohler's book, and the court sustained objection to the impeaching questions. This was improper, for the rule against admission of such works as direct evidence is subject to the qualification that textbooks relied upon by an expert witness may be used as a foundation of impeaching cross-examination. See State v. Bess, 60 Mont. 558, 199 P. 426; Whitley v. Stein, Mo. App., 34 S.W.2d 998; 3 Wigmore on Evidence, sec. 1700.

There were other errors in the exclusion of evidence and restriction of cross-examination which we do not find it necessary to discuss.

[8, 9] On the hearing in this court defendants rely chiefly on the contention that the four defendants were sued as joint tort-feasors, and that the agreement resulting in the dismissal of the hospital and nurse destroyed plaintiff's cause of action against the other two defendants. They seek to uphold the trial court's decision on the theory that the agreement constituted a release, and that the dismissal amounted to a retraxit. Under well-settled principles this view is untenable.

The agreement was entitled "Covenant Not to Sue and Covenant Not to Sue Further"; it recites that the named defendants desire "an agreement and covenant not to sue and a covenant not to sue them or either of them further", or prosecute "any suit or suits now pending against them"; it states that plaintiff "promises and agrees that he will not sue and/or sue further" the said defendants, and that he covenants and agrees to hold them harmless from any liability arising out of the accident or treatment; it concludes by stating that plaintiff does not waive any claims against others. This instrument was unmistakably intended to constitute a covenant not to sue. "Its language is of covenant and indemnity, not of release." Kincheloe v. Retail Credit Co., 4 Cal.2d 21, 23, 46 P.2d 971, 972. Unlike a release, a covenant not to sue one joint tort-feasor does not relieve the others. Kincheloe v. Retail Credit Co., supra;

Cowles v. Independent Elevator Co., 22 Cal.App.2d 109, 70 P.2d 711; see, also, Hawber v. Raley, 92 Cal.App. 701, 268 P. 943; Charleville v. Metropolitan Trust Company, 136 Cal.App. 349, 29 P.2d 241.

[10-13] Since the agreement did not operate to release the other tort-feasors, plaintiff's voluntary act in requesting the clerk to dismiss as to the first two could not possibly have this effect. There is a well-recognized distinction between a dismissal voluntarily made by the clerk's entry, which is presumed to be without prejudice to the bringing of another action, and a dismissal entered in open court pursuant to stipulation, which is ordinarily effective as a retraxit. In the absence of such stipulation or motion addressed to the court, there is no retraxit. Breznikar v. Topper Co., 23 Cal.App.2d 298, 72 P.2d 895; Lamb v. Herndon, 97 Cal.App. 193, 275 P. 503; Stoutenborough v. Board of Education, 104 Cal. 664, 667, 38 P. 449; Shippy v. Peninsula Rapid Transit Co., 97 Cal.App. 367, 275 P. 515.

The cases relied upon by defendants deal with instruments properly construed to be releases, and their reply brief frankly states; "We readily concede that if this document (the covenant) under the circumstances is but a covenant not to sue, then it can avail these defendants nothing."

The judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; HOUSER, J.



12 Cal.2d 501

MARY PICKFORD CO. et al. v. BAYLY BROS., Inc., et al.

L. A. 16384.

Supreme Court of California.

Jan. 5, 1939.

As Modified on Denial of Rehearing Feb. 3, 1939.

1. Licenses ⇐39

In action to recover amount paid for beneficial interest under declaration of trust issued in financing realty subdivision project, evidence supported finding that one of corporations promoting project was guilty of actual fraud.

2. Limitation of actions ⇐197(2)

Evidence supported finding that buyers of beneficial interest in declaration of trust had no knowledge that promoting corporation project had not subscribed and paid for beneficial interests as represented until within three years before commencement of action, as respects whether cause of action for fraud was barred by limitation. Code Civ.Proc. § 338.

3. Limitation of actions ⇐100(13)

As respects whether cause of action by buyers of beneficial interest in declaration of trust for fraud in misrepresenting that promoting corporation would subscribe and pay for beneficial interests was barred by limitation, buyers had no duty to examine trust records to ascertain how certificates were acquired. Code Civ.Proc. § 338.

4. Licenses ⇐18½

As respects necessity for permit, sale by corporations owning entire beneficial interest under declaration of trust made by trust company, of certificates executed by corporation but not by trust company purporting to transfer fractional interest of corporation in trust constituted "issuance of a security." St.1917, p. 679, § 12; St.1925, pp. 963, 964, 970, § 2, subds. 3, 4, 7(d) and §§ 13, 14.

5. Licenses ⇐18½

Certificates executed by corporations purporting to transfer undivided fraction of beneficial interest of corporations in trust created in financing real estate subdivision project were "securities" within Corporate Securities Act as respects necessity of obtaining permit. St.1925, pp. 963, 964, § 2, subds. 3, 4, 7(d).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

6. Licenses ⇐18½

A trust company which did not execute certificates of fractional interests in trust declared by company and had no interest in property represented thereby was not a co-issuer of certificates, as respects contention that permit for sale of securities was not necessary because trust company need not obtain permit. St.1909, p. 87, as amended; St.1917, p. 679, § 12; St.1925, pp. 963, 964, 970, § 2, subds. 3, 4, 7(d) and §§ 13, 14.

7. Licenses ⇐18½

Provision of trust agreement requiring notice to trustee of assignment of beneficial interest did not make trust company a co-issuer of certificates assigning fractional interests as respects contention that permit for sale of securities was not necessary because trust company under statute need obtain permit. St.1909, p. 87, as amended; St.1917, p. 679, § 12; St.1925, pp. 963, 964, 970, § 2, subds. 3, 4, 7(d) and §§ 13, 14.

8. Licenses ⇐18½

Certificates transferring undivided fractional interests under trust were sold to the "public," within Corporate Securities Act, where sales were made pursuant to general plan to dispose of substantial portion of beneficial interest in trust to raising capital for subdivision venture. St.1925, p. 964, § 2, subd. 7(d).

The word "public" does not have a fixed or definite meaning; in one sense the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few. Among other definitions is given a particular body or section of the people; often specifically, a clientele.

[Ed. Note.—For other definitions of "Public," see Words & Phrases.]

9. Licenses ⇐39

Officers of company which issued certificates of fractional interests in trust without permit, who actively participated in sale of certificates, were liable to buyers where entire subdivision enterprise, to finance which certificates were issued, was carried on with knowledge and on authority of such officers. St.1917, p. 679, § 12; St.1925, p. 970, §§ 13, 14.

10. Licenses ⇐39

A trust company which made declaration of trust in connection with subdivision project was liable to buyers of certificate of beneficial interest sold without permit required by Corporate Securities Act under circumstances showing company's participation in general scheme. St.1917, p. 679, § 12; St.1925, p. 970, §§ 13, 14.

11. Torts ⇐21

Where there is a common plan or design to commit a tort, all who participate therein are jointly liable, whether they actually commit the wrongful acts or not.

12. Licenses ⇐39

Evidence supported finding that it would not be inequitable to hold liable to buyers of certificates of fractional interests in trust sold without permit, trust company which made declaration of trust, on ground that company paid out the escrowed money. St. 1917, p. 679, § 12; St.1925, p. 970, §§ 13, 14.

13. Licenses ⇐39

Buyers of beneficial interest in trust sold without permit were not in pari delicto and so estopped from recovery because of terms of subscription agreement which made one of selling corporations manager of property with full authority to act for syndicate. St.1917, p. 679, § 12; St.1925, p. 970, §§ 13, 14.

14. Licenses ⇐39

A corporation which served principally as a conduit to transfer title to realty was liable to buyers of interest in trust created to finance subdivision project which was sold without permit, where it was closely connected with transaction. St.1917, p. 679, § 12; St.1925, p. 970, §§ 13, 14.

15. Sales ⇐264

At common law, seller of securities impliedly warrants that they are genuine and are legally what they purport to be.

16. Sales ⇐251

Issuer or underwriter of securities for sale to the public impliedly represents that applicable provisions of law have been complied with, and falsity of such representation may give rise to action either for breach of warranty or for fraud depending on seller's culpability. St.1917, p. 673, as amended; Civ.Code, § 1774.

17. Sales ⇐251

The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether seller knew or should have known of falsity of his representations, while fraud involves the additional requirement that seller knew or should have known that his representations were false.

18. Limitation of actions ⇐49(7)

Limitations on cause of action for breach of implied warranty in sale of securities that Corporate Securities Act had been complied with commenced to run at time of sale. St.1917, p. 673, as amended; Civ.Code, § 1774.

19. Limitation of actions ⇐49(7)

The typical warranty, being an undertaking regarding quality of goods at time of their sale, must be broken at such time, and limitation begins to run immediately.

20. Limitation of actions ⇐100(6)

Cause of action for money paid for interest in trust sold without permit was barred by limitation as against contention that fraud was implied and that cause of action was not barred until three years after discovery of facts, where evidence would not support finding that sellers had no reasonable ground for believing that certificates were valid. St.1917, p. 673, as amended; Code Civ.Proc. § 338.

21. Limitation of actions ⇐100(6)

Accrual of cause of action of buyers of interest in trust sold without permit was not postponed until buyers discovered facts on theory that issuance of securities without permit constituted "constructive fraud" as defined in statute. St.1917, p. 673, as amended; Civ.Code, § 1573.

[Ed. Note.—For other definitions of "Constructive Fraud," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by the Mary Pickford Company and another against Bayly Bros., Inc., and others, to recover the amount paid by plaintiffs for a beneficial interest under a declaration of trust which was issued and sold without a permit from the commissioner of corporations. From a judgment and orders denying motions to vacate the judgment and to render a different judgment, both defendants and plaintiffs appeal.

Judgment against named defendant modified and, as so modified, affirmed; judgment as against other defendants reversed; appeals from orders denying motions dismissed.

Rehearing denied; LANGDON, J., dissenting.

Prior opinion, 68 P.2d 239.

Mott, Vallee & Grant, Paul Vallee, and T. D. Mott, all of Los Angeles, for plaintiffs, appellants and respondents Mary Pickford Co. and Mary Pickford Fairbanks.

Swanwick, Donnelly & Proudfit and Finlayson, Bennett & Morrow, all of Los Angeles, for defendant, appellant and respondent California Trust Co.

John W. Preston and Chapman & Chapman, all of Los Angeles, for defendants, appellants and respondents Bayly Bros., Harold Bayly, Roy D. Bayly, Suburban Estates, Inc.

Horton & Horton, Joseph K. Horton, and John S. Frazer, all of Los Angeles, for defendants, appellants and respondents Edwards & Wildey Co., and Walter C. Durst, trustee.

PER CURIAM.

Bayly Brothers, Inc., Harold Bayly, Roy D. Bayly, Edwards & Wildey Company, Suburban Estates, Inc., and California Trust Company have appealed from a judgment by which they were held liable for the amount paid by the plaintiffs for a beneficial interest under a certain declaration of trust which was issued and sold without a permit from the commissioner of corporations. The plaintiffs also are dissatisfied with the judgment, and upon their appeal claim interest in a larger sum than was allowed.

The controversy arose out of a real estate subdivision project initiated by Bayly Brothers, Inc., in 1925. That corporation made a contract for the purchase of a large tract of land and conceived a plan for financing the enterprise by means of a trust which it termed a syndicate. Edwards & Wildey Company joined it in this undertaking. They formed Suburban Estates, Inc., and a contract was made between the three corporations in which it was agreed that, when the property was purchased, title should be conveyed to California Trust Company and held by it under a declaration of trust. The plan contemplated that the required capital should be secured from a loan of $800,000 to be made by California Bank and the proceeds of the sale of beneficial interests in the trust to be created.

In October, 1925, and while these plans were still in a promotional stage, at the solicitation of Bayly Brothers, Inc., Charlotte Pickford Smith, on behalf of Mary Pickford Company, a copartnership, subscribed for a $25,000 interest in the syndicate. The amended agreement signed by Mrs. Smith provides that the real estate to be acquired shall be held in trust by a responsible trust company and that each subscriber shall receive a certificate of beneficial interest in the syndicate in that proportion thereof as the amount of his subscription bears to an amount afterwards fixed at $490,000. On

October 31, 1925, $2,500 was paid to Bayly Brothers, Inc. In the following December a check payable to California Trust Company was delivered to it as the balance of the investment.

The declaration of trust which constitutes the means by which the plan of the subdividers was carried out was executed by the trustee on December 24, 1925. It names Bayly Brothers, Inc., and Edwards & Wildey Company as beneficiaries and contains detailed provisions concerning the improvement, subdivision and sale of the property and the application of all income therefrom. It states how the profits of the venture are to be divided and provides: "The Beneficiaries herein named, and each of them, shall have the right and privilege of dividing their beneficial interest hereunder and of assigning and transferring portions thereof, subject to all the terms, conditions, obligations and provisions thereof, but no sale or transfer of any interest hereunder shall be valid or binding upon the Trustee until an executed original of such transfer in form satisfactory to the Trustee has been delivered to it, * * *." In February, 1926, Bayly Brothers, Inc., and Edwards & Wildey Company executed an instrument purporting to assign to Mary Pickford Company, a corporation, which had succeeded to the rights of the partnership, "an undivided 25/490 beneficial interest of the Beneficiaries in, to and under the certain Declaration of Trust executed by California Trust Company". Mary Pickford Company accepted this assignment and the trustee, by an endorsement upon the certificate, acknowledged receipt of a duplicate of the assignment and of the acceptance.

The complaint is in four counts, the first of which alleges the facts concerning the issuance and sale of the certificate of beneficial interest purchased by Mary Pickford Company. It also charges that the defendants, for the purpose of inducing that company and its assignor to make such investment, represented that the beneficial interests to be vested by said declaration of trust in Bayly Brothers, Inc., and Edwards & Wildey Company would be valid and genuine, and that the defendants would be able to lawfully issue and sell undivided parts of such interests; on the contrary, such issuance and sale was illegal and void because the commissioner of corporations had given no permit therefor. There is a further allegation that the beneficial interests were and are void and of no value.

By other averments of the complaint the plaintiffs declare that neither the Mary Pickford Company nor its assignor discovered the falsity of any of the false and fraudulent representations until January, 1932. This is more than six years after the purchase. During this time, so the plaintiffs state, neither Charlotte Pickford Smith nor Mary Pickford Fairbanks nor their corporation had any knowledge or information that the representations were false. They explain that in the latter part of 1931 they were threatened with an assessment upon these beneficial interests. An investigation by a committee of investors other than the plaintiffs was then made, and the facts concerning the issuance and sale of the interests were given to the plaintiffs "by a member of said committee or by a supposed owner of beneficial interests in said trust".

Actual fraud is charged in the second and third counts of the complaint. The plaintiffs claim that for the purpose of inducing them to make the investment, the defendants represented that Bayly Brothers, Inc., would subscribe and pay for at least $50,000 face value of interests in the proposed trust and that it would not sell or dispose of those interests without notifying Charlotte Pickford Smith and Mary Pickford Fairbanks and giving them an opportunity to dispose of their interests at the same time. Allegations concerning the falsity of the representations, lack of knowledge by the plaintiffs of the true facts, and the time when and the manner in which the truth was learned are in substantially the same form as those of the first cause of action. A common count for $25,000 follows.

The findings of the trial court uphold these allegations and also declare that Harold Bayly and Roy D. Bayly, who were, at all times during the transactions in controversy, officers of Bayly Brothers, Inc., knowingly joined with that corporation in assisting it and the other defendants in issuing and selling the beneficial interests. Upon these findings the court concluded that the plaintiffs should recover from Bayly Brothers, Inc., Harold Bayly, Roy D. Bayly, Edwards & Wildey Company, Suburban Estates, Inc., and California Trust Company $25,000 with interest from January 7, 1933, the date of a demand for payment, and rendered judgment accordingly.

[1] Bayly Brothers, Inc., contends that the evidence does not fairly sustain the finding of the trial court concerning actual

fraud on its part. However, by a plan conceived at the outset, this corporation together with Edwards & Wildey Company, contrived to reserve a large share of the possible profits of the venture for themselves without any investment of capital. The purchase price agreed to in the option was $1,300,000 and by transferring this option to Suburban Estates, Inc., their dummy corporation, for $1,450,000 they obtained a bookkeeping credit of $150,000. In addition Bayly Brothers, Inc., and Edwards & Wildey Company received 98,000 shares of stock issued by Suburban Estates, Inc., as consideration for the assignment of the contract for the purchase of the real property proposed to be subdivided. They retained one-half of this stock and transferred the remainder to the syndicate trustee for distribution among the purchasers of the certificates of beneficial interest. When title to the land was transferred to the trust company, the $150,000 credit was used by Bayly Brothers, Inc., and Edwards & Wildey Company to purchase certificates of beneficial interests in that amount. The plaintiffs and other purchasers of beneficial interests paid $340,000 in cash for the capital of the enterprise. Of this sum Bayly Brothers, Inc., took $40,000 in payment for the loss of profit it claimed because of the cancellation of a contract under which it agreed to underwrite a bond issue, paying one-half of this amount to the co-underwriter.

In the purchase of their beneficial interest, the plaintiffs dealt only with Bayly Brothers, Inc. There is evidence that the officers of the company led them to believe that $1,450,000 was the price to be paid under the option, and there was a positive representation that Bayly Brothers, Inc., would make a cash investment of $50,000 in the property. The plaintiffs refused to subscribe unless this representation was put in writing, and accordingly Bayly Brothers, Inc., wrote them a letter stating that it would subscribe and pay for beneficial interests in the trust to the amount of $50,000. It is urged that because this letter stated that the company "made a profit on the sale of the property to Edwards & Wildey Co., and we expect to make a profit from the underwriting of the bonds", the plaintiffs cannot now complain of the transaction. But the statement relied upon is itself false for no profit had been made on any sale to Edwards & Wildey Company. Moreover, the representations concerning the amount of money which Bayly Brothers, Inc., would invest in the enterprise were made at a time when its officers knew that the company would receive certificate of beneficial interest in the trust to the amount of $75,000 without the payment of any money.

The defendants argue that Bayly Brothers, Inc., and Edwards & Wildey Company might legitimately have taken their profit of $150,000 in cash and then have used the cash to purchase the beneficial interests, but that in so doing they would merely be performing an idle act. However, this argument erroneously assumes that there was a profit. Suburban Estates, Inc., was the completely dominated instrumentality of the other two corporations, and as the trial court described the sale of the option, "there were not two sides to that transaction". Furthermore, in the report of the deputy commissioner of corporations, made on the application of Suburban Estates, Inc., to issue stock, it was said: "Applicant also has agreed to pay these two companies (Bayly Brothers, Inc., and Edwards & Wildey Company) $150,000 in cash to be paid out of profits when said ranch is subdivided". Nor does the statement contained in the syndicate agreement to the effect that the price for the land included a commission to the promoters negative the proof of fraud. The chief factor which persuaded the plaintiffs to make the investment was the representation that Bayly Brothers, Inc., was willing to assume the risk of investing money for the subdivision and sale of the property. However, the evidence conclusively shows that it not only risked no money, but took $20,000 out of the transaction. These facts amply support the finding that the company made a promise without any intention of performing it.

[2, 3] Bayly Brothers, Inc., also seek to avoid liability for their representations upon the ground that the causes of action based thereon are barred by the statute of limitations. But section 338 of the Code of Civil Procedure, which fixes three years as the period within which an action for relief against fraud may be commenced, also provides that "the cause of action in such case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake". According to the finding of the trial court, which is amply supported by the evidence, the plaintiffs had no knowledge that Bayly Brothers, Inc., had not subscribed and paid for at least $50,000 worth of beneficial interests until early in

1932. The action was commenced within three years thereafter. There was nothing in the declaration of trust which would create a suspicion that Bayly Brothers, Inc., had not paid in cash for the interest it had acquired and the books of the trust showed certificates to an amount of $75,000 standing in the name of that corporation. While the facts concerning the manner in which these certificates were acquired could have been ascertained by an examination of the trust records, no duty rested upon the plaintiffs to make such an investigation. "Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery". Tarke v. Bingham, 123 Cal. 163, 166, 55 P. 759, 760.

The attack on the judgment, in so far as it rests upon the finding that the defendants are liable to the plaintiffs as buyers of a security issued without a permit of the commissioner of corporations, is made on a number of grounds. California Trust Company contends that under the Corporate Securities Act as that statute existed in 1925 and 1926 (Stats. 1917, p. 673, as amended) it was not required to obtain a permit for the issuance or sale of any security; that no security was offered to the public and it assumed no duty to the plaintiffs; and that it cannot be liable because it disbursed the money paid by subscribers before it had any knowledge that a required permit had not been obtained. The other appellants found liable by the judgment also argue that the trust company did not require a permit and that its immunity protects them. A further claim is that the certificates of beneficial interest are not securities and were not offered or sold to the public. Other reasons advanced as grounds for reversal of the judgment are: None of the defendants knew that a permit was required; under the subscription agreement the plaintiffs were vicariously parties to any wrong and are estopped from recovery; and for various reasons the findings are not supported by the evidence. The defendants also urge that a recovery upon the ground that the certificates of beneficial interest were sold without a permit of the commissioner of corporations is barred by the statute of limitations.

At the time of the transactions now questioned, the Corporate Securities Act, supra, defined a "security" as "Any instrument offered for sale, or sold, or issued, to the public by any company, evidencing or representing any right to participate or share in the profits, earnings or income, gross or net, derived from the assets, or any thereof, of any business carried on for profit or in the distribution of such assets * * *." Sec. 2, subd 7(d), St.1925, p. 964. It also provided that the word "company" shall include all domestic and private corporations (with certain exceptions), and the word "trust" "all voluntary trusts, as the same are defined in the Civil Code, expressly created by or declared in an instrument in writing, other than a will or a judicial writ, order, decree, or judgment, to carry on any business or to secure the payment or repayment of money". Sec. 2, subds. 3, 4, St. 1925, p. 963. Under another provision of the statute, "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void". Sec. 12, St.1917, p. 679. It also made "Every company which shall directly or indirectly issue or cause to be issued any security contrary to the provisions of this act" and "Every officer, agent, or employee of any company, and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security", in nonconformity with the requirements, guilty of a public offense. Secs. 13, 14, St.1925, p. 970.

[4, 5] The declaration of trust issued by California Trust Company named Bayly Brothers, Inc., and Edwards & Wildey Company as beneficiaries and vested in them the entire beneficial interest in the trust. They in turn sold and delivered to the plaintiffs and others certificates executed by them but not by the trust company. That sold to the plaintiffs purported to transfer to Mary Pickford Company an undivided 25/490 of the beneficial interest of Bayly Brothers, Inc., and Edwards & Wildey Company in the trust. This constituted the issuance of a security; it was a new interest created by Bayly Brothers, Inc., and Edwards & Wildey Company in the property owned by them. Unquestionably the certificates executed by Bayly Brothers, Inc., and Edwards & Wildey

Company were securities within the meaning of the Corporate Securities Act. People v. Ferguson, 134 Cal.App. 41, 24 P.2d 965; People v. Craven, 219 Cal. 522, 27 P.2d 906; Ex parte Girard, 186 Cal. 718, 200 P. 593; Barrett v. Gore, 88 Cal.App. 372, 263 P. 564.

[6] These conclusions make it unnecessary to determine whether in 1925 and 1926 a trust company organized and licensed to do business under the Bank Act of this state (Stats.1909, p. 87 as amended) was required to obtain a permit for the issuance of a security as defined by that statute. The security sold to the plaintiffs was issued by Bayly Brothers, Inc., and Edwards & Wildey Company. True, the trial court found that money paid to the trust company by various purchasers of the certificates of beneficial interest was not received by it solely as an escrow holder, but "as a substantial part and portion of the general scheme to issue and sell" them. But the facts concerning the execution and delivery of the declaration of trust and the certificates are undisputed. Therefore, the finding of the trial court that the trust company issued them is only a conclusion of law which was incorrectly drawn from the admitted facts and must be disregarded. The evidence shows that the trust company did not execute the certificates of fractional interest nor did it have any interest in the property represented by them. Under such circumstances it clearly was not a co-issuer of the certificates.

[7] The fact that the trust agreement provided that no assignment would be "valid or binding upon the trustee until an executed original of such transfer in form satisfactory to the trustee had been delivered to it" does not negative this conclusion. Obviously the purpose of the provision requiring notice to be given to it of assignments of the beneficial interest in the trust was to protect assignees under the rule that notice to the obligor determines priority between successive assignees. Such notice was not necessary to the acquisition of title by the assignee. Baumgarten v. California Pacific T. & T. Co., 127 Cal.App. 649, 657, 16 P.2d 332, and cases there cited.

[8] It is also contended that even if the certificates of beneficial interest are securities, they were not sold to the public, hence the defendants were not subject to the regulations imposed by the Corporate Securities Act. However, the record shows that Harold Bayly, Roy D. Bayly, James Dunham, Godfrey Edwards and Otto Wildey, the principal officers of Bayly Brothers, Inc., and Edwards & Wildey Company, solicited and took subscriptions for them, the sale to the plaintiffs being handled by Mr. Dunham. Persons to be solicited were selected at random, although a number of former purchasers of securities from each firm were invited to invest in the syndicate.

This method certainly constituted an offering to the "public". Corpus Juris states that the word does not have a fixed or definite meaning; in one sense "the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them for a few". 50 C.J. 844, 845. Webster's New International Dictionary, Second Edition, gives among other definitions of the word, "a particular body or section of the people; often specifically, a clientele". While the group solicited by defendants in this case was a comparatively small one, it nevertheless constituted the "public" so far as the purposes of the Corporate Securities Act are concerned. Sales were made in pursuance of a general plan to dispose of a substantial portion of the beneficial interest in the trust for the purpose of raising capital to carry out the venture. This, in the absence of a permit, constituted a violation of the Corporate Securities Act. People v. Craven, supra; Black v. Solano Co., 114 Cal.App. 170, 299 P. 843.

[9] Because of the breach of statutory duty Bayly Brothers, Inc., and Edwards & Wildey Company are each liable to the plaintiffs as issuers of the security. Harold Bayly and Roy D. Bayly are equally responsible for any damages caused thereby. Each of these persons as an officer of Bayly Brothers, Inc., actively participated in the sale of the certificates and the court found upon substantial evidence that "the entire enterprise, including the financing required therefor and the manner in which the same was carried out, was undertaken and carried on with the knowledge and upon the authority of Harold Bayly and Roy D. Bayly, and without their sanction thereof and their participation therein, the same would not have been undertaken or accomplished. * * *." Under these circumstances they are liable to the plaintiffs. Randall v. California L. B. Syndicate, 217 Cal. 594, 20 P.2d 331; Walker v. Harbor Realty, etc., Corp., 214 Cal. 46, 3 P.2d

557; O'Connell v. Union Drilling, etc., Co., 121 Cal.App. 302, 8 P.2d 867; McClory v. Dodge, 117 Cal.App. 148, 4 P.2d 223.

[10, 11] California Trust Company is also liable because of its participation in the "general scheme" to issue and sell the certificates. The evidence shows that it took a prominent part in the financial plans of the promoters. Indeed, they could not have financed their enterprise without the assistance of the trust company. It prepared the certificates to be used in making assignments of interest and had them printed. It assisted in the transfer and delivery of the certificates, communicating in writing with various subscribers for the purpose of getting the papers in acceptable form. The check of $22,500 given by Mary Pickford Company as the balance of the subscription for the beneficial interest was made payable to it. It is well settled that where there is a common plan or design to commit a tort, all who participate therein are jointly liable, whether they actually commit the wrongful acts or not. Revert v. Hesse, 184 Cal. 295, 193 P. 943; Burckhardt v. Woods, 124 Cal.App. 345, 12 P. 2d 482; Mox, Inc., v. Woods, 202 Cal. 675, 262 P. 302; City of Boston v. Simmons, 150 Mass. 461, 23 N.E. 210, 6 L.R.A. 629, 15 Am.St.Rep. 230; Purington v. Hinchliff, 219 Ill. 159, 76 N.E. 47, 2 L.R. A.,N.S., 824, 109 Am.St.Rep. 322; Green v. Davies, 182 N.Y. 499, 75 N.E. 536, 3 Ann.Cas. 310; Martens v. Reilly, 109 Wis. 464, 84 N.W. 840.

The conclusions just stated are not contrary to those reached in Fox-Woodsum Lumber Co. v. Bank of America Nat. Trust & Savings Ass'n, 7 Cal.2d 14, 59 P.2d 1019, Vandervort v. Farmers, etc., Nat. Bank, 7 Cal.2d 28, 59 P.2d 1028, and Miller v. Union Bank & Trust Co., 7 Cal. 2d 31, 59 P.2d 1024. In the last case the question of the liability of the bank arose upon demurrer to a complaint which alleged that it "issued and sold" the securities there involved. The decision necessarily assumes those facts, but the defendants point out that exhibits attached to the complaint show the issuance and sale of fractional parts of a trust interest in substantially the same form as the transaction complained of in the present case. If it be assumed that these exhibits could negative the allegations of the complaint, it is sufficient to point out that no contention was made that the assignments of fractional interest constituted the issuance of a new security. In all of these cases the court proceeded upon an assumption that the defendant bank issued the securities which were sold to the public.

[12] The trust company also contends that the plaintiffs should not be allowed to change their position to its injury because it paid out the escrowed money in 1925. That defense rests upon equitable principles and was rejected by the trial court which found that it would not be inequitable or unjust to subject the defendants to liability. The evidence supports such finding and fully justifies it.

[13] Another defense urged by the defendants is that the terms of the subscription agreement estop plaintiffs from recovery. Although by that instrument Edwards & Wildey Company was made the manager of the property with full power and authority to act for the syndicate, this did not bring the parties in pari delicto. The rule has been stated in Randall v. California Land Buyers Syndicate, supra, as follows: "Although the parties seeking affirmative relief, i. e., the buyers of such stocks, may be in some degree guilty with the parties against whom the relief is sought, they will be denied relief only where the record shows that they are equally culpable (Campbell v. Julian Merger Mines, 111 Cal. App. 649, 295 P. 1040); and, considering the object and purpose of the Corporate Securities Act, mere knowledge of the terms of the permit, or of the fact that no permit has been issued, may not alone be sufficient to raise the guilt of the purchaser or subscriber to that degree." Page 598, 20 P.2d page 333.

[14] Suburban Estates, Inc., stands in the same position as Bayly Brothers, Inc., and Edwards & Wildey Company. Apparently it served principally as a conduit to transfer title to the real estate. However, it was so closely connected with the transaction sued upon that it is liable to the same extent as its co-defendants.

A more difficult question is presented by the contention of the defendants that the causes of action alleged in the first and fourth counts are barred by the statute of limitations. In these counts the plaintiffs allege that the certificates of beneficial interest were issued without a permit from the commissioner of corporations; that they are, therefore, void and that the defendants are entitled to recover the amount invested with interest from the day of payment. During the trial the plaintiffs

conceded that their causes of action under these counts were not based upon any express representation that a permit had been issued by the commissioner of corporations or that the trust certificates were valid but were established by proof that the security sold to them was issued without a permit therefor.

The findings on this aspect of the case recite that the plaintiffs believed that the subscription agreement and the beneficial interests issued pursuant thereto were valid and genuine, that they relied upon that belief in signing the agreement and paying the purchase price for the certificates, and that the certificates of beneficial interest in the trust were and are void and worthless. There are no findings that the defendants acted with knowledge that a permit was required or that they acted recklessly and without reasonable grounds for believing that the securities were valid. The absence of any findings upon these essential elements of a fraud cause of action was compelled by the state of the record. There is affirmative and uncontradicted proof that the defendants responsible for the issuance and sale of the certificates carefully considered the question of the necessity for a permit and honestly believed that none was required. They entrusted the legal details of the enterprise to competent and experienced attorneys, who, upon a consideration of all the facts, concluded that the trust interests proposed to be sold were not securities within the meaning of the Corporate Securities Act. Under these circumstances a finding that the defendants had no reasonable ground for believing that the certificates were valid would not have been supported by the evidence. The plaintiffs insist, however, that the sale of a "security" as defined by the Corporate Securities Act, supra, without a permit therefor, implied fraud regardless of the seller's good faith and gives the buyer a cause of action for the recovery of the amount paid by him which is not barred until three years after he discovers that no permit was in fact issued. The defendants contend that the action under counts 1 and 4 does not sound in fraud and having accrued when the securities were sold, it is now barred by the statute of limitations.

[15] At common law it was the rule that in a sale of securities the seller impliedly warrants that they are genuine and are legally what they purport to be. The Supreme Court of the United States has said that where there is no statute to the contrary, the obligation of the vendor is not restricted to the mere question of forgery vel non, but requires him to deliver that which he has contracted to sell. The vendor, by the principal contract itself and not because of a collateral contract of warranty, must give the purchaser that which is genuine. Meyer v. Richards, 163 U. S. 385, 16 S.Ct. 1148, 41 L.Ed. 199. This case was followed by the supreme court of Oklahoma in an action brought by a bank to recover the purchase price of state warrants which were invalid. These warrants purported to have been drawn upon a special fund of the state but had been issued without authority of law. It was held that as the bank which sold them impliedly warranted that the securities were what they purported to be, it could not recover because the purchaser was entitled to have warrants that were valid and existing obligations of the state. Logan County Bank v. Farmers' Nat. Bank, 55 Okl. 592, 155 P. 561, at pages 562, 563. This rule is fully in accord with the warranties which are implied in the assignment of choses in action. See Restatement of Contracts, sec. 175 (1), (b) (c); Fletcher Encyclopedia of Corporations, Perm. Ed., vol. 12, sec. 5616, page 744.

When the transaction which is the subject of the present litigation occurred, section 1774 of the Civil Code provided that "One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as * * * its invalidity for any cause." This section limited the rule of the common law and was held to be exclusive. Sutro v. Rhodes, 92 Cal. 117, 124, 28 P. 98; Harvey v. Dale, 96 Cal. 160, 31 P. 14; Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 585, 73 P. 456, 63 L.R.A. 245, 96 Am.St.Rep. 169. It was repealed in 1931.

[16, 17] Although by these decisions the common-law warranty applicable to a sale of securities was limited in this state, nevertheless because of the provisions of the Corporate Securities Act, supra, in effect at the time of the transaction here in controversy, a seller of securities necessarily warranted that the duties therein imposed upon him had been performed. Such a warranty is based upon the obligation to secure a permit which the law enjoined upon the seller.

Warranties implied by sellers' statutory duties are not unknown to the common law. The case of Smith v. Luning Co., 111 Cal. 308, 43 P. 967, well illustrates the rule. There the parties had entered into a contract to build a sewer in front of a lot. By an ordinance then in force, it was unlawful to build such a sewer without first securing a permit from the superintendent of streets. The court held [page 968]: "As the obtaining a permit from the superintendent of streets was essential to rendering the agreement between the plaintiff and defendant valid, and as the instrument in question is silent upon that subject, the obtaining of such permit must be implied as a condition of the agreement between them * * *." In Swift & Co. v. Etheridge, 190 N.C. 162, 129 S.E. 453, the action was for damages claimed to have been suffered by reason of the breach of an implied warranty in the sale of commercial fertilizer. The court held that inasmuch as a statute required fertilizer to be properly analyzed and labeled, a warranty that the law had been complied with would be implied from the sale. The seller's express refusal to give an express warranty did not relieve him of this obligation. In each of these cases the court applied the general and well-established rule that "all applicable laws in existence when a contract is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms". 6 Cal. Jur., pp. 310, 311.

Whenever, therefore, an issuer or underwriter of securities offers them for sale to the public, he impliedly represents that the applicable provisions of law have been complied with. The falsity of that representation may give rise to an action either for breach of warranty or for fraud depending upon the culpability of the seller in the particular transaction. "The representation of fact which induces a bargain is a warranty. In truth, the obligation imposed upon the seller in such a case is imposed upon him not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement. The obligation in such a case is quasi contractual, and at least if the seller knows the falsity of his representation there is also a tort." Williston on Contracts, Revised Ed., vol. 5, sec. 1505, p. 4198. The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representations. Fraud, on the other hand, involves the additional requirement that the seller knew, or, in the exercise of reasonable diligence should have known, that his representations were false.

The case of Shippen v. Bowen, 122 U.S. 575, 7 S.Ct. 1283, 30 L.Ed. 1172, aptly illustrates the basic distinction. There the plaintiff sued for breach of express warranty in the sale of certain bonds, alleging that the defendant had falsely represented the bonds to be valid and genuine whereas they were in fact spurious. The complaint also contained allegations essential to support an action for deceit; i. e., that the defendant, who was the seller, knew the representations to be false. The trial court instructed the jury that the plaintiff could not recover unless he established scienter in the defendant. The court held that such an instruction was erroneous and that the plaintiff was entitled to recover upon the warranty without alleging or proving scienter.

The distinction is likewise well established in California. In 22 California Jurisprudence 960 it is said: "While the fact that the defendant acted with superior knowledge is the gist of the action, whether it be one on the case for false representation or upon contract for breach of warranty, there is, in theory at least, a plain distinction between fraud and warranty in respect to the degree of the defendant's knowledge. To support the action for deceit, the plaintiff must prove that the defendant was aware of the falsity of his statement, or at any rate, that he spoke with a conscious lack of knowledge as to the truth, whereas, to the maintenance of an action for breach of warranty, it is not essential to show that the seller consciously misstated the fact as to the quality, fitness or value of the goods or thing; the plaintiff need only establish an assumption by the seller of superior knowledge as to the fact, —a state of mind which is perfectly consistent with good faith or a belief in the truth of the statement." See Spiegelman v. Eastman, 95 Cal.App. 205, 216, 272 P. 761; Pacific Feed Co. v. Kennel, 63 Cal.App. 108, 218 P. 274; Brock v. Newmark Grain Co., 64 Cal.App. 577, 222 P. 195; Hackett v. Lewis, 36 Cal.App. 687, 173 P. 111; Pepper v. Vedova, 26 Cal.App. 406, 147 P. 105.

[18, 19] The allegations of the first and fourth cause of action in the present case presents facts showing a sale of securities upon an implied warranty which was un-

true. That warranty was broken at the time of the sale and the statute of limitations commenced to run at that time. "The typical warranty, being an undertaking regarding the quality of goods at the time of their sale must, if ever broken, be broken at that time; and the statute of limitations, therefore begins to run immediately." Williston on Sales, 2d ed., vol. 1, sec. 212a, p. 411. See note, 75 A.L.R. 1086. The causes of action for breach of warranty were, therefore, barred long prior to the commencement of the action.

[20] The respondents, however, contend that the allegations of their complaint concerning the issuance of the certificates of beneficial interest without a permit therefor state a cause of action for fraud which, they say, is implied from the facts concerning the particular transaction in controversy. Although in a number of cases, the appellate courts of this state have said that a seller of securities in contravention of the Corporate Securities Act, supra, is guilty of fraud, in all but two of these cases a recovery might have been had for breach of warranty. In MacDonald v. Reich & Lievre, Inc., 100 Cal.App. 736, 281 P. 106, it was held that an action for money had and received brought to recover the consideration paid for stock which was issued and sold without a permit, sounded basically in fraud or mistake, and although more than four years had elapsed since the stock had been sold, the action having been commenced within a reasonable time after the plaintiff's discovery of the seller's lack of a permit, and within three years thereafter, it was not barred by the statute of limitations. The case of Klombies v. Weeks Poultry Community, 121 Cal.App. 175, 8 P. 2d 940, involved an action by a buyer to recover purchase money paid to a seller who failed to comply with the requirements of the permit. The court held that the buyer's cause of action sounded in fraud and therefore accrued at the time he discovered the seller's dereliction, and was not barred by sections 339 and 340 of the Code of Civil Procedure. These cases were decided upon the theory that the buyer of securities sold without a permit has a cause of action for fraud under all circumstances. They are, therefore, at variance with the conclusions now stated and are overruled.

Boss v. Silent Drama Syndicate, 82 Cal. App. 109, 112, 255 P. 225; Hemmeon v. Amalgamated C. Mines Co., 95 Cal.App. 400, 273 P. 74; Michaels v. Pacific Soft Water Laundry, 104 Cal.App. 349, 286 P. 165, 1071; McClory v. Dodge, 117 Cal.App. 148, 4 P.2d 223; O'Connell v. Union Drilling, etc., Co., 121 Cal.App. 302, 8 P.2d 867; Belden v. California Fireproof Storage Co., 140 Cal.App. 706, 35 P.2d 1034; Walker v. Harbor Realty, etc., Corp., 214 Cal. 46, 49, 3 P.2d 557; Gillis v. Pan American Western Pet. Co., 3 Cal.2d 249, 256, 44 P.2d 311, also state the implied fraud doctrine, but none of those cases involved the bar of the statute of limitations and the language used was not necessary to the result reached. These cases failed to note the well-established distinction between fraud and breach of warranty which has heretofore been pointed out, and in so far as the opinion in any one of them contains language to the effect that implied fraud will be conclusively presumed from the sale of securities in violation of the Corporate Securities Act, supra, it is overruled.

In the case of Young v. Three For One Oil Royalties, 1 Cal.2d 639, 36 P.2d 1065, the plaintiffs sued to recover the amounts paid for certain certificates of beneficial interest in a common law trust which, it was alleged, were issued in violation of the Corporate Securities Act. This suit was filed six years after the sales were made. The superior court found that none of the defendants represented that a permit had been issued, or concealed any fact from the purchasers, or practiced any fraud upon any of them; that inquiry was made of the corporation commissioner concerning the necessity for a permit and that officer ruled that it was not necessary. Upon these findings the trial judge ruled that the cause of action was barred by the statute of limitations. Upon appeal this court held that no permit for the issuance or sale of the certificates bought by the plaintiffs was necessary, and affirmed the judgment upon the ground. Although urged to state what the applicable statute of limitations is in such a case, it left that question to be later determined.

The theory of allowing a buyer of void certificates of stock to recover their value upon the ground of fraud was first applied in this state in the case of Green v. Caribou Oil Mining Co., 179 Cal. 783, 178 P. 950, which did not involve a violation of the Corporate Securities Act. The evidence relied upon by the plaintiff in that action showed that a vice-president of the corporation whose stock was sold negligently signed several certificates. The secre-

tary of the corporation issued them to himself without any authority therefor and passed them on to an innocent purchaser. This court held the corporation liable for the amount paid by the plaintiff because the culpable negligence of the vice-president amounted to actual fraud. In the course of the opinion it said that the "false issue * * * is a representation by the corporation itself to the purchaser from the original holder that the false stock is genuine". [page 952.] This statement is entirely proper as applied to the facts of that case, where negligent fraud had been affirmatively proved, but is not authority for holding that one who issues a security without the required permit of the commissioner of corporations is conclusively guilty of implied fraud.

There are other decisions of the appellate courts of this state giving relief to buyers of void securities which, on principle, are not founded either upon fraud or breach of warranty. For example, the case of Pollak v. Staunton, 210 Cal. 656, 293 P. 26, was commenced by a buyer of securities sold without a permit. He charged one who participated in the sale upon a common count for money had and received. The defendant was held liable for the amount of the consideration received by him upon the theory that the plaintiff was entitled to recover upon a quasi contract. In other cases the cause of action sued upon sounded in tort and was based upon the seller's breach of a statutory duty. It has been held that a buyer of securities may recover damages notwithstanding his knowledge of the seller's lack of or noncompliance with a permit provided only he is not in pari delicto with the seller. Randall v. California Land Buyers Syndicate, 217 Cal. 594, 20 P.2d 331; Duntley v. Kagarise, 10 Cal.App.2d 394, 52 P. 2d 560; Olds v. Simmons, 123 Cal.App. 275, 11 P.2d 36; Western Oil, etc., Co. v. Venago Oil Corp., 218 Cal. 733, 24 P.2d 971, 88 A.L.R. 1271; Campbell v. Julian Merger Mines, 111 Cal.App. 649, 295 P. 1040; Parrish v. American Ry. Emp. Pub. Corp., 83 Cal.App. 298, 256 P. 590. In Randall v. California Land Buyers Syndicate, supra, it was said [page 332]: "Although the parties seeking affirmative relief, i. e., the buyers of such stocks, may be in some degree guilty with the parties against whom the relief is sought, they will be denied relief only where the record shows that they are equally culpable (Campbell v. Julian Merger Mines, 111 Cal.App. 649, 295 P. 1040); and, considering the object and purpose of the Corporate Securities Act, mere knowledge of the terms of the permit, or of the fact that no permit has been issued, may not alone be sufficient to raise the guilt of the purchaser or subscriber to that degree." It is obvious that a buyer who knows that the seller is violating the provisions of the statute may not recover from that seller on a theory that he had relied upon an implied representation that the security was validly issued and sold.

It is likewise clear that a fraudulent transaction can be ratified by acquiescence of the party defrauded with full knowledge of the facts, but a purchaser of void securities is given relief against the seller notwithstanding acquiescence with full knowledge. The seller cannot assert that the purchaser has ratified the void transaction. First National Bank v. Thompson, 212 Cal. 388, 298 P. 808; Reno v. American Ice Machine Co., 72 Cal.App. 409, 237 P. 784; Pollak v. Staunton, 210 Cal. 656, 663, 293 P. 26; Olds v. Simmons, 123 Cal. App. 275, 11 P.2d 36; Tatterson v. Kehrlein, 88 Cal.App. 34, 263 P. 285. The recovery in these situations has been based upon the principle that stock issued in violation of the Corporate Securities Act is void for illegality, and the purchaser, not being in pari delicto, may recover the consideration in an action upon quasi contract.

Analogous cases in other branches of the law have likewise established principles which are not wholly consistent with the conclusive implied fraud doctrine announced in some of the Corporate Securities cases. The California Usury Law (Stats.1919, p. lxxxiii, Deering's General Laws, 1937 ed., vol. 1, Act 3757) provides that where a contract is usurious, the agreement to pay interest is void. An action to recover interest paid in violation of this law is held to be merely "the common-law remedy to recover money paid under illegal provisions of a contract" under which the plaintiff is entitled to recover interest paid "within two years of the suit". Taylor v. Budd, 217 Cal. 262, 18 P.2d 333, 334. Likewise in Smith v. Bach, 53 Cal.App. 63, 199 P. 1106, the defendants violated a statute making it unlawful to sell land by reference to an unrecorded map. In a suit by purchasers to recover the consideration paid it was held that the contract of sale was void, and that the purchasers could recover all payments except those made more than two years prior to the com-

mencement of the suit. While it is true that the action was one in assumpsit and the complaint did not charge fraud, still the court was of the opinion that the cause of action to recover payments made for land sold in violation of a statute making such a sale void was barred in two years.

[21] The respondents also contend that the issuance of a security without a permit constitutes constructive fraud within the meaning of section 1573 of the Civil Code which defines it as: "* * * any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." However, this section states the rule applicable in confidential relations. It has never been applied to fix liability for the breach of a statutory duty except that of a fiduciary, and in the early case of Feeney v. Howard, 79 Cal. 525, 21 P. 984, 4 L.R.A. 826, 12 Am.St.Rep. 162, this court held that it is essential to the operation of the principle of constructive fraud that there be a fiduciary relation. "It is one of the facts constituting the fraud," said the court in that case. That is in accord with fundamental principles. "To constitute positive or actual fraud there must be such fraud as affects the conscience, that is, there must be an intentional deception. Constructive fraud, on the other hand, is presumed from the relation of the parties to a transaction, or the circumstances under which it takes place. * * * Constructive fraud often exists where the parties to a contract have a special confidential or fiduciary relation, which affords the power and means to one to take undue advantage of, or exercise undue influence over, the other." 12 R.C.L. 230, 231, 232.

Upon a full consideration of the applicable principles of law, it is clear that a person who sells a security impliedly represents that a permit therefor has been secured when one is required by the Corporate Securities Act for such a sale. If this implied representation is false, then it is a negligent misrepresentation which is an actionable fraud, and the buyer's right of action does not accrue until he discovers its falsity unless the seller acted upon information sufficient to justify a reasonable man in concluding that no permit was required. In that event there has been a breach of warranty, but no fraud, and the buyer's cause of action accrues at the date of the sale.

Because of the representations made by Bayly Brothers, Inc., which amounted to fraud, the plaintiffs are entitled to recover from it the amount paid for the beneficial interest in the trust with interest thereon from the date of payment. The evidence shows that the false representations were made by J. W. Dunham, the executive vice-president of the corporation, and it does not appear that either Harold Bayly or Roy D. Bayly participated in or were aware of the fraud which induced the plaintiffs to buy their certificates. Hence on the present record the two Bayly brothers cannot be held individually liable, but the judgment against the corporation must stand with interest on the amounts paid by the plaintiffs from the dates of such payments.

The judgment against Bayly Brothers, Inc., is modified by allowing interest at the rate of 7 per cent per annum on the sum of $2,500 from October 31, 1925, and on the sum of $22,500 from December 12, 1925, and as so modified it is affirmed; the judgment as against all other defendants is reversed; the appeal from the order denying the motion of the plaintiffs to set aside and vacate the judgment and to render another and different judgment is dismissed for the reason that the relief sought thereby has been granted in part and denied in part by the determination of the appeal from the judgment; the appeal from the order denying a similar motion made on behalf of Harold Bayly and Roy D. Bayly is dismissed for the reason that the questions presented by it have also been decided upon the appeal from the judgment. The plaintiffs will recover costs on appeal as against Bayly Brothers, Inc. The defendants Edwards & Wildey Company, Suburban Estates, Inc., and California Trust Company, will recover costs on appeal as against the plaintiffs. Harold Bayly and Roy D. Bayly will not recover any costs on appeal.

HOUSER, J., deeming himself disqualified, does not participate in the foregoing opinion.

LE SAGE v. TITLE GUARANTEE & TRUST CO. et al.

L. A. 16405.

Supreme Court of California.

Jan. 5, 1939.

Rehearing Denied Feb. 3, 1939.

1. Limitation of actions ⇐180(4)

A complaint for money paid for note secured by assignment of beneficial interest in trust, sold without permit, which sounded in fraud and was brought within three years after either plaintiff or his assignors had knowledge of facts, *held* not demurrable on ground of limitation. St.1917, p. 673, as amended.

2. Licenses ⇐39

A complaint to recover amount paid for note secured by assignment of interest in trust which was sold without permit required by Corporate Securities Act was sufficient to charge defendants with failure to secure permit. St.1917, p. 673, as amended.

3. Licenses ⇐39

Complaint for recovery of money paid for note secured by assignment of interest in trust which was sold without permit required by Corporate Securities Act was not demurrable as to trust company on ground that company was not required to secure permit, under circumstances. St.1917, p. 673, as amended.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by M. M. Le Sage against the Title Guarantee & Trust Company and others. From an order sustaining named defendant's demurrer to the complaint without leave to amend, and a judgment, plaintiff appeals.

Judgment reversed, with directions; appeal from order sustaining demurrer dismissed.

Rehearing denied; LANGDON, J., dissenting.

Prior opinion, 68 P.2d 250.

Claude I. Parker, Ralph W. Smith, G. C. De Garmo, and W. M. Crane, all of Los Angeles, for appellant.

Laurence W. Beilenson, of Los Angeles, for respondent.

Mott, Vallee & Grant and Paul Vallee, all of Los Angeles, amici curiæ.

PER CURIAM.

This appeal presents the question of the sufficiency of a complaint which charges Title Guarantee and Trust Company with responsibility for certain securities alleged to have been issued and sold in violation of the Corporate Securities Act (Stats.1917, p. 673, as amended). A demurrer of the trust company to the complaint was sustained without leave to amend and the appeal was taken both from that order and from the judgment which followed it.

The complaint is in forty-three counts, each of which is based upon the purchase, by an assignor of the plaintiff, of a promissory note secured by an assignment of beneficial interest in a trust. According to the complaint, in 1923 there was conveyed to the trust company certain real property, the consideration for which was furnished to the grantor by the other defendants. Two years later all of the defendants entered into a declaration of trust which provides that the trust company shall hold title to the property as trustee. The declaration of trust further provides that this property shall be subdivided, improved and sold upon certain conditions and that those persons who contributed the consideration for the purchase of the property shall be beneficiaries in proportions named.

Other allegations of the complaint are: "That for the purpose of facilitating the sale and issuance of said beneficial interests to the public, the defendants appointed and empowered [certain] defendants * * * as an executive committee under said trust to execute to each purchaser as evidence of said beneficial interests to be so sold a promissory note in the amount paid by each, reciting that it is secured by an assignment of the beneficial interest in said trust in said proportion. That from 1925 to 1930 all of the defendants in this action offered, issued and sold, or aided and participated in the offer, issuance and sale to the public, including plaintiff's assignors herein, beneficial interests in said trust and all payments therefor were, according to an understanding between the defendants, made to and received by defendant Title Guarantee & Trust Company under said trust, and said executive committee for and on behalf and with the approval of all of the defendants executed to the respective purchasers of said beneficial interests its promissory notes * * * as evidence of said payment and the purchase of and interests as hereinafter related."

The plaintiff then complains that no permit was ever issued by the commissioner of corporations for the issuance or sale of any right in the trust, and that "all of the defendants herein fraudulently and wrongfully represented and warranted to plaintiff's assignors that the same were legal, valid and genuine, when in fact they were illegal, void, fictitious and wholly valueless, and a total failure of consideration therefor occurred". The plaintiff's assignors "were accordingly damaged by the said fraud and illegal acts of the defendants in the amount paid by each".

All of the notes are dated between March 1, 1926, and March 1, 1930. The complaint was filed in February, 1934. In each cause of action it is alleged that neither the plaintiff nor his assignor knew or discovered that no permit had been issued until June, 1933. It is said that about the month of March, 1933, Title Guarantee and Trust Company ceased to pay interest on the notes and an investigation was then made which showed the lack of a permit.

[1] Under the principles stated in Mary Pickford Company v. Bayly Brothers, Inc., Cal.Sup., 86 P.2d 102, filed concurrently herewith, the allegations of the complaint sufficiently charge the defendants with the commission of a fraud. If the defendants by answer plead the defense of the statute of limitations and can show that they acted in good faith upon information sufficient to warrant a belief that no permit for the issuance or sale of the securities was required, then the plaintiffs cannot recover. However, the cause of action as stated in the complaint sounds in fraud, and having been brought within three years after either the plaintiff or his assignors had knowledge that no permit was issued, the demurrer should not have been sustained.

[2] Respondent contends that the complaint is defective "because it contains no allegation of a lack of a permit to issue promissory notes". This contention has no merit. The complaint alleges "that no permit for the issuance and/or sale to any party of any right in said trust, its assets, earnings or income was ever issued by or secured from the Commissioner of Corporations of the State of California and each and all of the rights and interests purportedly assigned and transferred to plaintiff's assignors, and all instruments issued to them purporting to create and evidence such rights and interests always were and are illegal and void". These allegations are sufficient to charge the defendants with a failure to secure a permit for the issuance and sale of the promissory notes.

[3] The respondent argues that under the law it was not required to secure a permit to issue and sell securities. The complaint charged that all of the defendants "offered issued and sold or aided and participated in the offer issuance and sale [of the notes] to the public". However, specific allegations show that the trust company did not issue the notes. They were executed by a committee acting in behalf of the beneficiaries under the declaration of trust. Any immunity which the trust company had did not extend to the issuers, and since the allegations of the complaint are broad enough to include a charge that the trust company participated in the general scheme and plan to issue and sell void securities, it is jointly liable for any damages which resulted. Mary Pickford Company v. Bayly Brothers, Inc., et al., supra.

The judgment is reversed and the superior court is directed to overrule the demurrer and allow Title Guarantee and Trust Company to answer within a reasonable time. The appeal from the order sustaining the demurrer is dismissed.

HOUSER, J., deeming himself disqualified, does not participate in the foregoing opinion.

BARTLETT v. SUBURBAN ESTATES, Inc., et al. and eight other cases.

L. A. 16385–16393.

Supreme Court of California.

Jan. 5, 1939.

Rehearing Denied Feb. 3, 1939.

1. Licenses ⇐39

The issuance or sale of security carries with it implied representation that a permit therefor has been secured if one is required by Corporate Securities Act. St. 1917, p. 673, as amended.

2. Fraud ⇐13(2)

Where seller of securities acted on information sufficient to justify reasonable man in concluding that no permit was required by Corporate Securities Act, he is not liable in fraud even though he was mistaken in his belief. St.1917, p. 673, as amended.

3. Limitation of actions ⇐49(7)

Plaintiffs could not recover amounts paid for certificates of beneficial interests in a trust which were sold without a permit in actions commenced more than six years after sale, if defendants acted on information sufficient to justify reasonable man in believing that permit was not required. St.1917, p. 673, as amended.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Actions by Mabel P. Bartlett, by J. L. Hickson and wife, by B. A. Finch, by Reese Llewellyn, by Lida Webber, by J. H. Watt, by George W. Pierson and another, by James Shalda and wife, and by O. G. Bates against Suburban Estates, Inc., and others. From judgments for plaintiffs, defendants and the respective plaintiffs appeal, and from each of several orders denying motions to vacate the judgment and enter ones favorable to them, certain defendants appeal.

Judgments reversed and appeals from orders denying motions to vacate dismissed.

Rehearing denied; LANGDON, J., dissenting.

Prior opinion, 68 P.2d 250.

A. W. Sorenson, B. A. Finch, G. C. DeGarmo, and W. M. Crane, all of Los Angeles, for plaintiffs, respondents and appellants.

Swanwick, Donnelly & Proudfit and Finlayson, Bennett & Morrow, all of Los Angeles, for defendant, appellant and respondent California Trust Co.

John W. Preston, Chapman & Chapman, and Ward Chapman, all of Los Angeles, for defendants, appellants and respondents Bayly Bros., Harold Bayly, Roy D. Bayly, Suburban Estates, Inc.

John S. Frazer and Joseph K. Horton, both of Los Angeles, for defendants, appellants and respondent Edwards & Wildey Co. and its receiver.

PER CURIAM.

The plaintiffs in the above-entitled cases purchased certificates of beneficial interest in the trust created by Bayly Brothers, Inc., and Edwards & Wildey Company and their rights are governed by the principles stated in the case of Mary Pickford Company v. Bayly Brothers, Inc., Cal.Sup., 86 P.2d 102, the opinion in which is filed concurrently herewith. These cases and the Mary Pickford Company Case were tried together and judgments were rendered in favor of the plaintiffs against the same defendants. The defendants appealed from each of the judgments and the defendants Harold Bayly and Roy D. Bayly and California Trust Company also appealed from each of several orders denying motions to vacate the judgment and enter ones favorable to them. The respective plaintiffs also appealed from each of the judgments, claiming that the court did not allow the full amount of interest to which they are entitled.

The complaints in the present cases are alike in their essential allegations. Each charges the defendants with implied fraud in that they sold to the plaintiffs a security within the meaning of the Corporate Securities Act (Stats.1917, p. 673, as amended) in violation of the provisions of that statute requiring a permit therefor. The defendants pleaded the bar of the statute of limitations but the trial court found that the actions sounded in fraud and having been commenced within three years after the plaintiffs discovered that no permit had been issued, they were not barred.

None of the plaintiffs relied upon or proved any representations concerning the

validity of the securities sold other than those which may be implied from the issuance of the certificates representing the interests in the trust. Moreover, the findings in these cases go much further than those in the Pickford Case. In each of them the court found "that none of the defendants in this action actually knew at the time of the creation of the trust and of the securities and of the issuance thereof, that any such permit was required. On the contrary, the agents and attorneys of the defendants to whom was delegated the duty of conducting the proceedings for the organization of the corporation, Suburban Estates, Inc., the creation of the trust for the securities and providing for the issuance and sale thereof, were honestly of the opinion that no permit other than the permit obtained for the issuance of the stock of Suburban Estates, Inc., was required" and "that Harold Bayly, Roy D. Bayly and California Trust Company, a corporation, did not nor did either of them, nor did the agents or attorneys of either of them, have any knowledge or information on that any permit required by law for the issuance of all or any of the instruments or securities in these findings referred to had not been issued".

[1, 2] However, the defendants cannot escape liability merely because they had no knowledge or information that a permit was required. As stated in the Pickford Case, the issuance or sale of a security carries with it an implied representation that a permit therefor has been secured if one is required by the Corporate Securities Act. But where the seller acted upon information sufficient to justify a reasonable man in concluding that no permit was required, then he is not liable in fraud even though he was mistaken in his belief.

[3] Therefore, in so far as the liability of the defendants in these actions is concerned, as each of them was commenced more than six years after the sale of the securities, the plaintiffs cannot recover if the defendants acted upon information sufficient to justify a reasonable man in believing that a permit was not required. The question is not concluded by their honest opinion or by the fact that they had no knowledge that a permit was required, unless this opinion or knowledge was based upon information sufficient to justify a reasonable man in acting as they did. This is, of course, a question of fact.

The judgments are and each of them is reversed; and the appeal from each order denying a motion to vacate is dismissed.

HOUSER, J., deeming himself disqualified, does not participate in the foregoing opinion.



30 Cal.App.2d 211

LUDOLPH v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10776.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1938.

Rehearing Denied Jan. 27, 1939.

Hearing Denied by Supreme Court Feb. 23, 1939.

1. Municipal corporations ⇐185(3), 189(2)

The authority conferred upon board of police commissioners of the City and County of San Francisco to punish by fine, reprimand, suspension or dismissal members of police department after notice and trial is of a judicial character exercised by a quasi judicial body. Const. art. 11, § 8½, subd. 3.

2. Municipal corporations ⇐185(13)

Certiorari will lie to review an order of the board of police commissioners of the City and County of San Francisco dismissing member of police department only if the board acted in excess of the jurisdiction granted. Code Civ.Proc. § 1068.

3. Constitutional law ⇐102(1), 277(2)

The right to an office or of employment with the government or any of its agencies is not a "vested property right," and removal therefrom will not support the question of "due process."

[Ed. Note.—For other definitions of "Due Process of Law" and "Vested Property Right," see Words & Phrases.]

4. Constitutional law ⇐318

Where police lieutenant's case before the board of police commissioners of the

City and County of San Francisco was continued and lieutenant after conviction in criminal court appeared without objection before the board of police commissioners which heard evidence to assist it in determining penalty to be imposed, police lieutenant could not attack jurisdiction of board of police commissioners on ground that second hearing was a new and separate trial for acts occurring after he was under suspension and no longer amenable to the rules of the department and deprived lieutenant of his office without due process of law.

5. Municipal corporations ⇐185(11)

A police officer is entitled to have the rules and regulations of the department under which he holds a position fairly invoked and applied, but when the guilt of an officer is fairly established before the board of police commissioners, punishment as fixed by the charter rests in the discretion of the board.

6. Municipal corporations ⇐185(11)

In the absence of oppression and a showing of bad faith, the measure of discretion of the board of police commissioners of the City and County of San Francisco in determining the punishment of police officers for violation of the rules and regulations of the police department is limited only by the terms of the charter and the board's sense of responsibility for the discipline and efficiency of the department it controls.

7. Municipal corporations ⇐185(8)

The rules and regulations of the police department are applicable to every officer alike and trials on charges of violation thereof should substantially follow the same procedure in each case.

8. Municipal corporations ⇐185(11)

The penalty to be imposed upon police officers for violation of rules and regulations of the police department involves the discretion of the board of police commissioners of the City and County of San Francisco, and not its jurisdiction.

9. Municipal corporations ⇐185(13)

Certiorari did not lie to review an order of the board of police commissioners of the City and County of San Francisco dismissing a police lieutenant from the department after notice and trial regularly and duly had where there was no evidence of oppression or bad faith and dismissal was within the power of the board. Code Civ.Proc. § 1068.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Certiorari by Henry H. Ludolph against the Board of Police Commissioners of the City and County of San Francisco and others to review an order dismissing petitioner from the police department. From an adverse judgment, the defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellants.

Walter H. Duane and J. W. Ehrlich, both of San Francisco (Leo R. Friedman, of San Francisco, of counsel), for respondent.

GEARY, Justice pro tem.

Appeal by defendant the Board of Police Commissioners of the City and County of San Francisco, and the named individual commissioners composing said board from a judgment of the superior court in and for the City and County of San Francisco annulling upon certiorari the order of the defendant board dismissing respondent from the police department.

In the spring of 1936 the grand jury was conducting an inquiry regarding alleged corruption in the police force of San Francisco. In the course of the inquiry it sought information concerning the property and income of certain members of the department. Some police officers when subpoenaed as witnesses before the grand jury assumed the position that that body was without authority to inquire into the income, bank accounts and property of police officers and refused to testify. On May 6, 1936, and for some time prior thereto respondent was a lieutenant in the San Francisco police department. On that date when summoned to appear before the grand jury he refused to testify for the reason stated. On May 12, 1936, the Board of Police Commissioners amended rule 46, section 19, of its rules and regulations, to read:

"Section 19. Members of the department when called upon to give evidence, or when making depositions or testifying before any court, officer, or competent tribunal, or before the grand jury, or the Board of Police Commissioners will conduct themselves with dignity, courtesy and respect, and state clearly and without reservation, all facts pertaining to the case, admissible in evidence or matters under investigation."

This amendment by resolution was immediately effective and was "published in

orders" of the police department with notice that violation of the rule would result in immediate suspension of and the filing of formal charges against the offender before the Board of Police Commissioners. That respondent had personal notice of the amendment and the threatened result of the violation thereof is not questioned. On May 15, 1936, respondent was again subpoenaed before the grand jury and again for the same reason refused to testify. Thereupon two charges against respondent were filed with the board by his immediate superior. One complaint charged him with "conduct unbecoming an officer and insubordination", in which it is alleged that the refusal of respondent to testify assisted in bringing discredit upon, destroyed the public confidence in, and subverted the good discipline and efficiency of the police department. The other charged respondent with "conduct unbecoming an officer and disobedience of orders" and is based upon the specific violation of section 19, rule 46, of rules and regulations, as amended. On July 3, 1936, after a full and complete hearing, respondent, Lieutenant Roche, Patrolman Gurtler and eleven other members of the department were found guilty of the respective charges against them. The last-mentioned eleven police officers were thereupon summarily dismissed from the department. As regards respondent, Lieutenant Roche and Patrolman Gurtler the transcript of the proceedings before the board discloses the following: "President Roche: In regard to these last three cases, Roche, Gurtler and Ludolph, from the evidence it is quite apparent that these three men, before the matter was finally determined by the Superior Court, manifested their desire to testify fully, freely and completely before the grand jury. The judgment of this commission is that these matters be postponed until the 3d day of August, 1936, for judgment, upon the understanding, however, that these three officers will consent that during this period, and while their suspensions remain in effect, that they waive their right to salary." Thereafter, Lieutenant Roche again refused to testify before the grand jury and was dismissed from the department. Patrolman Gurtler appeared and testified before the grand jury and was reinstated. Respondent appeared and testified and his case was thereafter regularly continued for judgment until August 31, 1937. Upon that date the board unanimously voted the judgment to be dismissal from the department.

Subsequent to July 3, 1936, when respondent was found guilty of the charges against him he reappeared and testified before the grand jury. Thereafter he was indicted upon two counts by that body. It appears he was subsequently acquitted upon one of the charges by a trial jury, and the other was dismissed in open court on motion of the district attorney in August, 1937. On August 31, 1937, when respondent's case came on regularly for judgment three new commissioners had been appointed and qualified in the place and stead of the members comprising the board when respondent was found guilty. Upon the case being called counsel for respondent requested leave to argue the facts. In the course of the argument portions of the transcript of evidence educed before the grand jury were read by both counsel for respondent and for the board. This included testimony of respondent and other witnesses, including "tapped" telephone conversations and related to conduct of respondent subsequent to July 3, 1936, when he was found guilty and suspended.

This testimony if believed would indicate that respondent was on terms of intimacy with an individual whose alleged corrupt influence upon the police department was then under investigation by the grand jury. It would also tend to establish that while under suspension respondent had actively sought for another, the assistance of this particular individual to secure wire service for bookmaking purposes. Testimony of one Lombardi taken before the board on July 12, 1937, was likewise read. Respondent was sworn and testified in his own behalf and sweepingly denied the testimony educed against him both before the grand jury and before the board. Upon the conclusion of the hearing the judgment of dismissal was voted by the board.

Respondent contends here, as in the court below, that the board acted in excess of its jurisdiction and in violation of his constitutional rights. He claims the hearing on August 31, 1937, was a new and separate trial of acts allegedly occurring when he was under suspension and no longer amenable to the rules and regulations of the department; that no formal charges embracing these acts were ever filed against him as provided by the charter and the board's action thereon amounted to depriving him of property without due process of law. It is further contended that when after conviction both he and Patrolman

Gurtler availed themselves of the opportunity to testify before the grand jury, the failure of the board to reinstate him as it did Gurtler deprived him of "the uniform operation and protection of the law".

The charter of the City and County of San Francisco, section 155 thereof, provides:

"Members of the fire or police department guilty of any offense or violation of the rules and regulations of their respective departments, shall be liable to be punished by reprimand, or by fine not exceeding one month's salary for any offense, or by suspension for not to exceed three months, or by dismissal, after trial and hearing by the commissioners of their respective departments.

"Members of either department shall not be subject to dismissal, nor to punishment, for any breach of duty or misconduct, except for cause, nor until after a fair and impartial trial before the commissioners of their respective departments, upon a verified complaint filed with such commission, setting forth specifically the acts complained of, and after such reasonable notice to them as to time and place of hearings as such commission may by rule prescribe. * * *"

[1, 2] The authority thus conferred upon the board is pursuant to the provisions of our state Constitution and is of a judicial character exercised by a quasi-judicial body. California Constitution, art. 11, sec. 8½, subd. 3; Imperial Water Co. v. Supervisors, 162 Cal. 14, 17, 18, 120 P. 780; Crane v. Board of Supervisors, 17 Cal. App.2d 360, 364-366, 62 P.2d 189. If, and only if, the board acted in excess of the jurisdiction granted certiorari will lie. Code Civ.Proc. sec. 1068; Fickert v. Zemansky, 176 Cal. 443, 445, 168 P. 891; Southern California Nurses Registries Ass'n v. Division of Labor Statistics and Law Enforcement, 10 Cal.App.2d 292, 293, 51 P.2d 886; Faias v. Superior Court, 133 Cal.App. 525, 529, 24 P.2d 567; Winning v. Board of Dental Examiners, 114 Cal. App. 658, 665, 300 P. 866.

[3] The right to an office or of employment with the government or any of its agencies is not a vested property right, and removal therefrom will not support the question of due process. Matter of Carter, 141 Cal. 316, 319, 74 P. 997; Boyd v. Pendegast, 57 Cal.App. 504, 506, 507, 207 P. 713; Garvin v. Chambers, 195 Cal. 212, 225, 232 P. 696.

Respondent had been formally charged, tried and convicted of the charges against him. He admits that all of the proceedings thus far "were regular and lawful and within the jurisdiction of that body". After conviction the case was regularly continued for judgment to the meeting of August 31, 1937, at which according to the transcript, the following occurred:

"The Secretary. Lieutenant Henry H. Ludolph.

"Mr. Ehrlich. Ready.

"The President. What form does this take, Mr. Pigott?

[4-6] "Mr. Pigott (Attorney for Board of Police Commissioners): The officer has been tried and convicted. Testimony may be taken after conviction for the purpose of determining the extent of punishment.

"Mr. Ehrlich: Have you anything that you want to offer on behalf of the defendant before sentence is passed?"

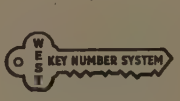
It is clear that the purpose of the hearing and of the evidence received thereat was solely to assist the board in the exercise of its discretion in determining the penalty to be imposed upon respondent. Language in the record cited by respondent in support of the contention he was being tried anew falls far short of establishing that fact; at most the words used appear to have been a mere inadvertence. The section of the charter quoted provides the extent of punishment might be from a reprimand to dismissal. Its determination rested in the discretion of the board. If the scope of the inquiry that followed was broader than usual, it must be remembered that judgment was to be imposed by a board wholly different in personnel from the one that tried him. Further, the record is completely silent of any objection by respondent to the procedure taken by the board. The record offers no basis for respondent to have indulged the belief that reappearing and testifying before the grand jury would automatically reinstate him in the department. Indeed, the board could not have even tacitly so agreed without closing its eyes to the possibility that the testimony might prove adverse to him or embarrassing to the department. That the evidence concerning respondent before the grand jury was not of a satisfactory nature is indicated by its action in the matter.

While his acquittal of the charges of that body absolves him of criminal liability, it could neither serve to diminish nor extend the duty of the board in the premises. That is fixed by its primary obligations to the public upon the one hand, and to the individual concerned upon the other. A police force, small in numbers compared to the population it serves, is able to maintain law and order in direct proportion to the prestige it enjoys in a community. Its efficiency is immediately dependent upon the confidence it inspires and the respect which it is able to command. If the acts of an officer tend to impair the respect and confidence of the public in its police force, such conduct even though it be not of a criminal nature, may wholly destroy his usefulness in the department. We are not to be understood as approving or disapproving the sentence in the instant case. That is a matter which cannot concern the court. An officer is entitled to have the rules and regulations of the department under which he holds a position fairly invoked and applied. Garvin v. Chambers, supra. However, when the guilt of an officer is fairly established before the board in the mode provided by law, the punishment as fixed by the charter rests in the discretion of the board. Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 402, 163 P. 69; Cleu v. Board of Police Commissioners, 3 Cal.App. 174, 177, 84 P. 672. In the absence of oppression and a showing of bad faith, the measure of this discretion is limited only by the terms of the charter and the board's sense of responsibility for the discipline and efficiency of the department it controls.

[7-9] The rules and regulations of the department are applicable to every officer alike and trials on charges of violation thereof should substantially follow the same procedure in each case. It is not contended and the record does not disclose respondent was charged and tried in a different manner than other officers. The charter provisions were applied in his case in the same manner as in the case of other violators; in the same manner as in Gurtler's case, except as to penalty. It is manifest the board had authority to impose the penalty in question. The penalty in each case involves the discretion of the board; not its jurisdiction. People ex rel. Smith v. Judge, etc., 17 Cal. 547, 554, 555; City of Sacramento v. Swanston, 29 Cal.App. 212, 217, 155 P. 101. Under such circumstances certiorari will not lie. Fickert v. Zemansky, supra; Donovan v. Board of Police Commissioners, supra; McKenzie v. Board of Education, 1 Cal.App. 406, 407, 82 P. 392.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.



30 Cal.App.2d 126

PEOPLE v. VALENCIA.

Cr. 3160.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1938.

1. Criminal law ⇐1144(13)

On appeal from conviction and order denying motion for new trial, the reviewing court views the evidence most favorable to the prosecution.

2. Criminal law ⇐1170½(1)

Error in sustaining objection to a question is not prejudicial if the question was answered before the objection was sustained and motion to strike the answer was not made.

3. Criminal law ⇐1170(2)

In murder prosecution, error in excluding evidence of deceased's threats against defendant's life was not prejudicial where court had admitted other testimony concerning such threats and the excluded evidence was merely cumulative.

4. Criminal law ⇐1037(2), 1129(1)

Alleged error in argument of district attorney in criticizing defense argument was not reviewable where defendant did not assign such misconduct as error nor request instruction that jury disregard such misconduct.

5. Criminal law ⇐1037(2), 1129(1)

Unless the harmful result of alleged misconduct of a district attorney cannot be obviated by appropriate instructions, defendant may not predicate error thereon without assigning such misconduct as error and requesting court to instruct the jury to disregard it.

6. Criminal law ⇐942(2)

Newly discovered evidence consisting only of a witness' affidavit impeaching her own testimony was not ground for new trial.

7. Criminal law ⇐1023(10)

A sentence is not appealable, and purported appeal therefrom must be dismissed.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Clemente L. Valencia was convicted of second degree murder, and he appeals.

Judgment of conviction and order denying new trial affirmed, and appeal from sentence dismissed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury of murder in the second degree. This appeal is from the judgment and order denying his motion for a new trial. There is also a purported appeal from the sentence.

[1] Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 658, 266 P. 558), the facts in the instant case are:

May 6, 1938, defendant went to the home of Mr. and Mrs. Fortalesa. He knocked at the front door, which was open, whereupon Mrs. Fortalesa told her husband that defendant was at the door. Thereafter defendant shot Mr. Fortalesa, who died as a result of the wounds.

Defendant relies for reversal of the judgment on the following propositions:

First: The trial court committed prejudicial error in sustaining objections to the following questions:

(a) "Q. Do you recall if any time in February or March or April that you and Mary were together and Mary told you that her husband was going to get Clemente?

"A. Yes.

"Mr. Ferguson: That is objected to. Incompetent, irrelevant, and immaterial, not tending to illustrate any issues involved in this case.

"The Court: The objection is sustained."

(b) "Q. Will you just tell us what he said and what you said?

"Mr. Ferguson: Object to that as immaterial and hearsay.

"Mrs. Root: Now, if your Honor pleases, it is not hearsay in that it was a definite threat as made against the life of Clemente Valencia.

"The Court: The defendant was not there, was he?

"Mrs. Root: The defendant was not there.

"The Court: Objection sustained."

Second: The district attorney committed prejudicial error in stating, during the course of his argument, to the jury the following:

" * * She said also that the deceased, and this was vicious, a vicious statement for her to make, one that I wish she had not made, that the evidence in this case would justify the belief that the deceased knew that his wife was getting money from the defendant and was happy to have a meal ticket. Mrs. Root dipped very, very far down into filth when she made that statement to you, because there is not a bit of evidence in the case to establish that or sustain that statement."*

Third: The trial court committed prejudicial error in denying defendant's motion for a new trial on the ground of newly discovered evidence.

[2] It was not *prejudicial* error for the trial court to sustain an objection to the question set forth in paragraph (a) of appellant's first proposition. The law is established that error in sustaining an objection to a question is not *prejudicial* if the question was answered before the objection thereto was sustained and a motion to strike the answer was not made. People v. Arnold, 80 Cal.App. 623, 626, 252 P. 635. In the present case the question asked the witness was answered before an objection was made thereto, and a motion to strike the answer was not made. It therefore is clear that the question and answer were left for the consideration of the jury.

[3] Neither was it *prejudicial* error for the trial court to sustain the objection to the question set forth in paragraph (b) of appellant's first proposition. The law is established that the erroneous exclusion of evidence is not *prejudicial* error where the

excluded evidence is cumulative to other evidence which is introduced at the trial. 5 Cor.Jur.Sec., 1937, page 1057, sec. 1749. See, also, cases cited in 8 Cal.Jur. (1922) 619, sec. 600, note 6; and 4 Cal.Jur. Ten Year Supp. (1936) 876, sec. 600. In the instant case the trial court permitted other testimony that deceased had made threats against the defendant's life. Therefore, the excluded evidence was merely cumulative to evidence which was received during the course of the trial, and hence the error was not prejudicial to defendant.

[4, 5] The second proposition presented by appellant may not be urged in this court for the reason that he did not lay the proper foundation in the trial court for review here of the alleged misconduct of the district attorney. The law is settled that, unless the harmful result of the alleged misconduct of a district attorney cannot be obviated by appropriate instructions of the trial court, a defendant may not predicate error thereon in this court in the absence of (1) an assignment of such alleged misconduct as error, and (2) a request to the trial court to instruct the jury to disregard it. People v. DuBois, 16 Cal.App.2d 81, 87, 60 P.2d 190. Defendant neither assigned the alleged misconduct as error nor did he request the trial judge to instruct the jury to disregard such misconduct, although the harm, if any, might well have been obviated by an appropriate instruction.

[6] Appellant's final contention is likewise without merit. The law is settled that evidence which merely tends to impeach the testimony of a witness is not such newly discovered evidence as will form the basis for granting a motion for a new trial. People v. Haines, 64 Cal.App. 628, 631, 222 P. 183; People v. Jenkins, 118 Cal.App. 115, 119, 4 P.2d 799. See cases cited in 8 Cal.Jur. (1922) 431, sec. 454, note 14, and 4 Cal.Jur. Ten Year Supp. (1936) 754. In the instant case the newly discovered evidence consisted solely of an affidavit of Mrs. Fortalesa impeaching her testimony at the time of the trial. Hence, the trial court ruled correctly in denying the motion for a new trial.

[7] An appeal does not lie from the sentence. People v. McNeil, 27 Cal.App.2d 353, 357, 81 P.2d 243. Therefore, the purported appeal from the sentence is dismissed.

The judgment and order are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

30 Cal.App.2d 290

Ex parte MEISNER.

Cr. 375.

District Court of Appeal, Fourth District, California.

Jan. 7, 1939.

1. Criminal law ⇐83

Question of jurisdiction is fundamental, and is primary question for determination by a court in any case.

2. Criminal law ⇐83

"Jurisdiction" is the power to hear and determine.

[Ed. Note.—For other definitions of "Jurisdiction," see Words & Phrases.]

3. Habeas corpus ⇐29

If complaint completely fails to include some element essential to description of criminal act and commitment has issued out of a court of inferior grade, the lack of jurisdiction is established.

4. Criminal law ⇐88

The criminal jurisdiction of a city court is limited to the trial of such offenses as are committed within the boundaries of the city wherein the court sits. Gen.Laws 1931, Act 5233, § 882.

5. Criminal law ⇐104

A city court is an "inferior court" to judgments of which no presumption of jurisdiction attaches.

[Ed. Note.—For other definitions of "Inferior Courts," see Words & Phrases.]

6. Criminal law ⇐103

Where court is one of inferior and limited jurisdiction, evidence of its proceedings must affirmatively show jurisdiction of the person of defendant and over the subject matter.

7. Criminal law ⇐252(1)

The statutory provisions regarding complaint filed in city court are not to be considered in the light of rules governing indictments and informations. Pen.Code, § 1426.

8. Criminal law ⇐252(3)

Complaint charging theft of property was sufficient to sustain city court's judgment of conviction after plea of guilty, notwithstanding failure of complaint to state in charging part thereof that offense was committed within corporate limits of city. Pen.Code, § 1426.

9. Criminal law ⇐252(3)

Complaint charging that defendant did willfully and unlawfully steal and take property not belonging to him was sufficient to sustain city court's judgment of conviction after plea of guilty, notwithstanding absence of allegation that property stolen was the property of another. Pen.Code, § 1426.

Habeas corpus proceeding by Conrad Meisner.

Writ discharged, and petitioner remanded.

Robert M. Barnard and Kenneth G. Avery, both of Fresno, for petitioner.

Dan F. Conway, Dist. Atty. of Fresno County and John W. Guerard, Deputy Dist. Atty., both of Fresno, for respondent.

GRIFFIN, Justice.

Petitioner seeks his release from the custody of the sheriff of Fresno county by a writ of habeas corpus, contending that on the 5th day of November, 1938, he was erroneously committed by the judge of the city court of the city of Coalinga, in Fresno county.

Petitioner sets forth two grounds by which he seeks his release: (1) failure of the complaint to state in the charging part thereof that the offense was committed within the corporate limits of the city of Coalinga and (2) that the complaint fails to state a public offense in that it does not specifically allege that the property stolen was the property of another.

The complaint was entitled "In the City Court of the City of Coalinga, County of Fresno, State of California". The charging portion of the complaint, about which petitioner complains, is as follows: "That said defendants on or about the 4th day of November, 1938, at and in the County of Fresno, State of California, did wilfully and unlawfully steal and take property not belonging to them, to wit, scrap iron which was located on railroad property adjacent to W. L. Plaugher's property on West Elm Street. All of which is contrary to the form, force and effect of Ordinance No. Section 488 of the City of Coalinga. * * *" To this complaint petitioner entered a plea of guilty and was thereafter sentenced to pay a fine of $120 or serve 60 days in the county jail. The judgment of conviction has become final without objection.

[1, 2] In approaching the first objection raised, we find a more or less perplexing problem presented. It has been often reiterated that the question of jurisdiction is fundamental. It is the primary question for determination by a court in any case, for jurisdiction is the power to hear and determine. In re Wyatt, 114 Cal.App. 557, 300 P. 132; 7 Cal.Jur., p. 584.

[3-6] In support of his contention petitioner cites the general rule that if the complaint, in its charge against the defendant, completely fails to include some element essential to the description of a criminal act and commitment has issued out of a court of inferior grade the lack of jurisdiction is established. In re Stewart, 2 Cal.App.2d 252, 37 P.2d 699; Ex parte Greenall, 153 Cal. 767, 96 P. 804; In re Hernandez, 64 Cal.App. 71, 220 P. 423. It appears to be well settled that the criminal jurisdiction of a city court is limited to the trial of such offenses as are committed within the boundaries of the city wherein the court sits. In re Wyatt, supra; In re Jacinto, 8 Cal.App.2d 275, 47 P.2d 300; Deering's Gen.Laws, Act 5233, § 882; Antilla v. Justice's Court, 209 Cal. 621, 290 P. 43. A city court is an inferior court and no presumption of jurisdiction attaches to the judgments of such a tribunal. Forbes v. Hyde, 31 Cal. 342, 347; In re Wyatt, supra; Carlon v. Gray, 10 Cal.App.2d 658, 666, 52 P.2d 966. Where the court is one of inferior and limited jurisdiction, evidence of its proceedings must affirmatively show jurisdiction of the person of the defendant and over the subject-matter. Ex parte Kearny, 55 Cal. 212; Ex parte Greenall, supra; In re Garbarini, 129 Cal.App. 618, 19 P.2d 27. The pleadings in city courts are governed by section 1426 of the Penal Code, which provides as follows: "All proceedings and actions before a justice's or police court, or a municipal court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint. In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or

any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft, it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

[7, 8] These provisions are not to be considered in the light of the rules governing indictments and informations. Ex parte Winston, 160 Cal. 18, 116 P. 390; In re Hartman, 9 Cal.2d 583, 71 P.2d 921. In the case of In re Wyatt, supra, this court held that an appellate court is not foreclosed from going beyond the record of a justice's court when it was conceded in the habeas corpus proceedings that the evidence dehors the record would show that the offense charged was one over which the justice's court had no territorial jurisdiction. Under this holding, assuming that the property was not stolen in the city limits of Coalinga and if it was so conceded, this court would have the authority to grant the writ on the ground of lack of territorial jurisdiction. But petitioner in this case does not so contend, nor does he make any showing to this effect.

In the late case of In re Hartman, supra, petitioner was tried in the justice's court of San Bernardino township, county of San Bernardino, on two counts. One count charged a violation of section 15 of the State Chiropractic Act (St.1923, p. lxxxviii), a misdemeanor committed on January 18, 1936, in "San Bernardino Township, County of San Bernardino, State of California". In count two he was charged with the violation of section 17 of the State Medical Act (St.1913, p. 734, as amended by St.1933, p. 1276) a misdemeanor committed on January 8, 1936, "within the State of California". Petitioner contended that his conviction and commitment under count two was insufficient because it was not alleged therein where the alleged offense was committed except "within the State of California". In other words, it was contended that the absence of an allegation that the crime was committed in San Bernardino township or in the county of San Bernardino rendered the count insufficient to warrant a conviction and imprisonment. In disposing of this question the Supreme Court said:

"Good pleading would require that the complaint allege the township in which the alleged offense was committed, but the Code sections governing pleadings in justice's courts do not specifically provide that such fact be alleged, and it was held in Re Kaster, 52 Cal.App. 454, 198 P. 1029, that the failure of the complaint to designate the township in which the crime was committed was not fatal to the execution of a judgment of conviction on such a defective pleading. It was there held that nothing could be found in the statute making it mandatory to insert in the complaint the name of the township wherein it is claimed the offense was committed; that while the writ of habeas corpus would lie when the complaint wholly failed to state a public offense, the writ could not be made to subserve the office of a demurrer; and that it was too late to raise the point after the judgment of conviction had become final in a case where it appeared that on the trial the court had jurisdiction of the subject-matter of the action and of the person of the defendant. The holding of the District Court of Appeal was approved by this court in Re Kaster, 185 Cal. 647, 198 P. 1031.

"In the present proceeding it is not contended that the offense with which the petitioner was charged and convicted was not committed in the township of San Bernardino. If such was not the fact it was incumbent on the petitioner so to allege. The complaint was entitled: 'In the Justice's court of San Bernardino Township, County of San Bernardino, State of California.' The first count alleged the matters which the petitioner claims the second count should have contained. The fact that in pleading the second count the names of the township and county were omitted could not have operated to the prejudice of the petitioner. When a defendant, under the circumstances here shown, suffers a doubtful record to become final against him without objection, he may not thereafter freely criticize it in an indirect attack upon it. Campbell v. Aderhold [5 Cir.], 67 F.2d 246. This court would not be justified in releasing a petitioner on habeas corpus who even now is not denying that he was convicted in the township wherein the offense was committed, but complains only that the complaint charging him with the offense did not allege that it was committed in that township."

[9] Considering the second point raised, petitioner claims that the property may have been abandoned property and therefore the allegation in the complaint that

he did wilfully and unlawfully steal and take property not belonging to him was not a sufficient allegation of the fact that the property taken was the personal property of another. Petitioner's plea of guilty to the charge that he did wilfully and unlawfully steal and take the property would in itself negative the claim that the property may have been abandoned. "All property has an owner, whether that owner is the state, and the property public, or the owner an individual, and the property private." Civ.Code, § 669. Then it must follow "as the night the day", that if the property did not belong to the petitioner it did belong to another. There has been no showing made in this court by petitioner that the property was abandoned property. In re Hartman, supra.

Measuring the allegations of the complaint herein in the light of the decision of In re Hartman, supra, and the terms of section 1426 of the Penal Code, we are impelled to arrive at the ultimate conclusion that there has been a sufficient compliance with the above-mentioned section to sustain the judgment after a plea of guilty.

No other points being raised, the writ is discharged and the petitioner is remanded.

I concur: MARKS, J.

BARNARD, P. J., being disqualified, does not participate herein.



30 Cal.App.2d 266

UNION OIL CO. OF CALIFORNIA et al. v. DOMENGEAUX et al.

TEXAS OIL CO. et al. v. DOMENGEAUX et al.

Civ. 10938.

District Court of Appeal, First District, Division 2, California.

Jan. 5, 1939.

1. Mines and minerals ⇐52

In suit to enjoin maintenance of oil and gas well, evidence that, beneath the surface, the well trespassed on adjoining property and produced oil from adjoining property, *held* to authorize granting of injunction.

2. Mines and minerals ⇐52

In suit to enjoin subsurface trespass on land resulting from the slanting of an oil well on adjoining land, whether slanting was intentional was immaterial.

3. Mines and minerals ⇐51(1)

Owners of an oil well were chargeable with trespass for drilling into lands of others after passing depth of 432 feet, notwithstanding that ordinary and usual methods of drilling were allegedly used.

4. Mines and minerals ⇐52

Maintenance of oil and gas well which trespassed on adjoining lands beneath the surface was within statute authorizing injunction where adequate amount of compensation would be difficult to ascertain, and was enjoinable without showing specific amount of actual damage. Civ.Code, § 3422, subd. 2.

5. Injunction ⇐46

In suits to enjoin trespass on land, each case must stand upon its own facts in determining whether equitable relief should be granted.

6. Mines and minerals ⇐52

Subsurface trespass on lands by drilling and producing a slanting oil well is enjoinable, particularly where the trespass is of continuing nature and might ripen into a prescriptive right. Civ.Code, § 3422, subd. 2.

7. Mines and minerals ⇐52

The statute governing measure of damages for the illegal extraction of oil or gas, and requiring credit for costs of development and operation, is not applicable to suit to enjoin trespass on adjoining lands by slanting well. Code Civ.Proc. § 349¾.

8. Time ⇐9(2)

The rule requiring exclusion of first day and inclusion of last day in computation of time was applicable to special statute of limitations on actions arising out of trespass by oil or gas wells, as respects existing causes of action. Code Civ.Proc. §§ 12, 349¾.

9. Time ⇐9(1)

Before an exception to general rule for computation of time requiring exclusion of the first day and inclusion of the last day may be invoked, intention to provide for different method of computation must be clearly expressed. Code Civ.Proc. § 12.

10. Bankruptcy ⇐391(3)

Where bankruptcy court refused to enjoin continuance against trustee of suit in state court to enjoin bankrupt from maintenance of a trespassing oil and gas well, making trustee a party defendant was not error, irrespective of contention that bankruptcy court abused its discretion and of applicability of statute authorizing suit against receiver or manager of property connected with his carrying on business. Jud.Code § 66, 28 U.S.C.A. § 125.

11. Mines and minerals ⇐52

The amendment to statute governing joinder of plaintiffs liberalized former rules and permits joinder of holders of separate oil and gas leases on various tracts in suit to enjoin maintenance of oil and gas well which trespassed beneath the surface. Code Civ.Proc. § 378, as amended by St.1927, p. 631.

12. Appeal and error ⇐1036(2), 1039(3)

Joinder of plaintiffs and of causes of action, in two separate actions against the same defendants, which could have been consolidated for trial if brought by each plaintiff singly, and were consolidated without objection by defendants, was not prejudicial.

13. Mines and minerals ⇐52

In suit to enjoin maintenance of oil and gas well because of subsurface trespass on adjoining lands, tenants in common of a 17 per cent. interest in the lands on which defendants commenced drilling were proper but not necessary parties.

14. Costs ⇐93

In suit to enjoin maintenance and operation of oil and gas well because of subsurface trespass on adjoining land, taxing costs against all defendants, including a bankruptcy trustee who did not become a party until after some costs had accrued, and defendants who did not participate in drilling, was not error where all defendants resisted plaintiffs' claims for any relief. Code Civ.Proc. § 1032(c).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Union Oil Company of California and others against Henry C. Domengeaux and others, and action by the Texas Oil Company and another against Henry C. Domengeaux and others, to enjoin maintenance of an oil and gas well, consolidated for trial. From a judgment for plaintiffs, and an order denying defendants' motion to retax costs, defendants appeal.

Affirmed.

Willett & Willett and Horace W. Danforth, all of Los Angeles, for appellants.

Andrews, Blanche & Kline, Mortimer A. Kline, Paul M. Gregg, and Douglas C. Gregg, all of Los Angeles, for respondents.

SPENCE, Justice.

The above-entitled actions were consolidated for trial and were tried by the court sitting without a jury. Findings were expressly waived and the trial court entered its judgment enjoining defendants from maintaining or operating a certain oil and gas well below a depth of 432 feet and ordering defendants to plug up and abandon all of said well below said depth in the manner provided by law. Plaintiffs were awarded costs against defendants in the sum of $102.55. Defendants appeal from the judgment and from the order denying defendants' motion to retax costs.

The defendants' contentions are expressed in various ways but it is apparent that the main contention is that the evidence was insufficient to sustain the judgment. We find no conflict in the evidence on any material point and a brief summary of the situation presented by the record should suffice.

The controversy arose because of defendants' slant-drilling of a well in the Signal Hill oil field. The defendants, other than the trustee in bankruptcy, were tenants in common of a parcel of land 65 feet by 135 feet in size. Plaintiffs Union Oil Company, A. S. Johnston Drilling Corporation, Texas Oil Company and Bolsa Chica Oil Corporation, respectively held separate oil and gas leases on various parcels of land in the vicinity. Plaintiffs Dabney-Johnston Oil Corporation and D. D. Dunlap Oil Company dismissed before trial and are not involved here. The other plaintiffs above mentioned were in possession of their respective leaseholds and were operating the same for the purpose of producing oil and gas therefrom under leases which conferred upon them the exclusive right to do so.

Defendants Henry C. Domengeaux and Owen Jackson formed a partnership and

commenced drilling the well in question on defendants' parcel. The surface location of said well was just south of the south boundary line of the leasehold of plaintiff A. S. Johnston Drilling Corporation. Shortly before the drilling operations commenced, plaintiffs Texas Company and Union Oil Company had each served a written notice warning defendants that they must not cause or permit said well to cross or be within the boundary lines of the respective leaseholds of said plaintiffs.

The drilling of the well was started on December 9, 1934, and was completed by January 29, 1935. It was brought into production and continued on production until closed down by temporary injunction in August, 1935. The evidence shows and defendants concede that at all times, defendants "had full knowledge of the course their well was taking". Said course was shown by defendants' own records as well as by the subsurface survey made by order of court after the filing of the complaint in the Union Oil Company case.

The well was drilled to a total depth of 4,110 feet. It was surveyed as the drilling progressed to a point 30 feet from the bottom. The surveys showed that the well deviated at a wide angle to the north and west and that the surveyed bottom thereof was slightly in excess of a quarter of a mile from a perpendicular line drawn through its surface location. Only 432 feet of the well was below the surface holdings of defendants. From there the well was drilled under the surface holdings of all the plaintiffs and the surveyed bottom thereof was located under the surface holdings of the General Petroleum Company at a point within 90/100ths of a foot of being under the surface holdings of plaintiff Union Oil Company. The bottom of the perforations were down to that point. The testimony showed that under such conditions the well drew oil from all the property surrounding the perforations including the property of the plaintiff Union Oil Company. The expert stated, however, that there could only be "a very remote guess" as to what proportion of the oil came from the Union Oil Company property.

The Union Oil Company action was filed on August 7, 1935. Henry C. Domengeaux and Owen Jackson were defendants in that action and after they were adjudicated bankrupt in November, 1935, the trustee in bankruptcy was brought in as a party to the action. The Texas Oil Company action was not filed until March 13, 1936, and the trustee in bankruptcy was likewise made a party to that action. Upon the trial, plaintiffs abandoned any claim for an accounting or for damages and sought only the injunctive relief which was granted.

[1–3] We find no merit in defendants' contention that the evidence was insufficient to sustain the judgment. Defendants have submitted voluminous briefs, but a reading of the arguments of plaintiffs on their main contention leads us to the conclusion that said arguments find no support in authority or reason. They concede that the course of their well was as described above and further concede that at all times they had knowledge of the course the well was taking. They nevertheless argue that they drilled their well by "ordinary and usual methods", using no "deviational tools" and that therefore their acts were not unlawful but were wholly within their rights. They go so far as to claim that the well was not a "crooked well" and that there was no evidence of "slant-drilling". Their position was expressed by counsel for defendants in the trial court as follows: "I don't agree with counsel at all that this is the crookedest well in Signal Hill, or a crooked well. The well is straight. Its direction happens to be sideways, or partially so, instead of straight down." We are unable to grasp the significance of the distinction for the purposes of this case and we cannot follow the above-mentioned arguments of counsel. Perhaps the key to the situation is found in the reply brief, where counsel argues that "there should be recognized some modification of the strict commonlaw doctrines of trespass". We find nothing, however, in the facts and circumstances before us which would justify any modification of the settled rules. Defendants continued to drill their well, knowing the course it was taking, and their acts must be treated as intentional and wilful. But, as pointed out in our recent decision in Union Oil Co. v. Mutual Oil Co., 19 Cal. App.2d 409, at page 413, 65 P.2d 896, at page 898, "The question of whether the well was intentionally or unintentionally drilled so as to slant into plaintiffs' premises, is immaterial here. In either case a trespass was committed in the drilling of the well * * *." We therefore conclude that defendants were chargeable

with trespassing in so drilling into and through the lands of others after passing a depth of 432 feet.

[4–6] Defendants raise another point with respect to the sufficiency of the evidence, which point requires further consideration. They contend that, even assuming that they were chargeable with trespassing, the damages were "too trifling and inconsequential" to justify the granting of injunctive relief. It appears to be defendants' theory that an injunction will issue only upon a showing of irreparable injury. In this connection, defendants entirely ignore the testimony showing that their well, after trespassing upon the property of the several plaintiffs, was bottomed at a point where it was producing oil from the property of plaintiff Union Oil Company. But even in the absence of such showing, we are still of the opinion that there is no merit in said contention. The trespass here was a subsurface trespass in an oil and gas producing area. It was conceded by plaintiffs on the trial that they could make no such showing as to actual damage as would justify an award of damages in any specific amount. The difficulty in making such a showing is recognized and discussed in the recent decision in Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, at page 254, 73 P.2d 1163. Such concession, however, does not justify the conclusion that plaintiffs had suffered no injury. It has heretofore been held in a case involving a subsurface trespass by way of tunneling that "the injury is irreparable in itself". Richards v. Dower, 64 Cal. 62, 28 P. 113, 114. Furthermore, we believe that the evidence before us brings the cause within subdivision 2 of section 3422 of the Civil Code providing for the issuance of an injunction "where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief". It appears from the authorities cited by the parties that each case must stand upon its own facts in determining whether equitable relief should be granted and defendants have not called to our attention any authority in this jurisdiction holding that such relief should be denied under the circumstances before us. In some cases, notably those involving inconsequential surface encroachments, injunctive relief has been denied ordinarily upon the application of the maxim de minimis but in such cases it is obvious that there was no appreciable damage or at least that the extent of such damage was easily ascertainable. But here we are dealing with a subsurface trespass in an area where it is extremely difficult to ascertain the extent to which plaintiffs have been and will in the future be damaged by defendants' drilling and maintaining an oil producing well through their oil producing properties. Under such circumstances, we believe that the circumstances warrant the interposition of a court of equity and particularly where the trespass is of a continuing nature and might ripen into a prescriptive right. Vestal v. Young, 147 Cal. 715, 82 P. 381; Harmon v. De Turk, 176 Cal. 758, 169 P. 680; Burris v. Rodrigues, 22 Cal.App. 645, 135 P. 1105; Felsenthal v. Warring, 40 Cal.App. 119, 180 P. 67. Before leaving the point under discussion, we should state that we do not wish to be understood as holding that every subsurface trespass in the drilling of an oil well would warrant injunctive relief. We can conceive of an oil well deviating slightly from the perpendicular, trespassing to a small extent upon the land of an adjoining owner and returning to oil-producing strata within the property of the owner of the well. In such case, the damage, if any, to the adjoining owner might be said to be wholly inconsequential and equitable relief might properly be withheld, particularly where the owner of the well is solvent. But under the circumstances before us, and giving consideration to the fact that the persons who had actually drilled the well were insolvent, there is no doubt that the trial court properly granted the injunction. (See 14 Cal.Jur. 235.)

[7] Defendants further contend that "even assuming that any injunction could issue in the cases here involved, still the trial court's action was erroneous, in that it did not provide for the recovery of well costs and other statutory items". This contention is wholly without merit. In support thereof, defendants cite the paragraph of section 349¾ of the Code of Civil Procedure which is entitled "Measure of damages". Assuming the constitutionality of said section 349¾, it is apparent that the cited portion of said section is not applicable here. It deals solely with the measure of damages to be awarded to a plaintiff who seeks the recovery of damages. Plaintiffs here relinquished all claim to a recovery of damages and they were entitled to an injunction without any provision for the payment of the cost of the drilling of the trespassing well, which well

was a detriment rather than a benefit to plaintiffs.

[8, 9] Defendants next contend that the action of the Texas Company and Bolsa Chica Oil Corporation, filed March 13, 1936, is barred by section 349¾ of the Code of Civil Procedure. We will again assume the constitutionality of said section, but we nevertheless believe that said contention cannot be sustained. Said section requires certain actions to be brought "within one hundred eighty days" and provides that "The time for commencement of existing causes of action which would be barred by this section within the first one hundred eighty days after this section becomes effective, shall be the said first one hundred eighty days." The section became effective on September 15, 1935, and defendants claim that the action was filed one day too late. It is conceded that the general rule for the computation of time provides for the exclusion of the first day and the inclusion of the last. Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365; Ley v. Dominguez, 212 Cal. 587, 299 P. 713; Scoville v. Anderson, 131 Cal. 590, 63 P. 1013; sec. 12, Code Civ.Proc. If said general rule applies, the action was filed in time. But it is argued that the general rule does not apply here because of the wording of the statute. In other words, it is claimed that the language of the statute indicates that an exception to the general rule was intended. We do not so read it. As was said in Ley v. Dominguez, supra, at page 594, 299 P. at page 716, "The gravest considerations of public order and security require that the method of computing time be definite and certain. Before a given case will be deemed to come under an exception to the general rule, the intention must be clearly expressed that a different method of computation was provided for." There is no clear expression in the section of an intention to provide for a different method of computation of time and in our opinion the action was brought within the time provided.

[10] It is further contended that "the defendant trustee in bankruptcy was not a proper party to this action for the purposes assigned, and could not be made such, even upon purported consent of the federal court". This contention appears to be likewise without merit. In discussing this contention it is unnecessary to consider whether section 66 of the Judicial Code, 28 U.S.C.A. § 125, is applicable. Assuming that the bankruptcy court, in the exercise of its discretion, might have issued an injunction (Ex parte Baldwin, 291 U.S. 610, 54 S.Ct. 551, 78 L.Ed. 1020), it appears that it refused to do so. Defendants assert "that the bankruptcy court in the instant case abused its discretion, and exceeded its powers and authority when it failed to protect its trustee against the jurisdiction of the state court, and permitted him, improperly to be made a party defendant in these consolidated cases * * *". There is nothing to show that said court abused its discretion or exceeded its authority but in any event, we do not believe the point is properly presented to this court.

[11–13] The further contention is made that "there is in this case both misjoinder of plaintiffs and of causes of action, and defective joinder of parties". A complete answer to the first portion of this contention is found in the 1927 amendment of section 378 of the Code of Civil Procedure (St.1927, p. 631). The previous rules set forth in the authorities cited by defendants were thereby liberalized so as to permit the joinder of plaintiffs and the joinder of causes of action under such circumstances as are presented here. But even if it be assumed that there was a misjoinder of plaintiffs and misjoinder of causes of action, we find no prejudice to defendants warranting a reversal. If each plaintiff had brought a separate action, said actions could properly have been consolidated for trial. The two actions here were consolidated for trial and defendants do not complain of the order for consolidation. If any prejudice could have resulted to defendants from such consolidation, they should have objected thereto in the trial court and urged their objection on appeal in the event of an adverse ruling by the trial court. No such objection was made in the trial court or on appeal and we cannot escape the conclusion that any alleged misjoinder of plaintiffs or of causes of action was without prejudice to defendants. The second portion of the last-mentioned contention relates to the failure to join plaintiffs' lessors and also to the failure to join certain persons who were owners as tenants in common of a seventeen per cent interest in the parcel of land upon which defendants commenced the drilling of the well. Said parties would have been proper parties but they were not necessary parties to the actions, but in any event, there is no showing that the

failure to join said parties resulted in any prejudice to defendants.

[14] The final contention of defendants is that the trial court erred in denying the motion to retax costs. In this connection, defendants call attention to the fact that the trustee in bankruptcy did not become a party until after the accrual of certain costs in the Union Oil Company action and to the further fact that certain defendants did not participate in the actual drilling of the well. We find no error in the trial court's ruling. The action was one where costs could be allowed in the discretion of the trial court under subdivision (c) of section 1032 of the Code of Civil Procedure. All of the defendants, including the trustee in bankruptcy, resisted plaintiffs' claims for any relief whatever. We find no abuse of discretion on the part of the trial court in awarding costs in the sum of $102.55 against all of said defendants.

The judgment and the order denying defendants' motion to retax costs are affirmed.

We concur: NOURSE, P. J., STURTEVANT, J.



20 Cal.App.2d 286

PEOPLE v. MOUNT.

Cr. 374.

District Court of Appeal, Fourth District, California.

Jan. 6, 1939.

1. Criminal law ⇐720(6)

Counsel is entitled to state fully his views as to what evidence shows and fair conclusions therefrom in argument to jury.

2. Criminal law ⇐730(14), 1037(2), 1129(1)

A deputy district attorney's improper statement in argument to jury on trial for attempts to commit sodomy and rape that "it has not been so long ago since a sex fiend was here in this community" was not ground for reversal of conviction, where only objection was that it was not based on evidence, court instructed district attorney to keep within testimony, no assignment thereof as misconduct or request for instruction to disregard it was made, and matter was dropped after court's admonition. Pen.Code, § 288a.

3. Criminal law ⇐1037(2), 1129(1)

Ordinarily, it is duty of defendant's counsel to assign prosecuting attorney's improper statements in argument to jury as misconduct or request instruction to disregard them.

4. Criminal law ⇐730(7)

A deputy district attorney's remark in argument to jury on trial for attempts to commit sodomy and rape that there would be no question in jurors' minds as to defendant's guilt, if prosecutrix had related her story to them as she did to investigating officers, was not ground for reversal of conviction, where court instructed jury to disregard remark. Pen.Code, § 288a.

5. Criminal law ⇐1037(2), 1129(1)

A deputy district attorney's improper statement in argument to jury on trial for attempts to commit sodomy and rape that evidence that prosecutrix' past record was bad "could not be produced or it would have been" was not ground for reversal of conviction, in absence of objection, assignment of misconduct, or request for instruction to disregard it. Pen.Code, § 288a.

6. Criminal law ⇐726

Defendant's statements attacking prosecutrix' character were sufficient to justify deputy district attorney's general statement in argument to jury on trial for attempts to commit sodomy and rape that defense "is, as they always are, an attempt to blacken and besmirch her character." Pen.Code, § 288a.

7. Criminal law ⇐726

The district attorney's statement in argument to jury that law did not permit him to introduce evidence against defendant's character, unless latter first produced evidence of his good character, was not misconduct prejudicial to defendant, in view of previous argument by defendant's counsel that there was no evidence against defendant's character, his failure to object, assign misconduct or request instruction, and defendant's admissions and testimony.

8. Criminal law ⇐1170½(5)

The district attorney was not guilty of misconduct prejudicial to defendant in asking latter's witness on trial for attempts to commit sodomy and rape whether he en-

deavored to induce prosecutrix to withdraw charges at defendant's request, though no impeaching witnesses were offered after negative answers to questions, where no bad faith appeared and defendant practically admitted essential facts on witness stand. Pen.Code, § 288a.

9. Criminal law ⇐1120(3)

The trial court's refusal to permit defendant to elicit evidence of entire conversation, portion of which had been admitted, was not ground for reversal of conviction, where appellate court was not referred to portion brought out, and no attempt was made to show how it could have been prejudicial.

10. Criminal law ⇐1186(4)

Errors appearing in record on appeal from conviction of attempts to commit sodomy and rape *held* not to justify reversal, where physical evidence demonstrated that defendant's version of affair, as told on witness stand, was not and could not be true. Pen.Code, § 288a; Const. art. 6, § 4½.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Edward S. Mount was convicted of attempts to commit sodomy and rape, and he appeals.

Affirmed.

Wardwell D. Evans, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged, in separate counts, with an attempt to violate section 288a of the Penal Code and with an attempt to commit the crime of rape. A jury found him guilty on both counts and he was sentenced to serve a term in the penitentiary, the sentences on the respective counts to run concurrently. He has appealed from the judgment and from an order denying his motion for a new trial.

[1] For obvious reasons it is not contended that the evidence is not sufficient to sustain the judgment. A reversal is sought mainly on the ground that the prosecuting attorneys were guilty of misconduct which amounted to prejudicial error. While the appellant's brief sets forth some twenty quotations from the arguments of these attorneys before the jury, any attempt to point out misconduct or prejudice is confined to a very few of them. Most of these quotations disclose nothing objectionable and are within the established rule that counsel is entitled to "state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom." People v. Sieber, 201 Cal. 341, 257 P. 64, 70.

[2, 3] Turning to those instances in which some argument is presented the first is where a deputy district attorney, in the course of his argument, said: "It has not been so long ago since a sex fiend was here in this community." While this was improper the only objection made by the appellant was that it was not based upon the evidence in the case and the court instructed the district attorney to keep within the testimony. Ordinarily it is the duty of counsel for the defense to assign such matters as misconduct or request the court to instruct the jury to disregard it. People v. Sieber, supra. No such assignment or request was here made and after the admonition of the court the matter was dropped.

[4-6] The next portion of the argument objected to is as follows:

"* * * and I want to tell you, ladies and gentlemen, that in my opinion when you are out of this jury box and you saw this woman and she related her story to you as she related it to the officers making the investigation, there would be no question in your mind as to the guilt of the man that assaulted her."

At the request of counsel for the appellant the court instructed the jury to disregard this remark. In speaking of the prosecuting witness a deputy district attorney said: "There hasn't been any evidence in this case to indicate that her past record was bad. It could not be produced, or it would have been; and I say to you that the defense in this case is, as they always are, an attempt to blacken and besmirch her character."

While it was improper to state that such evidence could not be produced or to say that it would have been produced if it had been possible to do so, no objection of any kind was made and there was no assignment of misconduct or request that the jury be instructed to disregard it. In this connection it is argued that it was im-

proper in this case for the district attorney to mention any attack upon the prosecuting witness because the appellant had made no attempt to attack her character other than by what he himself said. This was sufficient, however, to justify the general argument that was made in this regard by the district attorney.

[7] It is next contended that prejudicial misconduct appears in the following portion of the district attorney's argument: "I might say a word as to his character. Counsel said to you there wasn't one iota of evidence against his character. The law of the State of California does not permit the district attorney to put any evidence in against the character of the defendant unless he himself first produces evidence of good character. Of course that wasn't done, so ladies and gentlemen, that issue is not in the case at all. We don't know anything about his past, except what he told us about how many bars he frequented. That is all we know about his past."

The appellant relies upon the rule laid down in People v. Harris, 80 Cal.App. 328, 251 P. 823, that it is improper for the prosecuting attorney to argue that the state cannot introduce evidence of bad character until the defendant has introduced evidence of his good character. It not only appears here that counsel for the appellant had somewhat opened the door for this argument by himself arguing that there was no evidence against the character of his client, but it again appears that no objection was made at the time and there was no assignment of misconduct or request for instruction. In any event, no possible prejudice could have resulted in view of the admissions and evidence made and given by the appellant on the stand.

[8] It is further contended that the district attorney was guilty of prejudicial misconduct in asking certain questions which it is contended were not asked in good faith, but merely for the purpose of prejudicing the jury against the appellant. These questions asked of a witness for the appellant, were as to whether that witness had, at the request of the appellant, endeavored to induce the prosecuting witness to withdraw her charges, and whether the appellant had not asked the witness to undertake such a mission. It is argued that this was an attempt to show that the appellant was guilty of another offense, that of compounding a felony, and that it appears that the questions were not asked in good faith because after the witness had answered the questions in the negative no attempt was made by the district attorney to offer any impeaching witnesses. No bad faith appears and it became unnecessary for the district attorney to offer impeaching evidence when the appellant himself, from the witness stand, practically admitted the essential facts. He testified that he had made an effort to see the prosecuting witness in order to induce her to drop the case, and that "I asked Charlie (the witness last above referred to) if he would see the girl probably she would drop the charges".

[9] The only other point raised is that the court erred in decisions of law during the course of the trial. The only new matter here suggested is that the court erred in refusing to permit the appellant to bring out an entire conversation, a portion of which had been admitted. We are not even referred to the portion of the conversation which was brought out and if we assume that error occurred no attempt is made to show how it could have been prejudicial.

[10] While certain errors appear, none of them could be deemed sufficiently prejudicial to justify a reversal. This is not one of those close cases where it may reasonably be said that an existing error might have influenced the jury or affected the result. The physical evidence in the case demonstrated that the appellant's version of the affair, as told on the witness stand, was not and could not be the truth. The convincing nature of the evidence here, aside from any other consideration, brings any error which appears squarely within the meaning and intent of section 4½ of article 6 of the Constitution.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; GRIFFIN, J.

30 Cal.App.2d 321

PEOPLE v. GILBERT.

Cr. 3158.

District Court of Appeal, Second District, Division 1, California.

Jan. 11, 1939.

1. Criminal law ⇐419(11)

In prosecution for conspiracy to procure an abortion on wife of accomplice, testimony of accomplice concerning conversations with wife before wife's death was hearsay and inadmissible. Pen.Code, § 274.

2. Criminal law ⇐1169(1)

In prosecution for conspiracy to procure abortion on wife of accomplice, error in admitting hearsay testimony of accomplice concerning conversations with his wife before her death was prejudicial. Pen.Code, § 1111.

3. Criminal law ⇐511(2)

Evidence required by statute to corroborate testimony of an accomplice must of itself, without aid of accomplice's testimony, connect or tend to connect defendant with commission of the offense. Pen.Code, § 1111.

4. Criminal law ⇐511(2)

In prosecution for conspiracy to procure an abortion on the wife of an accomplice, evidence which itself had to be interpreted in the light of accomplice testimony *held* not sufficient corroboration to sustain conviction. Pen.Code, § 274.

5. Criminal law ⇐511(1)

More than a mere suspicion of defendant's guilt is required by way of corroboration of accomplice. Pen.Code, § 1111.

6. Criminal law ⇐511(1)

The statute requiring corroboration of testimony of an accomplice is mandatory, and does not give the court discretion. Pen. Code, § 1111.

7. Criminal law ⇐511(1)

Where testimony of accomplice is not sufficiently corroborated, conviction is wholly wanting in legal foundation. Pen.Code, § 1111.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Robert A. Gilbert was convicted of conspiracy, and he appeals.

Reversed.

Charles H. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant was charged, in effect, with the crime of conspiracy to violate section 274 of the Penal Code, which section declares it to be an offense to procure an abortion unless the same is necessary to preserve life.

In part, the facts briefly are as follows: On June 30, 1938, Marie Colombos was found dead lying on a couch in the front room of her residence in Glendale, California. Both the doctor that saw the body of the deceased immediately after her death, and the autopsy surgeon, testified that they could not determine the cause of her death.

The deceased was pregnant, the duration of which pregnancy was established at three months. The husband of the deceased, George Colombos, testified that he had discussed his wife's condition with the defendant on or about June 16th, and that the defendant had informed him that he was experienced in relieving such conditions and would accommodate him and his wife for $50 or less. Colombos also testified as to conversations which he had had with his wife on the same subject, as well as to conversations between his wife and the defendant, related to him by his wife before her death. Between June 16th and June 30th, the defendant had visited the Colombos' home on several occasions.

The defendant admitted that he had known the Colomboses socially, and contended that the visits to the home were of a social nature. Officer Woodard testified that in a conversation with him the defendant stated that he had called at the Colombos residence on the day of the death of Marie Colombos to discuss her case with her; that while he was there the deceased was writing something and that the deceased undertook to move the couch to "get some better light" whereupon the deceased fainted; that he picked her up and laid her down on the couch and proceeded to give her artificial respiration; that when she failed to respond he became "panicky" and ran out looking for Colombos so that he could call a doctor.

There was no evidence of any kind or character tending to establish either directly or inferentially that any effort had

been made by any means to bring about an abortion.

[1-4] The testimony of Colombos with reference to conversations between him and his wife was objected to at the trial and the objections were overruled. Appellant's contention that such evidence was hearsay is abundantly supported by the law. The ruling resulting in the admission of the testimony was error, and highly prejudicial. Excluding from consideration, for the purpose of determining the legal question involved, the testimony of Colombos, an admitted coconspirator and accomplice, there is little if anything of any legal consequence left in the record. "The law is settled in California that a conviction cannot be sustained upon the testimony of an accomplice, unless it be corroborated by other evidence which tends to connect defendant with the commission of the offense charged in the indictment (section 1111, Pen.Code), and it is equally clear that the corroborative evidence necessary to comply with this requirement must of itself without the aid of the accomplice's testimony connect or tend to connect defendant with the commission of the offense charged." People v. Rankin, 10 Cal.2d 198, 201, 74 P.2d 71, 72; See, also, People v. Kempley, 205 Cal. 441, 455, 271 P. 478; People v. Davis, 210 Cal. 540, 554, 293 P. 32. The evidence falls far short of the requirements of the rule.

[5] An examination of the record discloses that regardless of how the claimed corroborative evidence be viewed, nevertheless, in order to give it effect, even as tending in that direction, it is necessary at every point to interpret and explain this "corroboration" in the light of the testimony of the accomplice. It requires the testimony of the accomplice to give it direction to the alleged crime before it can be said to connect the defendant with the commission of that crime. Even though it be assumed that the corroborative evidence arouses a suspicion of defendant's guilt, still it is firmly established as the law that more than mere suspicion is required by way of corroboration. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Kelly, 69 Cal.App. 558, 570, 231 P. 767; People v. Taylor, 70 Cal.App. 239, 244, 232 P. 998; People v. Jones, 87 Cal.App. 482, 262 P. 361; People v. Robbins, 171 Cal. 466, 472, 154 P. 317; People v. Kempley, supra; People v. Davis, supra.

[6, 7] Section 1111 of the Penal Code is mandatory (People v. Allison, 200 Cal. 404, 253 P. 318), and a conviction cannot stand unless the testimony of the accomplice is corroborated in accordance with the standards laid down by the courts in the interpretation of the statute. "The court has no discretion in the matter, but is bound to apply the statute indiscriminately to all cases wherever an accomplice appears as a witness, and the state's case depends solely upon his uncorroborated testimony." People v. Robbins, supra, pp. 466, 469, 154 P. page 318. When, as here, the testimony of the accomplice is not sufficiently corroborated, the conviction of the accused is wholly wanting in a legal foundation to support it. People v. Viets, 79 Cal.App. 576, 587, 250 P. 588.

The judgment is reversed.

We concur: YORK, P. J.; WHITE, J.



30 Cal.App.2d 335

STEWART v. RICE et al.

Civ. 2185.

District Court of Appeal, Fourth District, California.

Jan. 11, 1939.

1. Mortgages ⇐25(2)

A note and trust deed given by son-in-law and daughter to father in amount of notes which were signed by son-in-law, daughter, and father, and which were subsequently paid by father, were supported by sufficient consideration, notwithstanding father allegedly signed one of notes as mere surety.

2. Fraudulent conveyances ⇐15

The fact that purchasers of trust deed applied rent collected under an assignment on debts of grantors without applying any portion thereof on their own claims did not warrant conclusion that purchasers were attempting to hinder and defraud creditors of grantors.

3. Fraudulent conveyances ⇐15

That purchasers of trust deed waited some years before foreclosing and that they spent considerable money in protecting their investment and clearing their title did not

indicate fraudulent attempt to protect grantors from their creditors so as to invalidate deed.

4. Fraudulent conveyances ⇐308(1)

In suit to quiet title, whether trust deed under which plaintiff deraigned title was originally given for purpose of hindering creditors of grantors was question of fact.

5. Fraudulent conveyances ⇐295(1)

In suit to quiet title, evidence *held* to sustain finding that trust deed under which plaintiff deraigned title was not void for fraud on creditors.

6. Quieting title ⇐29

A judgment creditor who levied attachment on property covered by trust deed on April 6, 1927, but did not record abstract of judgment until January 10, 1933, and certificate of sale until October 2, 1934, and who took no further steps until he filed cross-complaint in action to quiet title by owner deraigning title under trust deed on June 23, 1936, was guilty of laches and barred from relief.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Katherine G. Stewart against W. A. Rice and others, to quiet title, wherein the named defendant filed a cross-complaint by which he sought to have title to land involved quieted in him. Judgment for plaintiff, and the named defendant appeals.

Affirmed.

Clay & Handy, of Los Angeles, for appellant.

A. Heber Winder, of Riverside, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action to quiet her title to a parcel of land. The defendant Rice answered and also filed a cross-complaint by which he sought to have title to the land quieted in him. The court found in all respects in favor of the plaintiff and from a judgment quieting her title the defendant Rice has appealed.

Briefly summarized, the material facts out of which this action arose are as follows: On February 2, 1922, one Jonathan Watson, who then owned the land in question, conveyed it to his daughter, Winifred Stoner, with the understanding that she was to pay him $3,000. On or about that date Watson received $3,000 which was borrowed from a bank in Orange, the note being signed by Watson, Mrs. Stoner and her husband. Shortly thereafter Mr. and Mrs. Stoner borrowed $1,000 and $400 from this bank, giving their notes therefor, which notes were not signed by Watson. A little later these two notes were renewed by a note for $1,400 which was signed by Mr. and Mrs. Stoner and also by Watson. On July 18, 1923, Mr. and Mrs. Stoner gave to Watson a note for $4,400, secured by a trust deed on the land in question, which trust deed was recorded on July 28, 1923. It seems perfectly clear that this trust deed was given either to cover the $3,000 which Mrs. Stoner had agreed to pay for the land, plus the $1,400 note to the bank which had been signed by Watson, or to cover the liability assumed by Watson in signing the $3,000 and $1,400 notes held by the bank. Be this as it may, the evidence shows that Watson paid the $3,000 and the $1,400 notes held by the bank on April 9, 1924, by giving to that bank a note for $4,400 signed by himself alone, which note he later paid. On October 23, 1926, Watson assigned the $4,400 deed of trust given him by the Stoners to C. R. Stewart. Stewart gave notice of default and the land was sold to him at trustee's sale and he received a trustee's deed therefor on October 23, 1931, which deed was recorded. Two days later he conveyed the property by deed to Katherine G. Stewart, the respondent, who is his mother.

In August, 1923, the appellant Rice drilled a well for the Stoners on other property owned by them, which was not covered by the deed of trust above referred to. On September 1, 1923, he was given a note for $1,740 signed by the Stoners for his work on the well. At some later date this indebtedness was reduced to a judgment, an attachment being levied on the land here in question on April 6, 1927. Nothing further was done until January 10, 1933, when an abstract of this judgment was recorded. At an execution sale the Stoners' interest in the land was sold to the appellant Rice, his certificate of sale being recorded on October 2, 1934. About a year and half later, when the respondent attempted to sell the property, she discovered the existence of the appellant's claim and this cloud upon her title, and this action followed.

It is appellant's contention that the $4,400 trust deed, through which the respondent acquired title to the property, was void and ineffective from the beginning and that its invalidity was at all times known by C. R. Stewart and Katherine G. Stewart, the respondent. In this connection it was stipulated that anything that was known by C. R. Stewart was known by Katherine G. Stewart, and that she is to be charged with any knowledge which is chargeable to him.

[1] It is first contended that there was no consideration for the $4,400 note and trust deed given by the Stoners to Watson on July 18, 1923. It is argued that the Stoners borrowed $3,000 from the bank in Orange and paid the same to Watson for the land; that while Watson signed this note it must be presumed that he signed only as an accommodation maker; that he was, therefore, a surety for the Stoners; that under the law of this state a principal owes nothing to his surety until the surety has paid the debt; that at the time the trust deed was given Watson had not paid the $3,000 note to the bank; and that it follows that there was no consideration for the trust deed.

It does not necessarily appear that Watson was merely a surety. All three parties signed the $3,000 note to the bank and Mr. Stoner testified that Watson obtained the credit at the bank. Be that as it may, Watson had incurred a further obligation by signing the $1,400 note for the Stoners. The banker testified that Watson paid the $3,000 note and the $1,400 note on April 9, 1924, by giving the bank his note for $4,400, which the Stoners did not sign, and that this note was later paid. All of this was long before the appellant levied an attachment on the property. Moreover, on October 23, 1926, some six months before the appellant levied an attachment upon the property, C. R. Stewart purchased the $4,400 trust deed from Watson, paying $4,000 in cash for it. There is evidence that Watson told Stoner he was in need of cash and asked him if he could find someone who would buy the $4,400 trust deed, saying that he was willing to discount it. Stoner suggested to C. R. Stewart, who was his banker, that he should buy the note and trust deed, which Stewart did. While the appellant states that Stewart knew that the note was void for a lack of consideration he points to no evidence to sustain that contention and we find none. As far as the original transaction is concerned there is ample evidence of a benefit conferred upon the Stoners and a prejudice suffered by Watson, and a valid consideration appears. Thereafter, C. R. Stewart purchased the trust deed before any claim of the appellant appeared of record, paying a substantial consideration therefor, and the court's finding to the effect that Stewart had no knowledge of any infirmity or invalidity in connection with the trust deed is amply supported.

[2-5] It is next contended that the $4,400 trust deed was given by the Stoners to Watson for the purpose of hindering creditors and that the only purpose of the Stewarts in obtaining possession of this trust deed and note was to hinder creditors. It is argued that it must be inferred from the circumstances that Watson, in taking the trust deed, and C. R. Stewart, in later acquiring it, did so with the fraudulent purpose of protecting the Stoners from their creditors.

The land in question, a valuable orange grove, was given by Watson to his daughter, Mrs. Stoner, with the exception of the $3,000 payment which Watson desired in order to pay off an encumbrance thereon. In October, 1922, the Stoners mortgaged the land to one Giroux for $7,500. This was the only encumbrance which was prior to the $4,400 deed of trust here in question. At that time the Stoners had other property of considerable value and there is no evidence that they were then otherwise indebted. Subsequently, the Stoners gave a deed of trust to the First National Bank of Ontario securing a note for $11,000, and still later, gave a mortgage on the property to the Bank of Perris for $2,597. C. R. Stewart was an officer of the Bank of Perris and he and his father owned practically all of its stock. In 1928, C. R. Stewart purchased the $7,500 mortgage held by Giroux and in 1931 bought the $11,000 deed of trust held by the First National Bank of Ontario for $500. In other words, Stewart, before he foreclosed the $4,400 deed of trust, purchased the prior mortgage and also bought for $500 a subsequent deed of trust for $11,000.

The appellant argues that fraud must be inferred in connection with this $4,400 deed of trust, both in its inception and in connection with its transfer to Stewart, because of these facts and of the further

facts that Stewart had acted as banker for the Stoners for some years, that in October, 1925, the Stoners assigned the proceeds of the land to C. R. Stewart's father, who collected these proceeds for some years and paid them out on the order of the Stoners, and that Stewart did not foreclose the $4,400 trust deed until 1931. The fact that the Stewarts, under an assignment, collected the proceeds of this land for some years and paid it all out on debts owned by the Stoners, without applying any portion thereof on their own claims, certainly does not compel the conclusion that they were engaged in an attempt to hinder and defraud the creditors of the Stoners. The fact that they waited some years before foreclosing the deed of trust and that they spent considerable money in protecting their investment and clearing their title does not, in itself, indicate fraud. If it could be assumed that some portions of the evidence would justify an inference of fraud a contrary inference is not only possible but much of the evidence is entirely inconsistent with any idea of fraud in connection with the giving of this deed of trust or with its later transfer to C. R. Stewart. At best, the question is one of fact and the findings and conclusion of the trial court are amply sustained.

[6] A further consideration is that the court found that the appellant levied his attachment on this property on April 6, 1927, but took no further steps until he recorded his abstract of judgment on January 10, 1933, and his certificate of sale on October 2, 1934; that he took no further steps in enforcing his claim until he filed his cross-complaint herein on June 23, 1936; that this delay on his part was unreasonable; that by this conduct he was guilty of laches; and that such delay had been to the detriment of the respondent. These findings are amply sustained by the evidence and the appellant himself testified that in 1925 Stoner told him that certain of his property "was being turned over to Mr. Stewart to keep his creditors from getting it away from him". There can be no question that the delay of the appellant in pressing his claim resulted in detriment to the Stewarts in many respects. Not the least of these is the fact that the Stewarts, in 1931 and after they had foreclosed the $4,400 deed of trust, released the Giroux mortgage which was a first lien upon the property, for which they had paid $7,625, in 1928, long after the appellant claims to have been told that the Stoners were "covering up".

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



30 Cal.App.2d 317

UNION OIL CO. OF CALIFORNIA v. BASALT ROCK CO., Inc.

Civ. 10806.

District Court of Appeal, First District, Division 1, California.

Jan. 11, 1939.

Hearing Denied by Supreme Court March 9, 1939.

1. Corporations ⇐503(3)

In action to recover balance of price of stove oil, defendant corporation, which moved for change of venue to another county, had burden of showing that contract was not made and not performed, that obligation or liability did not arise, and that breach did not occur in county where action was brought. Const. art. 12, § 16.

2. Corporations ⇐503(2)

Where a contract to which a corporation is a party is to be performed partly in one county and partly in another, the last step toward completion determines situs of performance, as respects county in which action on contract should be brought. Const. art. 12, § 16.

3. Sales ⇐183

Ordinarily, as soon as a sale is made, the relationship of "seller and buyer" changes to that of "creditor and debtor," but that is not true unless the debt is due.

[Ed. Note.—For other definitions of "Buyer," "Debtor and Creditor" and "Seller," see Words & Phrases.]

4. Corporations ⇐503(3)

A corporation sued in Contra Costa county for balance of price of stove oil was properly granted change of venue to Napa county under constitutional provision authorizing corporation to be sued in county where "obligation" arises, where contract provided for delivery of oil in Contra Costa

county but provided for payment in Napa county. Const. art. 12, § 16.

[Ed. Note.—For other definitions of "Obligation," see Words & Phrases.]

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by the Union Oil Company of California against the Basalt Rock Company, Inc., to recover a balance due on the purchase price of stove oil. From an order granting defendant's motion for a change of venue, plaintiff appeals.

Affirmed.

Cooney & Kelley, L. C. Kelley, and Myron E. Smith, all of Los Angeles, for appellant.

Clarence N. Riggins, of Napa, for respondent.

WARD, Justice.

Plaintiff filed an action against defendant in Contra Costa county to recover judgment for a balance due on the purchase price of certain stove oil. Defendant moved for a change of venue to Napa county. The motion was granted and plaintiff appealed.

It appears from the complaint, the contract attached thereto and the affidavits on file that the principal place of business of the defendant corporation is in the city of Napa, county of Napa; that the contract was prepared in duplicate, signed on behalf of defendant corporation, and delivered to plaintiff's agent in Napa. The duplicate agreement, executed by the plaintiff corporation, was delivered personally by its agent in Napa. All orders for oil were placed by telephone from defendant's office to plaintiff's agent in Napa. Under the terms of the contract all deliveries of products were deemed to be complete when made by plaintiff, f. o. b. from the loading racks at Oleum in Contra Costa county. Defendant corporation receipted for the oil at Oleum and assumed the expense and risk of transportation to certain designated points. The contract also provided that "all oil delivered hereunder in any calendar month shall be paid * * *" for at the seller's office at Napa on or before the 10th day of the next calendar month. Likewise the contract provided that the "seller may, at its option, require the purchase price to be paid at the time of delivery". The complaint is silent relative to the exercise of the option to require payment of the purchase price at the time of delivery, and we therefore conclude that the seller delivered the oil under the provision of the contract requiring that payment should be made "at seller's office at Napa".

[1] Article 12, section 16, of the Constitution of the state of California, provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." It is incumbent upon the moving party to show that the contract was not made; that it was not performed; that the obligation or liability did not arise, and that the breach did not occur, in Contra Costa county. Gas Appliance Sales Co. v. W. B. Bastian Mfg. Co., 87 Cal.App. 301, 262 P. 452; Lakeside Ditch Co. v. Packwood Canal Co., 50 Cal.App. 296, 195 P. 284; Rowe v. Policy Holders' Life Ins. Ass'n, 131 Cal.App. 339, 21 P.2d 443. It is clear that the contract was made in Napa county and that any breach thereof occurred in Napa county upon the date or dates when defendant was obligated to pay for the oil and failed to do so.

[2] The contract was to be performed partly in one county and partly in another. Under such circumstances the last step toward the completion of the contract determines the situs of performance. Fitzhugh v. University Realty Co., 46 Cal. App. 198, 188 P. 1023; Rawson v. J. C. Forkner Fig Gardens, Inc., 206 Cal. 4, 272 P. 1057; Hammond v. Ocean Shore Dev. Co., 22 Cal.App. 167, 133 P. 978. The last act to be performed under the terms of the contract, namely, the payment of the money, was to be performed in Napa county.

[3] The main contention of appellant is that the obligation and liability arose in Contra Costa county. The place of performance and the place where the obligation or liability arose are often interlocked so that it is difficult to separate one from the other. The contract created the relationship of seller and buyer. Ordinarily as soon as the sale is made the re-

lationship of seller and buyer changes to that of creditor and debtor, but this is not true unless the debt is due. The term "indebted" means that an absolute liability exists. Provident Mutual Building-Loan Ass'n v. Davis, 143 Cal. 253, 76 P. 1034. A debt may be payable immediately, and under such circumstances liability does not accrue until the indebtedness has matured.

The framers of section 16, article 12, of the Constitution may have intended that the word "liability" had reference to responsibility for a tort, and that the word "obligation" was to be construed in reference to express or implied agreements. The words are often used synonymously, though "liability" has a more comprehensive meaning. Liability is a condition which creates a duty to perform an act, but the performance may be immediate or in the future. 36 Cor.Jur., p. 1050 et seq.

[4] An obligation is a legal duty by which a person is bound to do or not to do a certain thing. It arises from the contract of the parties or by operation of law. Civ.Code, §§ 1427, 1428. In this case it was predicated upon a written contract and hence must be interpreted to give effect to the mutual intentions of the parties. Civ.Code, § 1636. The contract provided for the delivery of oil in Contra Costa county, and the payment therefor in Napa county. This suit is brought not alone for the delivery of the oil but for nonpayment therefor. The allegations of the complaint in reference to delivery are merely necessary recitations leading up to the real basis of the action, namely, the nonpayment.

In a written contract there may be given to the respective parties many and various rights and obligations. When defendant availed itself of the right in Napa to order delivery of the oil, the plaintiff was obligated to make such delivery in Contra Costa county. Upon the delivery, an obligation to pay was imposed upon defendant, but this liability was potential and not absolute. There was no existing agreement to pay immediately. On the contrary, the obligation did not arise until the 10th of the month following delivery. This obligation to pay arose in Napa county. The cases cited by appellant are actions in tort or actions on insurance policies, which may be generally brought in the county where the loss occurs, or actions wherein the defendant did not have a residence in California.

We have before us a case wherein it appears that under the terms of the agreement certain obligations necessary toward the consummation of the contract arose and were to be performed in one county, and other acts ultimately arising were to be performed in another county. Under such circumstances it is fair to determine that the obligation that arose to cause the filing of the action is the obligation referred to in section 16 of article 12 of the Constitution in determining the place wherein the corporation may be sued.

The order appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



30 Cal.App.2d 275

MARR v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

Civ. 10984.

District Court of Appeal, First District, Division 2, California.

Jan. 6, 1939.

1. Pleading ⇐229

Generally, amendments to pleadings are allowed in furtherance of justice, when possible without prejudice to substantial rights of others than pleader, and not simply to give one party technical advantage.

2. Bankruptcy ⇐421(1)

A discharge in bankruptcy was meritorious defense to action on bankrupt's note, so as to entitle defendant to amend answer by pleading such discharge, as plaintiff's claim could have been proved and allowed against estate in bankruptcy. Bankr.Act §§ 17, 63a, 11 U.S.C.A. §§ 35, 103(a).

3. Bankruptcy ⇐423(1)

A company making loan in reliance on borrower's false representations regarding his credit was entitled to waive tort and sue as on implied contract and hence could have proved its claim against borrower's estate in bankruptcy, so that latter's discharge in bankruptcy was meritorious defense, to plead which he was entitled to amend his answer

in company's action for fraud. Bankr.Act §§ 17, 63a, 11 U.S.C.A. §§ 35, 103(a).

4. Mandamus ⇐4(2)

A petition for writ of mandate, directing superior court to allow petitioner to file amended answer, pleading his discharge in bankruptcy, in action, pending before it on appeal from justice court, to recover on note and for fraud in procuring loan, was proper remedy, as statute does not authorize appeal from judgment in such action. Code Civ. Proc. § 963.

5. Justices of the peace ⇐43(1, 2)

The justice's court had jurisdiction of action to recover less than $300 on note and for fraud in procuring loan.

6. Action ⇐48(1)

Causes of action on note and for fraud in obtaining loan were properly joined in one action, where both arose out of same transaction. Code Civ.Proc. § 427, subd. 8.

Proceeding by Robert L. Marr for a writ of mandate directing the Superior Court of the state of California, in and for Alameda county, to allow petitioner to file an amended answer in an action pending before such court.

Peremptory writ granted.

J. Bruce Fratis, of San Francisco, for petitioner.

No appearance for respondents.

STURTEVANT, Justice.

The petitioner applied to this court for a writ of mandate directing the trial court to allow the petitioner to file an amended answer in an action pending before said trial court. We ordered an alternative writ issued and the said writ was served on the respondents. The hearing of said application was on the calendar December 12, 1938. No appearance was made by respondents and the application was submitted.

On the 25th day of July, 1936, the Bay Cities Loan Company, a corporation, filed in the justice's court in the city of Berkeley, county of Alameda, state of California, an action, No. 27420, against this petitioner and his wife. Later it filed an amended complaint. The respondents filed an answer to the amended complaint, a trial was had on the issues made by said pleadings and a judgment was rendered in favor of Bay Cities Loan Company. From that judgment Robert L. Marr and his wife appealed on questions both of law and of fact. Later the action came on for trial de novo before the superior court. It was partly tried but was continued and the trial is now incomplete.

After said action was commenced against Robert L. Marr and his wife, Robert filed a petition in bankruptcy. In his petition he listed the obligation on which Bay Cities Loan Company had sued him and his wife. On the 25th day of April, 1936, he was adjudged a bankrupt. On the 26th day of October, 1936, he was granted a discharge in bankruptcy.

The amended complaint in said action No. 27420 pleaded the plaintiff's suit in one count. It contains seven paragraphs. The first four paragraphs contain the ordinary allegations of a complaint based on a promissory note. The remaining paragraphs contain allegations pleading a cause of action in fraud and deceit and allege that at the time Robert L. Marr and his wife applied for the loan mentioned above they made certain false representations regarding their credit, that Bay Cities Loan Company believed said representations, and acted thereon.

Bay Cities Loan Company also inserted in its complaint: "VI. On or before the 25th day of April, 1936, defendant Robert L. Marr was adjudged a bankrupt in the District Court of the United States in and for the Northern District of California, Southern Division." The pleading concludes with a prayer for $240.09, the principal, interest from February 27, 1936, counsel fees in the sum of $100, costs, and for such other and further relief as to the court may appear just and proper. In their answer Robert L. Marr and his wife admitted the material allegations regarding the execution and delivery of the promissory note and also paragraph VI, supra. They denied specifically all of the allegations charging fraud and deceit. The answer contained other denials not material to this application.

While action 27420 was on trial in the justice's court Robert L. Marr sought to introduce in evidence his discharge in bankruptcy. That attempt was opposed because he had not pleaded a discharge. His attorney took the position that the failure to plead the discharge was his own fault and not that of his client. He made a motion to be allowed permission to plead the dis-

charge in bankruptcy, the motion was denied and thereafter judgment was entered against this petitioner.

After the action had been appealed to the superior court, on June 7, 1937, Robert L. Marr applied to that court for permission to amend. He supported his motion by the affidavit of the attorney who represented him in the justice's court. No counteraffidavit was presented by or on behalf of Bay Cities Loan Company. That motion was also denied. Later Robert L. Marr substituted his present attorney for the one who had represented him in the justice's court. The hearing of the appeal commenced on the 15th day of September, 1938. Robert L. Marr again made a motion to amend his answer. He supported his motion by presenting a copy of the amended answer and the affidavit of the former attorney. No counter showing was made, but his motion was denied. For reasons not disclosed in the record the hearing of the trial was continued and the action is still pending in the trial court. On November 28, 1938, the petitioner applied to this court for a writ directed to the trial court commanding it to allow petitioner to file said amended pleading.

The foregoing statements clearly show that the record presents no disputed question of fact but solely questions of law.

[1, 2] Nothing appears showing that petitioner's application to amend was not in proper form. The general rule is that amendments are allowed in furtherance of justice when it can be done without prejudice to substantial rights of others, and not simply to give one a technical advantage. Under such circumstances it has been held to be reversible error to deny a motion to file an amended complaint. Hurley v. Lake County, 133 Cal.App. 219, 23 P. 2d 838. The remaining question of law is whether pleading a discharge in bankruptcy is a meritorious defense. In the instant case that question does not seem to be debatable. In so far as the suit of Bay Cities Loan Company was a claim against Robert L. Marr based on his promissory note, it is patent the discharge in bankruptcy was a meritorious defense. 18 C.J. 464.

[3] In so far as the same pleading was a charge against Robert L. Marr in fraud and deceit, a slight question arises. But that question is only slight. Conceding that he was guilty of fraud and deceit, under well-settled rules of law Bay Cities Loan Company was entitled to waive the tort and to sue as on an implied contract. 12 Cal. Jur. 785. That being the fact, even though no promissory note had ever been executed, the claim of Bay Cities Loan Company was one that could have been proved against Marr's estate in bankruptcy and therefore was a claim to which his discharge in bankruptcy was a meritorious defense. Crawford v. Burke, 195 U.S. 176, 187, 25 S.Ct. 9, 49 L.Ed. 147. In a similar case the court cited the case just mentioned and then it said: "This court held that plaintiff's claim was 'provable under the bankruptcy act,' that is, was 'susceptible of being proved,' and that it might have been proved under § 63a as 'founded upon an open account or upon a contract express or implied,' if plaintiff had chosen to waive the tort and take his place with the other creditors of the estate." Tindle v. Birkett, 205 U.S. 183, 186, 27 S.Ct. 493, 494, 51 L.Ed. 762.

It follows that whether the claim of Bay Cities Loan Company is measured by the first charge stated in its complaint, or by the second charge stated in its complaint, it could have been proved and allowed against the estate in bankruptcy of Robert L. Marr. Bankruptcy Act, § 63, subd. a, 11 U.S.C.A. § 103(a). It further follows that the discharge was a complete defense against said claim as measured by either charge. Bankruptcy Act, § 17, 11 U.S.C.A. § 35.

[4] That the petitioner has selected a proper remedy is also clear. In the first place it should be noted that from the judgment to be rendered by the superior court in action No. 27420 the statute does not authorize an appeal. Code Civ.Proc. § 963. In 38 C.J. at page 608, the author says: "While as already shown the discretion of the court will not ordinarily be controlled by mandamus, it is not universally true that the writ will not issue to control such discretion or to require a judicial tribunal to act in a particular way. Where the discretion of a court can be legally exercised in only one way, mandamus will lie to compel the court so to exercise it; and in some cases mandamus has been employed to correct the errors of inferior tribunals and to prevent a failure of justice or irreparable injury where there is a clear right, and there is an absence of any other adequate remedy, as for instance where no appeal lies, or where the remedy by appeal is inadequate. It may also be employed to prevent an abuse of discretion, or to

correct an arbitrary action which does not amount to the exercise of discretion." In support of the text it is sufficient to cite the following well-considered cases: Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978; In the Matter of Ford, 160 Cal. 334, 346, 116 P. 757, 35 L.R.A.,N.S., 882, Ann.Cas.1912D, 1267; Ford v. Superior Court, 17 Cal.App. 1, 3, 118 P. 96; Newlands v. Superior Court, 171 Cal. 741, 744, 154 P. 829; Sakurai v. Superior Court, 65 Cal.App. 280, Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L.R.A.,N.S., 682, 119 Am.St.Rep. 199; Dixon v. Risley, 114 Cal. 204, 46 P. 5.

[5, 6] No one of the foregoing propositions is weakened in any respect because the action was commenced in the justice's court and in part it sounded in fraud and deceit. The amount sued for being less than $300, the justice's court had jurisdiction to hear it. Stephan v. Superior Court, 183 Cal. 673, 677, 192 P. 1083. As both the first part of the complaint, a cause of action based on a promissory note, and the second part of the complaint, obtaining a loan under false representations, arose out of one and the same transaction, both matters were properly joined in one and the same action. Code Civ. Proc. § 427, subd. 8; Kane v. Mendenhall, 5 Cal. 2d 749, 753, 56 P.2d 498; Barberich v. Pooshichian, 59 Cal.App. 507, 511, 211 P. 236; Figlietti v. Frick, 203 Cal. 246, 249, 263 P. 534.

Let a peremptory writ issue as prayed for.

We concur: NOURSE, P. J.; SPENCE, J.



30 Cal.App.2d 333

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. MUNICIPAL COURT OF CITY OF LOS ANGELES.

Civ. 12142.

District Court of Appeal, Second District, Division 1, California.

Jan. 11, 1939.

1. Prohibition ⇐17

Lack of jurisdiction of municipal court of the city of Los Angeles could not be raised for first time in application for writ of prohibition.

2. Courts ⇐188(3)

Municipal court of city of Los Angeles had jurisdiction of suit, where first count of complaint was for conversion and second count was for money had and received.

Original proceeding by Bank of America National Trust & Savings Association, a national banking association, for a writ of prohibition directed to the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, prohibiting further proceedings in a cause lately pending in such court.

Petition denied.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for petitioner.

PER CURIAM.

An action was filed in the Municipal Court of the City of Los Angeles by Mrs. Rudolph Culli, plaintiff, against the petitioner herein, asking for a judgment on the first cause of action of her complaint for the sum of $371.77, alleging conversion by the bank of funds of the plaintiff in that amount. The second cause of action of the said complaint realleged the allegations of the first cause of action and alleged an indebtedness due plaintiff for money had and received in the same sum of $371.77. The petitioner herein filed a general denial of the said first cause of action on the ground of lack of information or belief. As to the second cause of action it filed a general denial, and set up as a further, second and separate defense to plaintiff's causes of action that plaintiff had no capacity to sue in either of said causes of action; and as a further, separate and third defense to each of plaintiff's causes of action, the petitioner herein, defendant therein, alleged that it had exercised a banker's lien and offset, and alleged that the defendant therein, petitioner herein, had applied to the payment of a judgment owing from one Bernard Toplitzky to the defendant the said sum of $371.77, and asked that plaintiff take nothing.

The judgment of the municipal court was in favor of the plaintiff and against the petitioner herein for the full sum of $371.77. Thereafter the petitioner herein appealed to the superior court, and the appel-

late department of said superior court duly rendered a judgment affirming said judgment of said municipal court and awarding costs of appeal therein.

[1, 2] In this petition for a writ of prohibition, petitioner alleges that the municipal court was without jurisdiction, and in support thereof alleges that the action in the municipal court was a suit in equity by a beneficiary. The point is without merit. In the first place, there was no demurrer interposed and the case was tried in the municipal court without presenting the points here raised. In the second place, the plaintiff pleaded an action in conversion in the first count of her complaint and one for moneys had and received in the second count. Under both these counts she clearly had a right to recover in the municipal court. Smith v. Farmers' & Merchants' Bank, 2 Cal.App. 377, 381, 84 P. 348; Lynch v. Wells Fargo Bank & Union Trust Co., 114 Cal.App. 565, 574, 300 P. 74, and cases therein cited.

The petition for an alternative writ of prohibition is therefore denied.



30 Cal.App.2d 264

PEOPLE v. BOUQUET.

Cr. 2048.

District Court of Appeal, First District, Division 2, California.

Jan. 5, 1939.

Rape ⇐51(4)

Where alleged rape was preceded by threats to shoot victim if she resisted, was accompanied by threats of bodily harm, and was followed by a cruel beating, proof was sufficient to show that resistance was overcome and to sustain conviction, although the force was used after commission of offense. Pen.Code, § 261, subd. 4.

Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

August Edward Bouquet was convicted of rape, and he appeals.

Affirmed.

Raymond Ferrario and Leo A. Sullivan, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant was convicted on a trial by jury upon an information charging rape under the provisions of section 261 of the Penal Code. He appeals from the judgment and from the order denying his motion for a new trial.

The appeal is based upon the sole ground that the evidence does not show "resistance to the utmost" on the part of the prosecutrix. The evidence presented by the state stands uncontradicted. The defendant did not take the stand and offered no evidence in his defense. On the part of the state the evidence shows a preconceived plan on the part of the defendant to accomplish his purpose and to prepare an alibi. The prosecutrix was a maid employed in a hotel in the city of Oakland, a woman of fifty-one years. The defendant approached her while she stood in an unoccupied room in the hotel. He held his right hand in his coat pocket and threatened to shoot if she made an outcry or resisted. He then took her keys and locked the entrance door, placed his handkerchief in her mouth, and tied a scarf taken from the dresser top about her head and face. With continued threats of bodily harm he committed the acts denounced by sections 288a, 261 and 286 of the Penal Code. These were followed by a cruel and inhuman beating of the prosecutrix from which she had not fully recovered at the time of the trial.

Appellant's entire case rests on the premise that since this "force and violence" was used after the commission of the act, there is no proof that her resistance was overcome. He overlooks the provisions of subdivision 4 of section 261 where a distinct element of the crime is defined to be the prevention of resistance "by threats of great and immediate bodily harm". Such was the case proved by the state.

The judgment and the order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

30 Cal.App.2d 301

MURRAY v. BABB et ux.

Civ. 10875.

District Court of Appeal, First District, Division 2, California.

Jan. 10, 1939.

Hearing Denied by Supreme Court March 9, 1939.

1. Trial ⇐330(1)

In action for damages sustained in automobile collision wherein defendants filed cross-complaint, verdict finding for defendants was a "general verdict," and, as such, was one which jury in its discretion was entitled to render. Code Civ.Proc. § 625.

[Ed. Note.—For other definitions of "General Verdict," see Words & Phrases.]

2. Trial ⇐343

A general verdict, if not inconsistent with special findings, includes a finding of every material, necessary, and issuable fact submitted to the jury in favor of the prevailing party.

3. Trial ⇐330(1)

In action for damages sustained in automobile collision wherein defendants filed a cross-complaint and wherein there was substantial evidence that each driver was negligent, general verdict for defendants implied findings of negligence against both drivers.

4. Judgment ⇐256(1)

In action for damages sustained in automobile collision wherein defendants filed a cross-complaint and jury returned general verdict for defendants, judgment "that the defendants and cross complainants take nothing by their cross complaint" was supported by the verdict.

5. Judgment ⇐321

Motion for an order correcting judgment to conform to verdict, being in effect a request to construe verdict, was properly denied where made after discharge of jury.

6. Trial ⇐345

Any objections to form of verdict must be made before jury is discharged, and change, if any, in verdict must be made, not by the court, but by the jury acting under proper instructions.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action for damages sustained in an automobile collision by J. H. Murray against Keith D. Babb and wife wherein defendant filed a cross-complaint. From the judgment, defendants appeal.

Affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

Francis N. Foley, of San Mateo, for appellants.

Charles V. Barfield, of San Francisco, and F. E. Hoffmann, of San Mateo, for respondent.

STURTEVANT, Justice.

On the 7th day of February, 1937, the plaintiff was driving his Plymouth automobile northerly on the El Camino Real in front of Mills Memorial Hospital in San Mateo county. At the same time Keith D. Babb was driving his Chevrolet automobile southerly. Approximately in front of the hospital the two automobiles collided. Thereafter, J. H. Murray, commenced an action to recover damages and named Keith D. Babb and Hazel Babb, his wife, as defendants. They appeared and answered the plaintiff's complaint and also filed a cross-complaint asking for damages. The plaintiff answered the cross-complaint and a trial was had before the trial court sitting with a jury. In his complaint the plaintiff charged that the defendants were negligent in the operation of their automobile. In their answer the defendants denied said allegations and alleged affirmatively that the plaintiff was guilty of contributory negligence. In their cross-complaint the defendants alleged that the plaintiff so negligently operated his automobile as to cause the accident, that the defendants suffered serious injuries, and they prayed for judgment against the plaintiff in the sum of $25,550. On the trial all of said issues were presented to the jury. Furthermore, a specific instruction on each of said allegations was given by the trial court. The jury returned a verdict, "We, the jury in the above entitled cause, find for the defendants eleven to one." Both parties concede that the expression "eleven to one" means eleven jurors voted for the verdict and one juror voted against it. That concession is so clearly supported by the record no further attention will be given to the expression. The verdict therefore was in effect as follows: "We, the jury in the above entitled cause, find for the defendants." From the judgment in their favor the defendants have appealed. Additional facts will hereinafter be stated as the necessity requires.

[1, 2] (1) The defendants contend the jury failed to find on the issues presented by their cross-complaint. That contention we think rests on a misconception of the force and effect of the verdict as rendered. In form it was a general verdict and as such it was one which the jury in its discretion was entitled to render. Code Civ. Proc., § 625. As to the effect of a general verdict in the instant case, the law is equally clear. In 64 C.J. 1106 the author says: "As a general rule, if it is not inconsistent with special findings, a general verdict includes a finding of every material, necessary, and issuable fact submitted to the jury in favor of the prevailing party. * * *" In Plyler v. Pacific, etc., Cement Co., 152 Cal. 125, at page 130, 92 P. 56, at page 58, the court said: "It is, of course true, but no truer to-day than it always has been, that a general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense, * *." In Hunt v. Elliott, 77 Cal. 588, 20 P. 132, the defendant had pleaded a cross-complaint which the plaintiff answered and all of the issues were submitted to a jury. It returned a general verdict in favor of the plaintiff. On appeal the defendant made the same contention which the defendants make in the instant case. On page 590, 20 P. on page 133, the court said: "The objection that the verdict should be set aside because there were no special findings on the issues raised by the cross-complaint and the answer thereto cannot be sustained. The Code provides that, 'in an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict.' Code Civil Proc. § 625. This action was for the recovery of money only, and the verdict covered all the issues presented by the pleadings. There was no necessity, therefore, for special findings."

[3] The conclusion just stated is reinforced by the facts contained in the record. The evidence was conflicting as to the negligence of the drivers of the respective cars. There was substantial evidence that each driver was negligent. Before the jury retired to deliberate on its verdict, without objection the clerk delivered to the jury three several forms of verdicts:

"Form I: We, the jury in the above entitled cause, find for the plaintiff and against the defendants in the sum of ——— Dollars.

"Form II: We, the jury in the above entitled cause, find for the defendants.

"Form III: We, the jury in the above entitled cause, find for the defendants and cross-complainants on their cross-complaint and against the plaintiff and cross-defendant in the sum of ——— Dollars."

The jury selected and returned as its verdict Form II. It declined to return Form I and we must assume because the plaintiff was negligent. It declined to return Form III and we must assume because the defendant, Keith D. Babb, was negligent. Form II implied findings of negligence against both drivers. Asebez v. Bliss, 178 Cal. 137, 138, 172 P. 595. Hence the proper form of verdict was the one returned by the jury.

[4] (2) In entering the judgment the clerk inserted a paragraph: "Wherefore, it is ordered, adjudged, and decreed, that the plaintiff take nothing by his complaint and that the defendants and cross-complainants take nothing by their cross-complaint." The defendants contend the portion of the judgment, as rendered, reading "that the defendants and cross-complainants take nothing by their cross-complaint" is not supported by the verdict and does not conform thereto and is erroneous. We think the contention is not supported by the record. The expressions "by his complaint" and "by their cross-complaint" were both surplusage. But neither expression was in conflict with the meaning of the verdict, "We, the jury in the above entitled cause, find for the defendants." Neither did either expression add to the legal effect of the verdict as framed.

[5, 6] (3) The verdict under attack was received and filed September 4, 1937. It was so received in the presence of the parties and their attorneys. No objection as to the form of the verdict was made by the defendants. Judgment was entered and recorded on the same day. Thereafter, on the 21st day of September, 1937, the defendants served and filed a notice of motion for an order correcting the judgment to conform to the verdict. Their notice recited that the motion would be based upon all the records, pleadings, papers and files, and upon their said notice. The plaintiff opposed said motion and offered in support of his opposition the affidavit of the deputy county clerk who was the clerk of the court during the trial, and the official court reporter who acted as the reporter when the verdict was returned.

The motion was denied. At this time the defendants assert the court erred in denying their motion. The point may not be sustained. The motion was, in effect, a request to construe the verdict. Any objection to the form of the verdict, if made at all, should have been made before the jury was discharged and the change, if any, in the verdict should have been made not by the court but by the jury acting under proper instructions. Mitchell v. Stringer, 133 Cal.App. 207, 209, 23 P.2d 765.

We find no error in the record. The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



30 Cal.App.2d 296

In re LOCKHART'S ESTATE.

HARPER et al. v. LOCKHART et al.

Civ. 11978-S.

District Court of Appeal, Second District, Division 1, California.

Jan. 9, 1939.

Rehearing Denied Feb. 1, 1939.

Hearing Denied by Supreme Court March 9, 1939.

1. Appeal and error ⇐1203(1)

Further proceedings may be had in trial court in proper cases to effect judgment of reviewing courts; the limit and extent thereof depending upon the reviewing court's order.

2. Appeal and error ⇐1214

Where opinion of reviewing court recited that judgment for distribution of estate was modified "so that [life beneficiary's administrator] shall receive that part of such income which the trustee collected in his decedent's lifetime," but the opinion as a whole showed that judgment as modified should be based on findings already settled, additional evidence concerning amount of income collected by trustee during beneficiary's lifetime was not admissible in the proceedings after remittitur.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Proceeding in the matter of the estate of Thomas G. Lockhart, deceased, wherein George Lockhart and others were interested, and the Security-First National Bank of Los Angeles presented final account and report. From a judgment and decree ordering final distribution, in conformity with a decision of the District Court of Appeal, 69 P.2d 1001, Ruth Lockhart Harper and another appeal.

Affirmed.

W. W. Wallace, of Los Angeles, and Charles F. Hutchins, of Pasadena, for appellants.

William G. Junge and Mott, Vallee & Grant, all of Los Angeles, for respondents Myra B. Rockwell and George J. Lockhart.

J. Marion Wright, of Los Angeles, for respondent Gladys S. Crail, executrix.

William Ellis Lady, of Los Angeles, for respondents Mildred Canavan and William Ellis Lady.

DORAN, Justice.

This is an appeal from a portion of a decree and judgment rendered after a decision by the District Court of Appeal, ordering final distribution of a testamentary trust estate. See Estate of Lockhart, 21 Cal.App.2d 574, 69 P.2d 1001.

The original decree of distribution of the estate of Thomas G. Lockhart, deceased, dated September 29, 1915, distributed "in pursuance of and according to the provisions of the last will of said decedent" to Security Trust & Savings Bank the residue of the estate upon the following trusts: "The net annual income *received* or *derived* from said trust estate shall go and be paid as follows, to wit: (a) The sum of one thousand ($1,000) dollars per annum, in equal semi-annual installments, shall go and be paid by said trustee to George J. Lockhart, a son of the testator, to and until he shall attain the age of fifty (50) years, * * * (and thereafter) a full one-sixth of the principal of the trust estate * * * shall go, vest in and be transferred absolutely, to said George J. Lockhart". (Italics added.) Identical provisions were repeated as to another son, Harry C. Lockhart, and as to a daughter, Myra B. Rockwell, except that as to the latter the age at which the one-sixth interest would vest was fixed at 40 years. The decree further provided that "all of the remainder of said net income shall go and be paid by said trustee in equal semi-annual installments to Minnie A. Lockhart, widow of said testator", and that upon the wid-

ow's death the trust should cease and the entire property then in trust should go in fee, equally, to the three children. No appeal was taken from this decree.

The trust terminated on January 14, 1936, upon the death of the testator's widow, and the Security-First National Bank of Los Angeles, trustee, thereafter filed its seventeenth and final account and petition for instructions as to the distribution of the property remaining in its hands. In answer thereto various interested parties set forth their respective claims; among those, the administrator of the widow's estate claimed certain income which had accrued, but had not been paid to the decedent during her lifetime. Evidence, both oral and documentary, was introduced and the cause was submitted for decision.

The trial court thereafter filed its findings of fact, the material portion of which, affecting the within appeal, is in part as follows: "That at the time of the demise of said Minnie A. Lockhart the income that had been earned on the principal of the trust estate but which had not been collected, through no fault of the trustee, amounted to $16,875.71. That on June 11, 1936, there had been collected on said amount the sum of $1,641.64, leaving a balance of $15,234.07 income earned as of January 14, 1936, and uncollected thereon as of June 11, 1936, which the heirs and/or devisees and legatees of Minnie A. Lockhart are entitled to receive, subject to the administration of her estate, if, as and when the same is hereafter received and collected."

The conclusions of law, and the judgment and decree approximated the findings.

Myra B. Rockwell and George J. Lockhart, the only appellants from such decree, appealed from certain other portions of the judgment, and, as pertaining to the within appeal, from that portion of the decree distributing to the estate of the deceased widow the income which had accrued prior to the widow's demise, but which remained uncollected as of June 11, 1936.

With respect to this issue, the District Court of Appeal declared [page 1004]: "The judgment ordered the trustee to pay to the administrator of the widow's estate net income received and derived from the trust estate between the date of the last semiannual installments and her death and therefore unpaid to her, and also net income earned during such period but collected thereafter. The [original] decree of distribution provided that the remainder of the net annual income *received* or *derived* from the trust estate *should* go and *be paid* by the trustees in equal semiannual installments to the widow. It further provided that the trust should terminate upon her death, and that thereupon the entire property then in trust should vest in the three children. Appellants argue that the decree created either an annuity or a legacy for maintenance, no part of which vested in the widow before the semiannual payment of the whole and that, therefore, net income earned but unpaid during her life should be distributed to the children as part of the trust estate instead of to the administrator as money due her. It was not an annuity because its amount, being dependent on earnings, was uncertain, and it was not a legacy for maintenance because there is no evidence that such was the testator's intention. Since the bequest was of net income received or derived, the widow was only entitled to such income after its receipt. * * * Since the net income, when received, was to go to the widow, her right thereto vested immediately on its receipt, although payment was to be made semiannually. * * * Her administrator was entitled to the income which was received by the trustee but which was not paid to her during her lifetime. [Citing cases.] He is not, however, entitled to income which the trustee collected after her death." Estate of Lockhart, supra. The trial court was instructed to modify its judgment accordingly, and to retry the issue as to an allowance of interest upon a claim by one John W. Luter, an assignee of George J. Lockhart.

After the remittitur in the appeal was filed, and pursuant to notice of hearing, the seventeenth and final account and report were again presented to the trial court, and it was then ascertained that Luter's claim to interest had been waived. At this time the residuary distributees of the estate of the deceased widow (appellants in the within appeal), called as a witness an officer of the trustee bank, for the purpose of proving the amount of income collected by the trustee in the lifetime of the deceased widow, but not paid to her, representing rents collected, interest, and interest on loans secured by trust deeds on real estate, which trust deeds had been foreclosed and the property purchased by the trustee, and which accounts were re-

tained by the trustee as a part of its trust funds. Objections were made on the grounds that the modification of the judgment by the appellate court was final and that the matter was res adjudicata; the objections were sustained. The court refused an offer of proof made on behalf of appellants, and thereafter entered its judgment and decree in conformity with the decision of the District Court of Appeal referred to above.

Appellants contend that "where a judgment is modified by the opinion of an appellate court, the trial court should thereafter hear evidence to comply with the modification directed by the opinion; and that where a trustee has foreclosed trust deeds and purchased property and both principal and interest are represented in the purchase price, a proper division of the proceeds of sale should be made between those entitled to the interest and those entitled to the principal".

Respondents contend that the aforesaid objection was properly sustained for the reason that appellants are foreclosed from offering such proof, as the first judgment settled the issues now sought to be raised. It is pointed out that such judgment was based on findings that definitely stated the amount of the income which had been collected prior to the death of Minnie A. Lockhart and also the amount that had accrued prior to that time but was uncollected on January 14, 1936, and, furthermore, that the widow had been paid all installments of income earned and collected during her lifetime which were due her. It is argued that inasmuch as appellants herein failed to attack such findings and judgment, it is too late to urge the grounds now that might have been available to them on the first appeal, and that as to such matters the issues are res adjudicata.

[1] That further proceedings may be had in proper cases for the purpose of effecting the judgment of the reviewing court appears to be well settled, the limit and extent thereof depending upon the order of such reviewing court. English v. Olympic Auditorium, Inc., 10 Cal.App.2d 196, 52 P.2d 267.

[2] In this connection appellants sought to prove, as heretofore noted in substance, that by reason of certain transactions of the trustee several thousand dollars in net income due appellants were not included in the $16,875.71, found by the court to be "the income that had been earned on the principal of the trust estate but which had not been collected". It is argued, in effect, that although income may temporarily lose its identity in terms of money, nevertheless, so long as it can be traced and definitely located as an undivided portion of tangible property capable of severance, it is available as such to those lawfully entitled thereto. Both the offer of proof and the aforesaid argument might find support in the evidence and the law if such a showing were entitled to be made. However, it should be noted, as contended by respondents, that appellants herein took no appeal from the original judgment of the trial court, nor were the findings in support of such judgment questioned by said appellants within the time allowed by law. The right, therefore, to retry any questions settled by the judgment of the trial court manifestly depended upon the judgment of the District Court of Appeal as set forth in the opinion in Re Estate of Lockhart, supra. In that regard, appellants rely on that portion of the opinion of the reviewing court which is as follows: "It [the original judgment] is modified in its distribution of the net income to the administrator of the estate of Minnie A. Lockhart, so that he shall receive that part of such income which the trustee collected in his decedent's lifetime * * *." Standing alone, such portion of the opinion might warrant the interpretation contended for by appellants; however, for the purpose of determining its legal effect it should be read in connection with the opinion as a whole. Thus read and considered, it is apparent that the order to modify the judgment as to the amount to be distributed to the administrator of the estate of Minnie A. Lockhart, clearly signified that such judgment, as modified, should be based on the findings already settled. In the absence of a clear intention to the contrary, any other conclusion would be unwarranted. This is especially true in view of the fact that, with regard to the claim of John W. Luter, the opinion clearly provided that the issue as to the allowance of interest upon such claim was to be retried.

The ruling of the trial court, therefore, on the objection to the introduction of any evidence on issues settled by the first judgment, was proper.

For the foregoing reasons the decree and judgment appealed from is affirmed.

We concur: YORK, P. J.; WHITE, J.

30 Cal.App.2d 283

HALL v. KAUFMAN et al.

Civ. 2071.

District Court of Appeal, Fourth District, California.

Jan. 6, 1939.

Appeal and error ⇐1071(6)

Where defendants alleged contributory negligence in pedestrian's action for injuries sustained when pedestrian came into contact with automobile turning right at intersection on change of signal, trial court's failure to find on that issue was prejudicial error under evidence.

J.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Melvina P. Hall against Max Kaufman and another for injuries sustained when plaintiff came into contact with an automobile. From a judgment for plaintiff, defendants appeal.

Reversed.

Arthur F. H. Wright, of San Diego, for appellants.

Hervey & Holt, of San Diego, for respondent.

MARKS, Justice.

This is an action for damages suffered by plaintiff when she came into contact with a motor vehicle owned by the Western States Grocery Company and driven by Max Kaufman, its employee. Plaintiff was given judgment in the sum of $4,000 and this appeal followed.

Defendants alleged contributory negligence on the part of plaintiff. The trial court failed to find on this issue. The only question we need to consider, is—Does this omission in the findings constitute prejudicial error? This question must be answered in the affirmative, unless, after an examination of the evidence, we can say as a matter of law that the plaintiff was not guilty of contributory negligence. Otherwise it remained a question put in issue by both the pleadings and the evidence which should have been decided by the trial court.

The accident happened at the corner of Sixth street and Broadway in the city of San Diego. These streets intersect each other at right angles, with Broadway running east and west. Traffic is controlled by signals. Pedestrian crossing lanes are established on each of the four sides of the intersection.

Kaufman, driving the automobile on Sixth street, approached the intersection from the south. He stopped at the pedestrian lane and waited the change of signals which would permit him to enter the intersection, turn right and proceed east on Broadway. When the signals changed he entered the intersection, signaling a right turn. He stopped twice to allow the pedestrian lane in front of him to clear and when the roadway was clear he continued on his way. He testified that he did not see plaintiff but felt an impact against the right side of his car. He stopped, alighted and found plaintiff lying on the pavement partially under the right side of the car.

Plaintiff testified that she left the sidewalk on the change of signals to cross Broadway from south to north after looking for vehicular traffic but did not see the automobile until about the moment of impact.

A witness for plaintiff thus described the accident:

"I was on the east side of Sixth street and started south across Broadway and there were several others ahead of me and I was the last one of that group and there was a car coming north and turned east into Broadway and I passed along just in front of it. It was just at my right. And as I passed along I could see out of the corner of my eye as I passed it that it was moving on. Well, there was a woman at my left going north and she passed on and the thought came to me— * * * The thought came to me that if she went on and the car went on they might get together. And so I turned to look and just as I looked, why, the woman, her face was just going against the glass of the front door of the car and she sort of threw her head back and the car threw her to the pavement. And when she struck the pavement then she turned over partly with her face up, partly under the running board, and her feet were back towards the back end of the running board. Her face was just about where the running board joins onto the front fender. And her feet, she was lying parallel with the car and her face up and the car was still somewhat on a curve and she was in a position where if the car moved further she was in danger of the hind wheel, which naturally would draw towards her, running over her."

Under this state of the record it seems clear that the question of contributory negligence was put in issue, not only by the pleadings, but by the evidence. It was a material issue and the trial court should have found upon it. As was said in Tucker v. United Railroads, 171 Cal. 702, 154 P. 835, 836: "The pleadings clearly raised the issue, and the court was bound to find upon the question whether or not deceased was guilty of contributory negligence proximately causing her death. The failure of the court to make a finding responsive to this issue was error."

The failure to find on this very material question was, under the facts before us, "prejudicial error, entitling the complaining suitor to reversal" of the judgment. Huntington v. Vavra, 36 Cal.App. 352, 172 P. 166, 168. See, also, Estate of Pendell, 216 Cal. 384, 14 P.2d 506.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.



30 Cal.App.2d 280

MOHUN v. WOLDEN, Assessor.

Civ. 10552.

District Court of Appeal, First District, Division 2, California.

Jan. 6, 1939.

Constitutional law ⇐208(1)
Taxation ⇐194

Amendment to constitutional provision allowing $1,000 exemption from taxation to residents who served in armed forces, in time of war, providing that exemption should not apply where wife of soldier or sailor owns property of value of $5,000 or more, is not unconstitutional as "class legislation" on ground that exemption is denied to a man but granted to a woman, since proviso serves only to limit men who may make claims for exemption and does not create any right in behalf of women. Const. art. 13, § 1¼, as amended in 1932.

[Ed. Note.—For other definitions of "Class Legislation," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Mandamus by Brooke Mohun against Russell L. Wolden, as assessor of the City and County of San Francisco, to compel the defendant to allow the exemption from taxation claimed by the plaintiff. Judgment for defendant, and plaintiff appeals.

Affirmed.

Frank T. O'Neill, of San Francisco, and Brooke Mohun, in pro. per., for appellant.

John J. O'Toole, City Atty., City and County of San Francisco, and Reynald J. Bianchi, Deputy City Atty., both of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff applied to the superior court for a writ of mandamus. An alternative writ was issued and thereafter the defendant appeared and filed a demurrer. After hearing the parties present the questions of law the trial court sustained the demurrer without leave to amend. Judgment was entered in favor of the defendant. From that judgment the plaintiff has appealed.

In his petition the plaintiff alleged that he is a legal resident of this state and that he is a veteran of the world war and holds an honorable discharge; that on the 24th day of June, 1936, he filed with Russell L. Wolden, as the assessor of the City and County of San Francisco, an affidavit demanding an exemption of certain property from taxation to the extent of $1,000; that the property on which he demanded said exemption is of the value of $210; that the defendant allowed petitioner an exemption of $100 as a householder and no more, leaving property of the value of $110 subject to taxation; that the said property of the value of $210 is all of the property of petitioner in this state subject to taxation; that he has no other property in this state or elsewhere of a value in excess of $5,000; that he is a married man and that his wife owns property in this state in excess of $5,000; and that on the 24th day of June, 1936, the defendant refused to grant petitioner's said demand.

A copy of the plaintiff's demand on the defendant was pleaded by the plaintiff in haec verba and accords with the allega-

tions hereinabove set forth. The plaintiff states his contentions in five different points but all of them are but different methods of presenting his sole contention, which is a claim that a part of section 1¼ of article 13, denies an exemption to a man but grants the same exemption to a woman. In other words, the plaintiff claims section 1¼ of article 13 is class legislation. The vice in that claim is that there is not a word in the section susceptible of such construction. The section was originally enacted October 10, 1911. At that time a woman veteran had never been heard of. It is clear, therefore, that the original section presumptively made no mention of women veterans. From time to time after the year 1911 the section was amended. The last amendment occurred November 8, 1932. Omitting certain of the amendments that are not material to the question before us, said section reads as follows: "The property to the amount of one thousand dollars of every *resident* of this State who has served in the army, navy, marine corps or revenue marine service of the United States in time of war, and received an honorable discharge therefrom, * * * or lacking such amount of property in his own name, so much of the property of the wife of any such person as shall be necessary to equal said amount; and the property to the amount of one thousand dollars of the widow resident in this State, or if there be no such widow, of the widowed mother resident in this State, of every person who has so served and has died either during his term of service or after receiving an honorable discharge from said service, * * * and the property to the amount of one thousand dollars of pensioned widows, fathers, and mothers, resident in this state, of soldiers, sailors and marines who served in the army, navy or marine corps or revenue marine service of the United States shall be exempt from taxation; provided, this exemption shall not apply to any person named herein owning property of the value of five thousand dollars or more, *or where the wife of such soldier or sailor owns property of the value of five thousand dollars or more.* No exemption shall be made under the provisions of this act of the property of a person who is not legal resident of the State; * * *". What remains is merely in substance the provision that was enacted in 1911. It will be observed the section grants (1) to veterans an exemption in the sum of $1,000; (2) an exemption in the same sum to the widow, etc., of a veteran; (3) an exemption to the pensioned widows, etc., of said veterans. Said grants are clearly in behalf of men veterans and those claiming under and through such veterans. No single word is contained in the section recognizing the existence of women veterans. The plaintiff italicizes the word "resident" in the second line of the section and argues therefrom that in the broad meaning of the word it applies to a woman as well as to a man, however, there was nothing in the history of the section showing it had any such meaning when placed in the section in 1911. Having made the first grant as to a veteran's property in the sum of $1,000, the section continues, "or lacking such amount of property in his own name, so much of the property of the wife of any such person as shall be necessary to equal said amount * * *". That language clearly shows that the framers of the section were making the grant to men and not to women nor to both men and women. The plaintiff italicizes and stresses the proviso, "* * *

provided, this exemption shall not apply to any person named herein owning property of the value of five thousand dollars or more, *or where the wife of such soldier or sailor owns property of the value of five thousand dollars or more*". That proviso limits the men who may make claims for exemption but it does not create any right whatever in behalf of women.

The claim of the plaintiff is without merit. The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

30 Cal.App.2d 313

CROW v. KENWORTHY et al.

Civ. 5966.

District Court of Appeal, Third District, California.

Jan. 10, 1939.

1. Sales ⇐114

Where it appears that buyer was induced to enter into contract by fraud of seller, he is entitled to maintain action for rescission and damages.

2. Sales ⇐113

Action for rescission of contract to purchase neon sign would not lie, where fraudulent representations were made concerning matters which had nothing to do with inception of contract, or making of it, but pertained solely to matters connected with performance of contract.

3. Sales ⇐166(1)

Under contract for sale of neon sign providing that sellers should erect such sign on buyer's hotel, in such manner that it would comply with city regulations, buyer's refusal to permit sellers to use angle iron in erection of sign which exceeded by one inch size recommended by city engineer was unwarranted, where city engineer testified that irons of such size would satisfy city regulations.

4. Sales ⇐175

Offer of sellers of neon sign to install larger angle irons so as to comply with city regulations, and unwarranted refusal of buyer to permit them to do so, was equivalent of full performance in respect to term of the contract requiring sign to be erected in compliance with city regulations, and hence statement of seller that everything had been taken care of according to contract was not a false representation which would justify buyer's rescission. Civ.Code, § 1512.

Appeal from Superior Court, Stanislaus County; L. J. Maddux, Judge.

Action by H. T. Crow against J. R. Kenworthy and R. H. Spencer, copartners doing business under the firm name and style of Ad-Art Signs, Ad-Art Signs, a copartnership, and J. R. Kenworthy and R. H. Spencer, to rescind a contract for the sale of a neon sign. From a judgment for the plaintiff, the defendants appeal.

Reversed.

Cornell & Brack and Samuel V. Cornell, all of Modesto, for appellants.

J. W. Hawkins and Hawkins, Hawkins & Cardoza, all of Modesto, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action brought to rescind a contract for the sale of a neon sign, and for the recovery of the purchase price. The court was also asked to remove the sign from the building of the plaintiff.

The complaint in the action is based upon fraudulent representations which are alleged to have been made by defendants to the effect that the contract had been fully performed by them. The answer sets up several defenses, including those of waiver and the prevention of performance by plaintiff and a substantial performance by defendants.

The facts of the case are practically without conflict. They disclose that plaintiff was the owner of an hotel in the city of Modesto; that the defendants conducted a sign advertising business in the same city; that on or about January 6, 1936, the parties entered into a written contract for the construction and erection of an electric sign on said hotel. Some five weeks after the sign had been erected upon the premises of plaintiff, and after it had been operated by plaintiff during that length of time, plaintiff notified the defendants, in writing, to remove said sign from said building, but defendants failed to do so. On May 9, 1936, plaintiff, in writing, notified the defendants that plaintiff rescinded the contract for the construction and installation of said sign, and demanded that the defendants remove the sign from said building, and return the consideration therefor.

Upon the failure of the defendants to comply with these demands, this action was commenced, a trial was had before the court, and judgment was thereafter rendered rescinding the contract, and for the recovery of the purchase price from defendants in the sum of $650; and it was further ordered in said judgment that defendants remove said sign from said building within five days after entry of said judgment.

One of the terms of said contract, and the only one pertinent to this appeal, provided that the defendants construct and erect said sign in such a manner that it

would comply with the regulations and pass the inspection of the city of Modesto.

The sole ground for the rescission is that the defendants, at the time payment was made for said sign under said contract, in effect, fraudulently represented that said sign had been passed and accepted under the regulations of the city of Modesto. The entire testimony bearing upon the question of the representations was given by the plaintiff as follows:

"Q. Mr. Crow, when you paid Mr. Kenworthy, or the Ad-Art Sign Company the $600 some odd dollars, at that time did you know that the city had or had not accepted—or I will state it this way: What did Mr. Kenworthy tell you at that time? A. Mr. Kenworthy came into my office with a bill and said he would like to have some money, he had to pay his help, and I says, 'Well, Mr. Kenworthy, has everything been taken care of?' And he said: 'Yes'. I said, 'According to contract?' He said, 'Yes'. I said, 'All right'. So we straightened it up, gave him his money."

It will be observed that at no time did the defendants actually represent that the city of Modesto had given its approval to the installation of the sign. It is contended by plaintiff, however, that the above language carries the implication to the effect that the city had given its approval. It is admitted by all parties that the city of Modesto never passed upon or accepted the installation of said sign.

[1, 2] There is no contention made by plaintiff to the effect that either at the inception of said contract, or prior thereto, any fraudulent representations were made with respect to the same. The fraud, if any, arose not in connection with the execution of the contract, but long after the contract was executed, and related to matters which concerned the carrying out of the terms of said contract. No authorities have come to our attention which justify or authorize the rescission of a contract under such circumstances, where the rescission is based solely upon the ground of fraud. "Where it appears that the buyer was induced to enter into the contract by fraud or misrepresentation on the part of the seller, he is entitled to maintain an action for rescission and damages." 22 Cal.Jur. 912. We are of the opinion that an action for rescission would not lie under the circumstances of this case, where the fraudulent representations were made concerning matters which had nothing to do with the inception of the contract, or the making of the same, but pertained solely to matters connected with the performance of the contract. However, this question was not raised by any of the parties on this appeal, and apparently the case was tried upon the theory that the pleadings properly presented an action for rescission and damages.

[3] It appears that prior to the erection of the sign the city engineer of Modesto recommended that the angle iron to be used as a support for said sign should be in size 3 inches by 4 inches by ⅝ inch, and that all the rest of the supporting members would be angle irons of a size 3 inches by 4 inches by ½ inch in thickness. When the sign was erected the angle irons actually used were slightly less than this requirement. Before the sign was erected it appears without dispute that the defendants offered and submitted, and attempted to install angle irons which were 4 inches by 4 inches by ⅝ inch in size, in fulfillment of the terms of the contract, which required "suitable" irons for this purpose. The city engineer testified that angle irons of such size would satisfy the regulations of the city of Modesto. It will be noted that the size of the irons last mentioned exceeded by one inch the size recommended originally by the city engineer. When the defendants attempted to use the larger sized irons, which were satisfactory to the city, they were forbidden to do so by plaintiff. We quote plaintiff's testimony, which is the sole basis for such refusal, "It was too big and cumbersome and detracted from the appearance of the hotel, and would look bad."

The reasons given by the plaintiff for his refusal to permit the larger irons to be used appear to be arbitrary and unreasonable. An iron one inch larger than that specified may have offended his aesthetic sense, but we do not believe that upon this ground alone he was justified in forbidding plaintiff to thus complete the performance of the contract.

[4] The gravamen of the action is the alleged false representation made in the manner we have pointed out. When defendant Kenworthy stated that "everything had been taken care of according to contract", he was legally correct. Defendants had performed all of the terms of the contract. The offer to install the larger irons, and the unwarranted refusal of plaintiff

to permit them to do so is, in law, the equivalent of full performance on the part of defendants in respect to this, the only disputed term. "If the performance of an obligation he prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties." Civil Code, § 1512. Defendants had done all within their power to carry out the obligations imposed upon them by the contract, and the law requires nothing more. The finding to the effect that the said representation was false is therefore not sustained by the evidence.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.



30 Cal.App.2d 306

REIMAN v. MOORE et al.

Civ. 6109.

District Court of Appeal, Third District, California.

Jan. 10, 1939.

Rehearing Denied Feb. 9, 1939.

Hearing Denied by Supreme Court March 9, 1939.

1. Trial ⇐165, 178

In passing upon motion for nonsuit or directed verdict after introduction of evidence, court must disregard conflicting evidence and accept as true all evidence offered in support of plaintiff's case and give to plaintiff benefit of any legitimate inference therefrom.

2. Trial ⇐109

Where motion is made for directed verdict upon opening statement, such statement as well as allegations of the complaint must be taken in entirety as true.

3. Landlord and tenant ⇐170(1)

A landlord is properly chargeable with liability to stranger where the cause of injury to stranger is a nuisance existing on the premises at time of the demise.

4. Negligence ⇐136(26)

Contributory negligence is ordinarily a matter to be determined by jury.

5. Negligence ⇐68, 136(26)

Ordinarily an invitee upon premises has a right to assume that she has a reasonably safe place in which to move about and whether or not she exercises reasonable care for her own safety is a question for jury.

6. Landlord and tenant ⇐162, 167(8)

Where landlord retains control of portion of building for use and benefit of all tenants, landlord has duty to exercise reasonable care to keep that portion of premises in a safe condition for the tenants and their invitees.

7. Landlord and tenant ⇐169(11)

In action for injuries sustained when invitee of tenant fell through skylight while assisting in gathering laundry from clothesline which was on roof of building for use of all tenants, whether landlord and owner had performed duty of exercising ordinary and reasonable care to keep premises in safe condition for tenants and their invitees was for jury.

8. Landlord and tenant ⇐169(11)

In action for injuries sustained when invitee of tenant fell through skylight while assisting in gathering laundry from clothesline which was on roof of building for use of all tenants, whether 15 year old invitee who had never been on roof before was contributorily negligent was for jury.

Appeal from San Joaquin County; C. W. Miller, Judge.

Personal injury action by Betty Reiman, a minor, by and through her guardian ad litem, Esther Koller, against Lutie Hineline Moore and another. From a judgment of dismissal, plaintiff appeals.

Judgment reversed, and new trial granted.

Hearing denied by Supreme Court; CURTIS, LANGDON, and EDMONDS, JJ., dissenting.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

Honey & Mayall, Maxwell M. Willens, Levinsky & Jones, and Jack J. Miller, all of Stockton, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff and appellant, a minor, through her guardian ad litem, filed her complaint in this action, to which demurrers were interposed and overruled. Thereupon defendants answered, and the cause was reg-

ularly set for trial before a court and jury. After the empanelment of the jury, counsel for plaintiff made an opening statement reciting fully the facts in support of the cause of action as set forth in the complaint. At the close of the opening statement of plaintiff's case, counsel for defendants moved the court for an order directing the jury to return a verdict in favor of defendants and against the plaintiff. After argument the motion was granted, and the jury directed to return a verdict in favor of defendants and against plaintiff, which was done. Upon this verdict a judgment was entered, and it is from this judgment this appeal is taken.

From the opening statement the following facts appear:

In the city of Stockton is located a three-story building, the ground floor being used for business purposes and the two upper floors as an apartment house. This building was owned by respondent Stockton Realty Company, Ltd., a corporation. The upper floors of this building were originally leased by the corporation to a Mr. and Mrs. Blackwell, who subsequently, with the consent of the owner, assigned the lease to Lutie Hineline Moore, and she at all the times herein mentioned conducted the apartments as lessee thereof. At the time this apartment house was leased by the corporation to the Blackwells, and since said assignment by them to the present lessee, the condition of the roof, as hereinafter described, has remained the same.

It is not contended that the premises had become dangerous through deterioration or through lack of repair. The condition complained of, and as described in the opening statement, had continued from the date of the execution of the original lease to the date of the accident.

Counsel for plaintiff during his opening statement referred to and, by stipulation, there was introduced in evidence, a diagram of the roof. From this diagram and from the statement of counsel it appears that at all the times herein mentioned there was a room on the roof used as a laundry for the washing of clothes. From this room there opened out onto the roof, a door. On the roof were clothes lines where clothes that had been washed in the laundry could be hung to dry. Also on the roof were three skylights, all constructed on practically the same plan. The skylight in question consisted of an opening in the roof three feet by five feet. Around this opening was a perpendicular wall twelve inches high, and resting upon this raised casing around the opening was a four-pane skylight, two panes on each side and the ridge pole between the sides elevated some eighteen inches above the side wall. The panes of glass were seventeen by twenty-eight inches, the length extending from the ridge pole to the baseboard. The skylights were plainly visible to anyone on the roof.

One of the apartments in this building was rented to Mrs. Green. Appellant, Betty Reiman, a minor of about fifteen years of age, was invited to the apartment house by a daughter of Mrs. Green, and was assisting her in collecting some clothes from a line on the roof, and in stepping backward to permit the opening of the laundry door, tripped and fell through the skylight to the floor below, suffering serious and permanent injuries.

This suit was brought against the corporation and its lessee jointly, alleging that they were jointly in possession and control of the premises, knew of the dangerous and defective condition then existing on the roof, and negligently kept and maintained the same in such defective and dangerous condition.

It was the contention of respondent that the opening statement of appellant failed to state sufficient facts to justify the cause being submitted to the jury. With this position we cannot agree.

[1, 2] In passing upon a motion for a nonsuit or a directed verdict after the introduction of evidence, the court must disregard conflicting evidence and accept as true all evidence offered in support of plaintiff's case and give to plaintiff the benefit of any legitimate inference therefrom. As here, where the motion is for a directed verdict upon the opening statement, such statement must be taken in its entirety as true, as well as the allegations of the complaint. This rule is stated in Bias v. Reed, 169 Cal. 33, 145 P. 516, the court there saying [page 518]: "In reviewing an order directing a verdict on an opening statement, the appellate court must apply rules analogous to those which govern it in reviewing an order granting a nonsuit after the introduction of evidence. Every fact which counsel has stated as among the matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted by the court as facts which would have been proved if the case had been allowed to be tried."

With this general rule in mind it would appear that the facts alleged in the second amended complaint and the opening statement to the jury make out a case of liability against the defendants.

In Hassell et al. v. Denning et al., 84 Cal. App. 479, 258 P. 426, the plaintiffs, being at that time the occupants of a portion of a two-story building, brought an action to recover damages on account of personal injuries sustained by the wife falling from an outside stairway. It is alleged that the stairway and landing were jointly used by them and defendants, the owners of the property. The accident was caused by the collapse of a wooden railing enclosing the landing, it being alleged that the same was faulty in construction, insecure, latently defective, and constituted a dangerous nuisance, and that such defective condition was at all times known to defendants but unknown to plaintiffs.

The appellate court, reversing an order sustaining the demurrer to this complaint, held that under the doctrine of caveat emptor and in the absence of fraud, concealment, or covenant, a landlord is not liable to a tenant for injuries due to defective condition or faulty construction of the demised premises, but that a lessor is liable for personal injuries to a lessee caused by defects in the premises known to the lessor and unknown to the lessee. After discussing the situation as to such unknown or concealed defects, the court continues [page 427]: "Another qualification of the doctrine of caveat emptor in its relation to demised premises is that, where a portion of the premises is reserved by the landlord for use in common by himself and tenants, or by different tenants, a duty is imposed upon him to use ordinary care to keep those particular portions of the premises in a safe condition; and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor." (Citing many cases.)

This rule was quoted and applied in the case of Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 26 P.2d 7. In that case the Supreme Court announced the rule it was the duty of the landlord to keep the particular portion of the premises under his control in a safe condition and not merely in as good condition as the same were at the time of the commencement of the tenancy.

In Spore v. Washington, 96 Cal.App. 345, 274 P. 407, the following language is found [page 409]: "A landlord letting portions of a building to separate tenants, retaining other portions under his control, is under the responsibility of a general owner of real estate who holds out a general invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the portion thus retained by him reasonably safe and fit for the uses which he has invited others to make of them."

The facts in the case of Henry et al. v. Haussling et al., 114 N.J.L. 222, 176 A. 564, are quite similar to the facts in the instant case. The plaintiff in that case was a young child who was injured by a fall through a skylight. It appears that the parents of the child rented certain rooms on the second floor of the certain building in question, and they were advised that the roof of the building was accessible for the purpose of drying clothes, and for a playground for the children. The plaintiff was sent by her mother to bring in the clothes pins and fell through the skylight. In its opinion the court said that there was evidence that the skylights were in bad order, and although there was no invitation for the tenants to use the skylights, nevertheless if they were where the tenants might come in contact incidentally while hanging out clothes and weak enough to let them through the roof with slight pressure, negligence would be inferred.

Respondents rely upon the rule laid down in Watwood v. Fosdick, 212 Cal. 84, 297 P. 881. In that case plaintiff leased an apartment on the lower floor, and during the term of said lease visited an acquaintance on the upper floor. On returning to her own floor she slipped on the stairs and fell, sustaining certain injuries. The evidence disclosed she had caught her foot in a worn rubber which covered one of the steps, causing her to fall. It was also shown there was no hand rail on the stairs. The decision in this case seemed to turn upon the question of the assumption of risk and contributory negligence. Plaintiff testified that on a former occasion she had visited the upper floor and knew that the stairway was not equipped with a hand rail, and had so known that fact ever since she had become a tenant of appellant. The court said: "* * * he [the landlord] is under no duty to remove structural defects which are visible and known to the tenant." The court did not there say, however, that a tenant took the premises subject to de-

fects in those portions of the building reserved by the landlord, which defects were unknown to the tenant at the time of the commencement of the tenancy.

[3] From the opening statement of counsel for plaintiff it appears that the defect complained of existed at the time of the execution of the lease by the Stockton Realty Company to Moore. The Realty Company based their claim of nonliability on its part by reason of that fact. However, the general rule seems to be as laid down in 16 Ruling Case Law, page 1076, paragraph 594, as follows: "It is the well settled rule that the landlord is properly chargeable with liability to a stranger where the cause of injury to the latter is a nuisance existing on the premises at the time of the demise."

[4] Respondents urge that appellants were guilty of contributory negligence. Contributory negligence is ordinarily a matter to be determined by the jury, and the court could not, upon an opening statement, under these circumstances, pass upon that question. The statement alleged that plaintiff had never been on the roof in question before, that she was a girl of fifteen years of age, and was on the roof by the invitation of a tenant and for the express purpose to assist in gathering laundry from the clothes line, which was there for the use of all the tenants. She followed closely behind her cousin, and it does not appear that she observed the skylight as she passed along the roof.

[5] Ordinarily an invitee upon premises has a right to assume that she has a reasonably safe place in which to move about, and whether or not she exercises reasonable care for her own safety is a question for the jury to decide under all the circumstances. Hodge v. Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80.

[6-8] It appears to us that the trial court has overlooked the fact that at the time of the accident here involved the owner or landlord was in possession and control of that portion of the premises where the accident occurred and that they retained control for the use and benefit of all the tenants in the building, and that under such circumstances they had a legal duty to exercise ordinary and reasonable care to keep that portion of the premises in a safe condition for the tenants and their invitees. But whether or not the landlord had performed that duty is a question of fact for the determination of the jury, as was the question whether or not plaintiff had exercised ordinary care for her own safety and protection.

The judgment of dismissal should therefore be reversed and a new trial granted. It is so ordered.

I concur: THOMPSON, J.



33 Cal.App.2d Supp. 756

MEDICAL FINANCE ASS'N v. RAMBO.

No. C. A. 4143.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 28, 1938.

1. Exemptions ⇐48(2)

Compensation for personal services performed becomes, as soon as it is earned, "earnings received," within exemption statute, and such earnings, if subjected to garnishment proceedings, may be allowed to judgment debtor as exempt, upon a proper showing; the word "received" meaning, arising and accruing. Code Civ.Proc. §§ 690, 690.11.

[Ed. Note.—For other definitions of "Earnings" and "Received," see Words & Phrases.]

2. Exemptions ⇐4

Exemption statutes are to be liberally construed.

3. Exemptions ⇐11

Judgment debtor was entitled to exemption of one-half of his earnings received for personal services rendered within thirty days next preceding the levy of attachment or execution, upon showing that such half was necessary for support of himself and family, irrespective of fact that real estate rentals accrued during the 30-day period which he assigned as security for another debt. Code Civ.Proc. §§ 690, 690.11.

4. Exemptions ⇐11

Under exemption statute, judgment debtor is allowed as exempt one-half of each part of his earnings during the thirty days next preceding the levy, as and when question of

exemption arises, regardless of disposition of any other part of such earnings. Code Civ. Proc. §§ 690, 690.11.

5. Exemptions ⇐4

The question of exemption does not arise until there is a levy, and the intent of exemption statute is that question whether judgment debtor is entitled to exemption shall be determined on facts existing at that time. Code Civ.Proc. §§ 690, 690.11.

Appeal from Municipal Court of Long Beach; Charles D. Wallace, Judge.

Action by Medical Finance Association against Ralph Rambo. There was judgment for plaintiff, and wages of defendant were levied upon, and, from an order granting a claim of exemption filed by defendant, the plaintiff appeals.

Affirmed.

Marshall & Farnham, of Long Beach, for appellant.

John Wm. Knowles, of Long Beach, for respondent.

SHAW, Presiding Judge.

[1, 2] Secs. 690 and 690.11, Code of Civil Procedure, exempt from execution or attachment, in a case such as we have here, "one-half of the earnings of the defendant or judgment debtor received for his personal services rendered at any time within thirty days next preceding the levy of attachment or execution" upon a proper showing that such half is necessary for the support of himself and family. The word "received," here, is not to be taken as requiring that earnings, to be exempt, must be paid over to the judgment debtor. So to construe it would prevent the exemption of earnings which, like those here in question, are levied on by garnishment proceedings before they come into the hands of the judgment debtor, and would very nearly deprive the provision of any effect, for such is the usual course of proceeding when it is sought to reach earnings. The word "received" has some variety of meaning, and may signify "arising and accruing" (52 Corpus Juris 1192). The liberality of construction which is applied to all exemption statutes (Wade v. Rathbun, 1937, 23 Cal.App.2d 758, 760, 67 P.2d 765) requires that it be so construed here. In other words, compensation for personal services performed becomes, as soon as it is earned, "earnings received," and such earnings, if subjected to garnishment proceedings, may be allowed to the judgment debtor as exempt, upon a proper showing. We are not to be understood as saying that the exemption would not also attach to the proceeds of his earnings in the judgment debtor's hands, so long as they could be identified as such. That question is not before us and we express no opinion on it.

[3] The provision quoted from, sec. 690.11, refers to the very money received or due as earnings, not to other income of an equivalent amount from some other source. When such earnings are before the court, the exemption is not to be denied because the judgment debtor may already have received or there may have become due to him during the thirty day period other income, no matter what its amount or what disposition he may have made of it. Hence in this case the facts that real estate rentals accrued to him and he assigned them as security for another debt, do not defeat his exemption claim. If this transfer is for any reason void as to plaintiff, the law affords it ample remedies otherwise.

[4, 5] The other question presented here relates to the manner of applying the exemption to the earnings during the thirty day period. Defendant's earnings during that period were "between $125.00 and $130.00," $78.85 thereof was held under the levy, and the status or disposition of the remainder of such earnings does not appear. There are two possible solutions of the problem. First: if the judgment debtor has already received part of the earnings, this part is to be applied to the exemption and out of the amount levied upon he can claim only enough to complete the exemption, leaving the balance subject to the levy. This is the plaintiff's contention here. Second: the statutory ratio is to be applied to the amount levied upon by each levy, allowing the judgment debtor as exempt one half of such amount, regardless of amounts theretofore received or subsequently to be received by him. This is the rule adopted by the trial court.

We conclude that the second of the rules above stated, by which the defendant is allowed as exempt one half of each part of his earnings (during the thirty day period) which may be levied upon, as and when the question of exemption arises, regardless of the disposition of any other

part of such earnings, best satisfies the purpose of the statute. The other rule would require the court, when a claim of exemption is made, to take an account of the debtor's entire earnings, as well as those held by the levy, and determine the amount and disposition thereof. Nothing in the statute indicates an intent that the court should embark on such an inquiry. The question of exemption does not arise until there is a levy, and the intent of the statute is that it be determined on facts then existing. If upon such a levy it appears that the fund held is for earnings of the judgment debtor as described, the statute directs that one half thereof be allowed to him as exempt upon the specified showing of necessity. It says nothing else about past events or earnings.

The second rule referred to would also better serve the purpose of the statute to keep the debtor continuously supplied with some means of support for himself and family. In the common case of the man who is paid twice a month for his services, when he receives an installment of earnings without any levy against him, he is likely to regard it as available and use it all for immediate expenditures, and may pay some of it on his debts, or for other purposes not essential to present support, relying on the next installment for future support. If within thirty days another levy takes his next installment of earnings, then, on plaintiff's contention, he would be told that he has already had his exemption and nothing can be allowed him from this levy, thus leaving him with no means of support for half a month. By the construction adopted here by the trial court a debtor will face no such predicament, for he can count upon the receipt of at least half of each installment of his earnings, for his support, if needed. Such a construction of a similar exemption statute, allowing as exempt seventy-five per cent of earnings within ninety days, was adopted in Oil Well Supply Co. v. Galbreath, 1935, 175 Okl. 305, 52 P.2d 780, 782. The court said, "We do not think it was intended that when the current wages of the head of the family are attached, he should be required to come into court and account for what he had earned and received during any part of this period and then be denied any exemptions if such accounting showed that he had already received three times as much as the sum attached. The theory of exemption statutes is that the debtor should, at the time of the levy, have the right to claim and reserve the specific property exempted to him. The idea prevailing is that the debtor should not be completely stripped and his dependents left destitute at any time, regardless of how prosperous he may have been previously." See also Hall v. Hartwell, 1886, 142 Mass. 447, 8 N.E. 333, 334; Bliss v. Smith, 1875, 78 Ill. 359; Crites v. Bede, 1917, 86 Or. 460, 168 P. 941.

This case differs from California United States Bond & Mortg. Corp. v. Grodzins, 1934, 139 Cal.App. 240, 34 P.2d 192, which involved the exemption of insurance money. There a single sum of money was involved, the exemption applied to a definite part of it only, which the debtor could ascertain at the time of receiving it, and the exemption was not conditional on any immediate need for support. Here we have recurring payments of income, and a continuous need for support to be provided from those payments.

The order appealed from is affirmed, respondent to recover his costs of appeal.

BISHOP and SCHAUER, JJ., concur.

Ex parte PETRAEUS.

Cr. 4199.

Supreme Court of California.

Jan. 17, 1939.

Rehearing Denied Feb. 16, 1939.

1. Criminal law ⇐42

One who, without claiming constitutional privilege against self-incrimination, gave self-incriminating testimony for defense in a criminal proceeding, could not invoke statutory immunity from conviction of offense concerning which he testified. Pen.Code, §§ 333, 334, 337a, subd. 2.

2. Criminal law ⇐42

The statute granting immunity from prosecution for offense concerning which witness gives self-incriminatory testimony manifests intent to protect only witnesses for the prosecution. Pen.Code, §§ 333, 334.

3. Statutes ⇐184

A statute must be construed with reference to the object to be accomplished.

4. Statutes ⇐231

Code sections relating to a particular subject are in pari materia and should be read and considered together. Pen.Code, §§ 333, 334.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Proceeding in the matter of the application of Westy Petraeus, Jr., for a writ of habeas corpus.

Writ discharged and prisoner remanded.

Prior opinion, 82 P.2d 700.

W. I. Gilbert and James B. Fredericks, both of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHENK, Justice.

The question for determination in this proceeding is whether one who has given self-incriminating testimony as a witness in the defense of another on trial for the crime of gaming may invoke the immunity provided by section 334 of the Penal Code.

Margaret Petraeus and Westy Petraeus, Jr., were charged by separate informations with violations of section 337a, subdivision 2, of the Penal Code. Margaret Petraeus was tried first. On her trial she called Westy Petraeus, Jr., as her witness. Without claiming the constitutional privilege against self-incrimination, he gave testimony on behalf of Margaret Petraeus which implicated him in the commission of the crime with which he was charged. The jury in the trial of Margaret Petraeus failed to agree upon a verdict. Upon his own trial, Westy Petraeus, Jr., claimed immunity by virtue of the provisions of section 334 of the Penal Code, but this was denied. He was convicted and thereupon commenced the present proceeding to obtain his release from custody, basing his petition for the writ of habeas corpus upon the same claim.

Section 334 of the Penal Code reads: "No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified."

The petitioner relies on the literal language of this section and on a statement in the case of In re Williams, 127 Cal.App. 424, 16 P.2d 172, referred to in Ex parte Critchlow, Cal.Sup., 81 P.2d 966, in support of his claim.

In the opinion in the Williams Case it was said at page 431, 16 P.2d at page 175: "What the statute means is that a witness called to testify to facts concerning or relating to the offense of gaming can safely testify for the reason that he is forever free from the possibility of punishment for any crime in the proof of which such testimony would be material. Such a construction is literally what the statute says, and it preserves the whole meaning and intention thereof. Such construction brings the statute within the rule that it must be coextensive with the Constitution. * * * Any witness who testifies to facts concerning or relating to prohibited gaming is immune from punishment for any offense in the proof of which such facts would be relevant and material."

In that case the petitioner was called as a witness for the People in a preliminary hearing of gaming charges against others. He refused to answer certain questions asked on behalf of the People on the ground that his answers would tend to incriminate him. He was adjudged in contempt and committed to jail. On his application for a writ of habeas corpus the following propositions were decided: (1) That section

334 of the Penal Code comprehended all offenses of gaming or gambling, including those defined in section 337a of the same code; (2) That conspiracy to violate any of such sections was also an offense concerning gambling and within the comprehension of the immunity section; (3) That any witness referred to by section 334 of the Penal Code must be afforded an immunity coextensive with the constitutional privilege against being compelled to give self-incriminating testimony; (4) That the section afforded such immunity and therefore that the petitioner in that case was under compulsion to give the incriminatory answers as to relevant matters because he was fully protected against future punishment on account of any offense as to which he might thus testify.

In the Critchlow Case the witness was subpoenaed to appear and answer before the grand jury. She claimed the constitutional privilege against self-incrimination and resisted complusion to testify as to certain bribery activities in connection with violations of the gaming law. The language quoted from the Williams Case was referred to as stating the correct rule of law in considering the question of the coextensiveness of the immunity given by section 334 of the Penal Code with the constitutional privilege.

[1] We are aware of no case or authority, and the petitioner has cited none, which holds that one who gives self-incriminating testimony on behalf of the defense in a criminal proceeding or investigation may thereafter claim the right, under any immunity statute, to go unpunished for the crime so confessed. The protection of the witness in such circumstances is not the immunity statute, but the constitutional provision which guards him from the compulsory revelation of self-incriminating evidence.

[2] The history of the origin of the constitutional privilege, and the development of the custom of granting immunity by prosecuting authorities in aid of the administration of justice, was referred to without extended discussion in the Critchlow Case. It was there pointed out that one curtailment on the right to invoke the constitutional privilege occurs during an investigation by a prosecuting or indicting body, in certain classes of cases specified by statutory law, wherein immunity is granted in exchange for information against other offenders. It must be obvious that it was not the intention either in the Critchlow Case or in the Williams Case to intimate that one who testified for the defense in a criminal proceeding could invoke the immunity provided by section 334 of the Penal Code. Such testimony is voluntary and is not under the compulsion which a reference to the history and development of such system or custom discloses as a necessary element within the meaning of the immunity granting system prescribed by the code sections. Such compulsion is present only when a witness is called by the prosecution, as to whom alone section 334 applies. That this is so is also indicated by the immediately preceding section of the Penal Code, namely, section 333, which provides: "Every person duly summoned as a witness for the prosecution, on any proceedings had under this chapter, who neglects or refuses to attend, as required, is guilty of a misdemeanor." Reading these sections together leads directly to the conclusion that the legislative intent was that witnesses for the prosecution were referred to by the language of section 334. There is no justification in law for reading the language of the latter section apart from other sections bearing upon the same subject-matter and which are in pari materia, where to do so would lead to the absurd conclusion that a witness may volunteer testimony on behalf of the defense, thereby incriminate himself, clear the accused and both escape punishment.

The petitioner contends that his testimony was "compulsory" because the defendant on whose behalf he testified was entitled to prove her innocence by showing that another was guilty. But it would not follow that one who is willing to confess a crime to exonerate another should necessarily go unpunished. The argument loses sight of the quid pro quo in the matter of granting immunity by the state, namely, information leading to the arrest and conviction of offenders. The petitioner would have the court extend the immunity beyond its clear ends and limits, that is, to situations wherein the state is assumed to have bargained to give all without any return. This was not the legislative purpose.

[3, 4] Additional support for the foregoing conclusion may be found in the rule that a statute must be construed with reference to the object to be accomplished (People v. Dana, 22 Cal. 11, 20; Bannerman v. Boyle, 160 Cal. 197, 200, 116 P. 732; Johnston v. Baker, 167 Cal. 260, 264, 139

P. 86; Gise v. Myers, 22 Cal.App. 127, 133 P. 500; Golden & Co. v. Justice's Court, 23 Cal.App. 778, 794, 140 P. 49; Spier v. Peck, 36 Cal.App. 4, 6, 171 P. 115), and the rule that code sections relating to a particular subject are in pari materia and should be read and considered together (23 Cal.Jur. 791; People v. Parvin, 74 Cal. 549, 555, 16 P. 490; People v. Upton, 67 Cal.App. 445, 450, 228 P. 50).

The writ is discharged and the prisoner is remanded to custody.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



12 Cal.2d 573

TURLOCK THEATRE CO. v. LAWS et al. LAWS et al. v. TURLOCK THEATRE CO.

Sac. 5258.

Supreme Court of California.

Jan. 12, 1939.

1. Venue ⇐72

Whether the subject matter of a cause of action is exclusively local, or is transitory entitling defendant to a change of place of trial, must be determined from allegations of complaint and nature of relief sought. Code Civ.Proc. §§ 392, 395.

2. Pleading ⇐34(4)

In determining whether subject matter of a cause of action is exclusively local, or transitory entitling defendant to a change of place of trial, all ambiguities in complaint and in relief sought must be resolved against pleader. Code Civ.Proc. §§ 392, 395.

3. Venue ⇐5(1)

An action relative to real property must, under statute, be tried in the county where property is situated only when property or title thereto is the exclusive subject matter of the action. Code Civ.Proc. § 392.

4. Venue ⇐16½

Where a cause of action for relief in personam is joined with a cause of action relative to realty, defendant is entitled to have the cause transferred to county of his residence. Code Civ.Proc. §§ 392, 395.

5. Venue ⇐5(1)

The right to bring an action relative to realty in the county where it is situated being an exception to the general rule that an action should be brought in the county where defendant resides, conditions under which exception is claimed must be clearly shown. Code Civ.Proc. §§ 392, 395.

6. Venue ⇐16½

Where lessor in action against lessee and others alleged lessee's breach of lease, default in payment of rentals, and a wrongful withholding of leased theater, and sought to recover unpaid rentals, cancellation of lease, damages for wrongful possession, and to have possession restored and title quieted, recovery of rentals was the primary object of the action, and defendants, under statute, were entitled to have the action tried in county where they resided rather than in county where theater was situated and where suit was instituted. Code Civ.Proc. §§ 392, 395.

In Bank.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by the Turlock Theatre Company against Elwood P. Laws and others for alleged unpaid rentals, cancellation of a lease, damages for wrongful withholding of possession of a theatre, to have title to theatre quieted, and to be restored to possession of the theatre. Defendants filed a demurrer and notice of motion for change of place of trial, and appealed from an order denying the motion. On defendants' application for writ of supersedeas, an order to show cause and a temporary stay of proceedings was issued.

Order to show cause and the temporary stay of proceedings discharged, and order denying the motion for change of place of trial reversed.

Nathan B. McVay, of Modesto, and Livingston & Livingston, of San Francisco (Leonard J. Bloom, of San Francisco, of counsel), for appellants.

Gumpert & Mazzera and Charles A. Zeller, all of Stockton, for appellee.

PER CURIAM.

The plaintiff sued Elwood P. Laws, A. Blumenfeld, Joe Blumenfeld, and several

fictitious defendants, to recover alleged unpaid rentals under a lease of a moving picture theatre in Turlock, Stanislaus county; also to terminate the lease and to be restored to possession of the property. The action was commenced in Stanislaus county on June 2, 1938. The defendants specifically named were served with summons. Within due time they filed a demurrer and a notice of motion for change of place of trial to the city and county of San Francisco, the place of their residence. The motion was argued on August 1st and on August 11th the court entered an order denying the motion. The defendants appealed from the order. They also applied for a writ of supersedeas staying further action of the trial court pending the determination of the appeal.

[1, 2] On the hearing of the motion it appeared that on July 22d, and after the filing of the notice of motion, Edward Albin, a resident of Stanislaus county, was served as one of the defendants fictitiously named. An amendment to the complaint stating the true name of such defendant to be Edward Albin was filed on July 25th. No service of the amendment was had on opposing parties or their attorneys. When the court called attention to the matter, counsel for the plaintiff stipulated that the plaintiff had no intention of urging the residence of Edward Albin in opposition to the defendants' motion for change of place of trial. The court took note of the stipulation and remarked that it would disregard entirely the matter of the residence of Edward Albin for purposes of the motion. The question before this court is whether the complaint states a cause of action, the subject-matter of which is exclusively local, thus requiring a trial in Stanislaus county; or whether the complaint includes as well a cause of action alleging matter of a so-called transitory nature which should permit the defendants to prevail in their application for a change of place of trial. That question must be determined from an inspection of the allegations of the complaint and the nature of the relief sought; and all ambiguities must be resolved against the pleader. See Sheeley v. Jones, 192 Cal. 256, 219 P. 744; Weygandt v. Larson, 130 Cal.App. 304, 308, 19 P.2d 852.

The complaint in form includes three causes of action. The first alleges that on August 1, 1936, a lease was executed by the plaintiff to the defendant Laws of the theatre property situated in the city of Turlock, for a five-year term, and whereby the lessee agreed to pay as rental fifteen per cent of the gross monthly box office and storeroom receipts, with a guarantee of $500 minimum rental per month; that it was also agreed that a complete daily report of the box office receipts would be mailed forthwith to the secretary of the plaintiff. It was also alleged that by the agreement no assignment would be made without the written consent of the lessor. Breaches of the lease provisions were alleged, consisting of the wilful and fraudulent failure and refusal of the defendant Laws to make full and accurate report of the daily box office receipts and refusal to pay fifteen per cent of such receipts, and that the defendants have thus withheld from the plaintiff an estimated $300 per month from the beginning of the lease. In addition it was alleged that the defendant has failed to pay any rental whatsoever subsequent to March 1, 1938, and that the defendant Laws had assigned the lease to others without the consent of the plaintiff. Upon its first cause of action the plaintiff prayed judgment for the amount of the rental found to be unpaid under the lease; for a cancellation of the lease, and to be restored to possession of the premises.

As a second cause of action the plaintiff alleged a wrongful withholding of possession, and in this respect it asked for $10,000 damages and restoration of possession. A third cause of action contained the usual allegations when it is sought to quiet the title against adverse claims, with a prayer for the appropriate relief thereunder.

Section 392 of the Code of Civil Procedure provides that actions for the recovery of real property, or for the determination of any right or interest therein, and for injuries to real property, must be tried in the county where the real property or some part thereof is situated.

[3-5] The plaintiff does not question the application to the appropriate facts of the well-settled rule enunciated in Smith v. Smith, 88 Cal. 572, 26 P. 356, and other cases. Ah Fong v. Sternes, 79 Cal. 30, 33, 21 P. 381; Warner v. Warner, 100 Cal. 11, 16, 34 P. 523; Sheeley v. Jones, supra; Howe v. Tucker, 219 Cal. 193, 25 P.2d 832; Bardwell v. Turner, 219 Cal. 328, 25 P.2d 978; Nason v. Feldhusen, 34 Cal.App. 789, 795, 168 P. 1162; Chew v. Storrie, 108

Cal.App. 313, 291 P. 610. The rule of the cited cases is that section 392 is effective only when the real property or the title thereto is the exclusive subject-matter of the action. When a cause of action for relief in personam also is joined, the defendant is entitled to have the cause transferred to the county of his residence. The basis for the distinction in the application of the code provisions, stated in Smith v. Smith, supra, 26 P. 357, will bear repetition:

"Section 395 [of the Code of Civil Procedure] provides that 'in all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action.'

"The general spirit and policy of the statute is to give to the defendant the right of having all personal actions against him tried in the county of his residence. Provision is made for the trial of actions affecting real estate in the county where the land is situated, and for the trial of certain other designated actions in the county where the cause of action arose, but the general rule for the place of trial is prescribed in section 395 by the declaration that 'in all other cases' the action must be tried in the county in which the defendant resides at the commencement of the action. This section is general and comprehensive in its terms, and embraces all other cases than those which are specified in the three preceding sections. It is intended to protect the defendant against the expense and inconvenience of being compelled to go to a distant county to defend himself against an action that might be commenced against him there, and is in accordance with the principles that obtain wherever the common law prevails, that the plaintiff, who would seek redress from a defendant, must seek it in the county where he resides.

"When, however, the subject-matter of the action is local, and the judgment which is sought is to operate directly upon that subject-matter, it is provided that the action shall be tried in the county where the subject-matter of the action is situated. This being an exception to the general rule, the conditions under which the exception is claimed must be clearly and distinctly shown. The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those 'other cases' provided for in section 395, which the defendant is entitled to have tried in the county of his residence."

The burden of the plaintiff's contention is that the title to and possession of the real property is the primary object of the action and that the personal remedies sought, namely, judgment for unpaid rentals and a necessary accounting to determine the amount thereof, are merely incidental to the primary object within the meaning of such cases as McFarland v. Martin, 144 Cal. 771, 78 P. 239 (wherein the plaintiff sought to recover a one-third interest in mining property); Grocers' Fruit Growing Union v. Kern County Land Co., 150 Cal. 466, 89 P. 120 (involving an action for the specific performance of a contract to convey lands); State v. Royal Consolidated Mining Co., 187 Cal. 343, 202 P. 133 (wherein the state sought to recover title and possession of certain mining properties and the rents, issues and profits derived therefrom); Robinson v. Williams, 12 Cal.App. 515, 107 P. 705 (an action brought to establish ownership in the plaintiff of real property pursuant to contract of sale to and a breach by the defendant), and Brown Materials Co., Ltd. v. Angus, 20 Cal.App.2d 32, 66 P.2d 470 (involving an action to establish the plaintiff as the owner of certain leases of lands).

A reference to but one of these cases will serve to distinguish all of them and dispose of the plaintiff's contention.

In the case of State v. Royal Consolidated Mining Co., supra, it was held that the action, in so far as it related to rents, issues and profits, was essentially one to quiet title, for the reason that the right thereto depended upon the issue of title, and an adjudication of the right to rents was necessarily determinative of the right

to the land itself. The question there did not arise out of proceedings for a change of venue, but was concerned with the question whether the court in Sacramento county had power pursuant to section 3773 of the Political Code to entertain jurisdiction of an action involving title and possession of real property situated in another county. The correctness of the holding that the relief there sought in the nature of rents, issues and profits was merely incidental to the primary object of the action, that is, to recover the title and possession of the mining properties, need not be questioned. It is apparent, however, that under the allegations in the complaint in the present action, the contrary situation obtains. Here the right to possession of the real property largely depends upon the outcome of the controversy concerning the amounts of rentals paid or claimed to have been unpaid by the defendant. If it be found, under the allegations of the first cause of action wherein the plaintiff seeks to recover the amount of rentals alleged to remain unpaid, that all rentals have been paid in accordance with the contract, it may result that the plaintiff would not be entitled to any of the relief prayed for. We would thus have the situation where the cause of action for the unpaid rentals is the primary object of the complaint, and relief by way of restoration of possession would follow the judgment on that cause of action. That is not the situation obtaining in the case last cited, where the judgment for the rents and profits followed as an incident of a judgment awarding title and possession to the plaintiff.

[6] As above indicated, the parties do not question the personal nature of the cause of action seeking recovery for alleged unpaid rentals. Inasmuch as that relief is not merely an incident to the claim to be restored to possession, but is distinctly a primary object of the complaint, we must conclude that the plaintiff has joined a personal or transitory cause of action with one of a local character, and the trial court on the record before it erred in denying the motion.

The order to show cause and the temporary stay of proceedings issued upon the application of a writ of supersedeas are discharged. The order denying the motion for change of place of trial is reversed.

12 Cal.2d 583

CUDAHY PACKING CO. v. JOHNSON, State Treasurer.

Sac. 5166.

Supreme Court of California.

Jan. 17, 1939.

1. Taxation ⇐117

A packing company, which owned a number of livestock, refrigerator, and oil tank cars which were used exclusively for transporting its own products to points within and without the state, was not a "public service corporation" or a "public utility" within constitutional provision imposing a franchise tax. Const. art. 13, § 14(a).

[Ed. Note.—For other definitions of "Public Service Corporation" and "Public Utility," see Words & Phrases.]

2. Taxation ⇐117

Where provision in Constitution for franchise tax on car loaning and other companies, with immaterial changes, was prepared by same commission that made report on which provision was based, Supreme Court could consider terms of report in determining meaning of provision. Const. art. 13, § 14(a).

3. Taxation ⇐117

Constitutional provision imposing franchise tax on car loaning and other car companies operating on railroads in the state was applicable only to public service corporations. Const. art. 13, § 14(a).

4. Taxation ⇐117

Packing company which owned a number of livestock, refrigerator, and oil tank cars which were used exclusively for transporting its own products to various points within and without the state was not liable to franchise tax under constitutional provision imposing tax on car loaning and other car companies operating on railroads in the state. Const. art. 13, § 14(a).

5. Constitutional law ⇐19
Statutes ⇐218

Contemporaneous exposition is strong evidence in support of an interpretation or construction of a statute or of a provision of the organic law in consonance with such exposition.

6. Constitutional law ⇐19

Failure to assess packing company for 19 years for state purposes based on gross

receipts, while not controlling on Supreme Court, was entitled to great respect in determining whether packing company was liable to tax for state purposes under constitutional provision imposing tax on car loaning and other car companies operating on railroads in the state. Const. art. 13, § 14(a).

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Cudahy Packing Company against Charles G. Johnson, as Treasurer of the State of California, to have an assessment declared void and to recover tax paid under protest pursuant thereto. Judgment for plaintiff, and defendant appeals.

Affirmed.

U. S. Webb, Atty. Gen., and H. H. Linney, James J. Arditto, and Albert F. Zangerle, Deputy Attys. Gen. (Dixwell L. Pierce, of Sacramento, of counsel), for appellant.

Thomas & Sullivan, of San Francisco, and E. H. Howlett, of Los Angeles, for respondent.

PER CURIAM.

This action was brought for the purpose of having an assessment declared void and to recover from the defendant, treasurer of the state of California, the amount of tax paid by plaintiff pursuant to said assessment. The tax was paid under protest.

Plaintiff operates plants in Los Angeles and San Diego, California, and at numerous points outside of the state of California, for the slaughtering of livestock and converting same into fresh meat and other products, and sells said products throughout the state of California and in other states, and maintains branch houses in a number of states of the United States, including two branch houses in the state of California, and also maintains other distributing points for its products in said state of California; it owns a number of livestock, refrigerator and oil tank cars in which livestock and other food products belonging to said plaintiff are transported from points without and within the state of California to its various plants, branch houses and distributing points, both without and within said state; said cars are owned and used for the transportation of plaintiff's products in connection with and as an incident to the general business of said plaintiff for the convenience of its operations and for the purpose of securing adequate facilities for its general business from the various railroad companies for carrying its own property and products, and to that end during all of the times herein mentioned the various railroad companies have operated said cars over their respective lines, paying to plaintiff as its sole compensation for the use thereof on a mileage basis for said cars, and charging plaintiff the usual tariff rates for the transportation of its property and products therein.

Plaintiff has not at any time mentioned in the complaint in this action been engaged in the loaning or rental of said cars or any portion of them to the public at large but said cars are used by said railroads for the sole and exclusive purpose of transporting the property and products of the plaintiff, and neither the service rendered by the plaintiff, nor the rates charged by it for said service, have ever been regulated by the railroad commission of this state, or by any other regulatory body.

The tax against the property of plaintiff which it seeks to recover by this action was levied by the board of equalization pursuant to the purported authority contained in section 14 of article 13 of the Constitution as in force during all the times herein involved. Said taxes were levied and paid during the year 1934, and were based upon the earnings of its property during the fiscal year next preceding the year of said levy.

Section 14 (a) of article 13 of the Constitution of this state, then in force, in so far as it is pertinent to the question before us, reads as follows: "All refrigerator, oil, stock, fruit, and other car-loaning and other car companies, operating upon the railroads in this state * * * shall annually pay to the state a tax * * *."

That portion of the section with which we are concerned in this proceeding would read as follows: "Taxes levied, assessed and collected as hereinafter provided upon * * * refrigerator, oil, stock, fruit, and other car-loaning and other car companies operating upon railroads in this state * * * shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided."

[1] Plaintiff, as stated herein, owns "a number of livestock, refrigerator and oil tank cars" which are used exclusively for

the purpose of transporting its own products to various points within and without the state. These cars are operated over the railroads of the state under an agreement whereby the various railroads using said cars pay to the plaintiff as compensation for the use of said cars a definite sum per mile, in most instances 2 cents per mile for each mile traveled during the time the car is being used by the company. The plaintiff then pays to the railroad companies using its cars, the usual tariff rates for the transportation of its property and products in said cars.

While it is not conceded, it must be held from the facts found by the trial court, the substance of which is set forth above, that the plaintiff is not a public service corporation, or a public utility. It has never dedicated its property or business to the use of the public. By its contract with the railroad, its cars are to be used exclusively for the transportation of its own products, and not for those of the public at large. In defining a public utility, this court has said: "That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges." Allen v. Railroad Commission, 179 Cal. 68, 88, 175 P. 466, 474, 8 A.L.R. 249; Richardson v. Railroad Commission, 191 Cal. 716, 720, 218 P. 418.

In the case of Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750, this court held that the plaintiff therein, who was the owner of an office building and who had installed a plant for the generation of electricity and steam to be used by the tenants of the building, was not liable under the said section of the Constitution for a tax on his gross receipts derived from the sale of electrical energy notwithstanding he supplied, as an incident to his business of furnishing his tenants with electricity, electrical energy to persons in his immediate neighborhood for light and power purposes. The basis of that decision was that the plaintiff was not a public utility and therefore did not come within the terms of said section of the Constitution. The court in that opinion reviewed at some length the history of said section of the Constitution, and, after referring to the fact that the Constitution was amended by the adoption of said section as a result of the appointment of a commission to investigate the then prevailing system of taxation and to recommend a plan for the revision thereof, called attention to certain specific portions of said report which indicated that the members of said commission had in mind only public utilities and certain corporations such as insurance companies and banks, the property of which should be taxed for state purposes. In that opinion, reference was also made to the argument submitted to the voters of the state at the time when said constitutional amendment was voted on in which the "gross receipt" method of taxation was advocated solely for public utilities. From this history of the amendment, as well as the language of the amendment itself, this court concluded [page 1059]: "Throughout the report electrical companies were classified and discussed as one group of 'public utilities' to be taxed upon gross receipts. In the printed arguments submitted to the voters in 1910, at the time the constitutional amendment was voted upon, the 'gross receipts' method of taxation was advocated solely for public utilities. It is clear, both from the report of the commission proposing the amendment, and the arguments advanced to those voting upon the adoption of the amendment, as well as from the nature of the amendment, that the provision for taxation in proportion to gross receipts is applicable only to public utilities." Appellant admits the force and effect of this decision in so far as "companies furnishing electricity" are concerned, but claims that the tax on "car-loaning companies" was fixed and determined for an entirely different purpose than that which prompted the sponsors of said constitutional amendment to recommend that electrical companies be taxed for state purposes upon their gross receipts.

[2-4] Appellant calls our attention and relies with considerable assurance in support of his contention upon that portion of the report of said commission contained in section 3 of chapter V of part III of the report of said commission which in part reads as follows: "The taxation of companies operating their own cars over the railroads of the State is in an especially unsatisfactory condition. Except in the case of the Pullman Company, which is assessed by the State Board of Equalization, on the basis of the average number of cars which it operates in the State during the year, the only taxes levied are those assessed by the county assessors on such cars

as happen to be found in the State on the first Monday in March. This, in spite of the fact that a considerable number of such cars find their way into the State during the year, amounts in actual practice to the taxation of those cars only which are owned or operated in California by some local company or agency, and a few scattering cars of other lines."

It is evident from this section of the report of said commission, appellant argues, that car-loaning companies "operating their own cars over the railroads of the state" whether they were public utilities or only private car lines, by the system of taxation then in force were not paying their just proportion of taxes for the reason that only those cars which happened to be within the state on the first Monday in March of each year could be reached by the county assessor, and thereby made subject to taxation in this state. The report of the commission then called attention to the fact that "a considerable number of such cars find their way into the State during the year", with the result that only cars "owned or operated in California by a local company or agency, and a few scattered cars of other lines", are subject to taxation. Appellant contends that it was for the purpose of compelling these cars owned without the state but which were operated during the entire year within the state, to pay their just proportion of taxes, that refrigerator, oil, stock, fruit and other car-loaning companies were made subject to taxation for state purposes upon a basis of an ad valorem tax upon such cars as happened to be within the state on the first Monday in March. If, therefore, this was the purpose of applying the new system of taxation to such car companies, the reason therefore would apply to private car lines as well as to car companies that were rendering a public service. We admit that there is much force in appellant's argument and we would be compelled to yield to its persuasive force were it not for other provisions of the report of the commission which seem to indicate that only public utilities were under consideration by the commission.

The commission, after a lengthy discussion of the then prevailing, and the proposed new systems of taxation, made certain recommendations in which the property of the state was to be divided into two separate classes, one of which would be subject to taxation for state purposes only, and the other for county and city purposes. Part III of said report is entitled, "Proposals and Recommendations", and chapter IV of part III is devoted to, "Taxation of Railroads". Chapter V of part III is concerned with, "Taxation of Public-Service Corporations Other Than Railroads", and section 3 of this chapter is devoted to, "The Taxation of Car Companies". It is in this section 3 that we find the quotation above set out on which the appellant relies in support of his contention that respondent is liable for a tax upon its property for state purposes even if it is not a public service corporation. As the subject of taxation of "companies operating their own cars over the railroads of the state" is found only in that section of the report which is devoted to, "Taxation of Public-Service Corporations Other Than Railroads", it is apparent that the commission in preparing that part of its report was considering only public service corporations, and as this is the only portion of the report which could possibly be construed as evidencing an intent on the part of the members of the commission to recommend a tax for state purposes upon the property of private corporations "operating its own cars upon the railroads of the state", the only reasonable construction to be given that section of the report is that it referred exclusively to public service corporations or public utilities, and not to private corporations.

This report of the commission was the basis upon which section 14 of article 13 was framed and submitted to the voters of the state. In fact, this section of the Constitution with immaterial changes was prepared by the very same commission that made said report. We may, therefore, consider the terms and provisions of the report in determining the meaning of the constitutional amendment which was the outgrowth of said report. Story v. Richardson, supra. As the provisions of the report clearly show that the commission had under consideration only public service corporations whose property should be assessed for state purposes upon a basis of their gross receipts, we must conclude that this intention was carried into the amendment of the Constitution which the commission was instrumental in preparing, and, therefore, that the amendment does not apply to property of a private corporation such as the plaintiff's.

Appellant has cited the case of Union Tank Line Co. v. Richardson, 183 Cal. 409, 191 P. 697, in support of its contention that

respondent's property is subject to taxation for state purposes. The question of whether the Union Tank Line Company, the plaintiff in said action, was or was not a public utility, was not raised in that action although the court held that it was a car-loaning company as defined in said section of the Constitution. There are certain statements in the opinion, notably the following [page 698]: "There is nothing in the section [of the Constitution] which requires that, in order for a public service company to be taxable thereunder, all its business must be transacted within the state," which clearly indicate that the court in determining the liability of the Union Tank Line Company to be taxed for state purposes, acted upon the theory that said plaintiff was a public service corporation and was, therefore, answerable under said section of the Constitution for the taxes sued for in that action. In that opinion it was stated, "The company [The Union Tank Line Company] was engaged in the acquiring, by purchase or otherwise, of oil tank cars and the leasing thereof to shippers throughout the United States". The Union Tank Line Company was evidently a public service corporation, or at least the court in that opinion assumed that it was such.

[5, 6] Under the rule of contemporary construction we are further fortified in construing said section of the Constitution so as to exempt plaintiff's property from taxation for state purposes. In the case of Reuter v. Board of Supervisors, 220 Cal. 314, 323, 30 P.2d 417, 421, this court in commenting upon said rule stated: "Contemporaneous exposition has ever been esteemed by jurists and statesmen as strong evidence in support of an interpretation or construction of a statute, or of a provision of the organic law in consonance with such exposition." Section 14 of article 13 of the Constitution was adopted, as we have seen, in 1910. The reports of the state board of equalization disclose that the Cudahy Packing Company was assessed as a car company in 1914, on the basis of its gross receipts from operations in 1913, in the amount of $1,612.23 on which a tax of $64.48 was computed. Whether this tax was paid or not, the record in this case does not show. We assume, however, that it was paid. After the year 1914, and until the present assessment was made, covering a period of nineteen years, no assessment was made against the plaintiff herein for state purposes based upon its gross receipts. It is not denied that during this period respondent paid an ad valorem tax upon its tangible property within the state. Just why no assessment was made for state purposes does not appear, but we are justified in assuming from these facts that the officers of the state construed said section of the Constitution as not applying to the plaintiff herein. This contemporaneous construction of said section of the Constitution by the authorities of the state charged with the duty of collection of the revenues of the state, while not controlling, is entitled to great respect. 23 Cal.Jur. 775.

The judgment is affirmed.



12 Cal.2d 563

RAE v. CALIFORNIA EQUIPMENT CO.

L. A. 16716.

Supreme Court of California.

Jan. 11, 1939.

Rehearing Denied Feb. 9, 1939.

1. Bailment ⇐21

A shaft used and being constructed in filming of motion picture constituted "construction of other structures" within ordinance requiring owners of hoists to have them inspected and licensed before use as respects liability of lessor of hoist used in lowering cage into shaft, to actor who was injured when cage fell down shaft.

2. Negligence ⇐25

The purpose of ordinance requiring owners of hoists to have them inspected and licensed before use is to protect from injury and possible death all persons properly on, near, or using the regulated machinery when used as contemplated in ordinance.

3. Municipal corporations ⇐120

Court was under duty to construe ordinance as it was enacted without adding thereto or detracting therefrom.

4. Bailment ⇐35

In actor's action against lessor of electric hoist used to lower cage into shaft used in filming motion picture, for injuries sustained when cage fell, with actor to bottom of shaft, evidence was sufficient to go to jury on question of lessor's negligence in failing to have had hoist inspected and licensed before use as required by ordinance.

5. Trial ⇐165

On motion for nonsuit, every favorable inference and presumption fairly arising from evidence must be considered as facts proved in favor of plaintiff.

6. Bailment ⇐21

Where electric hoist was leased to film corporation to lower cage into shaft used in filming motion picture, and person selected by corporation to operate hoist was one suggested by lessor, any negligence of such person in operation of hoist would be chargeable solely to corporation and not to lessor.

7. Bailment ⇐35

In actor's action against lessor of electric hoist used to lower cage into shaft used in filming motion picture, for injuries sustained when cage fell, with actor, to bottom of shaft, lessor's liability required finding that lessor's negligence in failing to have hoist inspected and licensed before use, as required by ordinance, was one of proximate causes of accident.

8. Bailment ⇐21

Violation of ordinance requiring hoists to be inspected and licensed before use would constitute negligence per se, as respects liability of lessor of electric hoist used to lower cage into shaft used in filming motion picture, when cage fell with actor thereon.

9. Bailment ⇐35

In actor's action against lessor of electric hoist used to lower cage into shaft used in filming motion picture, for injuries sustained when cage fell, with actor, to bottom of shaft, question whether lessor's negligence in violating ordinance requiring hoists to be inspected and licensed before use proximately contributed to actor's injuries would be for jury.

10. Negligence ⇐136(25)

The question of proximate cause is generally for jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Bud Rae against the California Equipment Company for injuries sustained while riding in the cage of an electric hoist rented by defendant to the Fox Film Corporation. Judgment for defendant, and plaintiff appeals.

Reversed with directions.

Rehearing denied; LANGDON and EDMONDS, JJ., dissenting.

For prior opinion, see 76 P.2d 115.

Murchison & Clopton, Mort L. Clopton, and Syril S. Tipton, all of Los Angeles, for appellant.

Pacht, Pelton, Warne & Black, Isaac Pacht, Alfred P. Chamie, Saul Ruskin, and Clore Warne, all of Los Angeles, for respondent.

WASTE, Chief Justice.

Plaintiff appeals from a judgment entered in favor of the defendant following the granting of the latter's motion for nonsuit. The action is one for damages for personal injuries.

It appears that shortly prior to the accident which gave rise to the plaintiff's injuries, the defendant, in the usual course of business, rented an electric hoist machine to the Fox Film Corporation by whom the plaintiff was employed as an actor. Defendant's salesmanager was informed that the hoist machine would be required to carry a load of approximately 2500 or 3000 pounds. The Fox Film Corporation by means of cables connected the hoise machine to a cage or car which was lowered and raised in a shaft leading down to a tunnel being constructed and used in the filming of a motion picture. At the suggestion of the film company, defendant's salesmanager submitted the names of persons who might be engaged to operate the machine. One of the persons so suggested, was employed to operate the hoist machine and was so engaged at the time of the accident. It was stipulated, however, that though recommended by the defendant, through its salesmanager, the operator was, in fact, the employee of the film company. Consequently, any negligence in the operation of the hoist machine would be chargeable solely to the employer, the Fox Film Corporation. Plaintiff did not, however, proceed against the defendant because of any negligence of the operator, as shall hereinafter appear.

Just prior to the accident, the plaintiff, with ten other actors, boarded the hoist car for the filming of a scene showing them being lowered in the shaft to the tunnel about the construction of which the picture evolved. The operator of the hoist machine could not see the hoist car or cage from his station and he was unaware that it was

loaded with men. Upon receiving the signal to lower the car, he disengaged the clutch and released the footbrake with which the hoist machine was equipped. The car thereupon fell thirty-three feet to the bottom of the shaft with resulting injuries to the plaintiff. As the car was falling, the operator apparently sensed that something was wrong whereupon he applied the footbrake. The brake failed to bring the car under control. His testimony indicates that "he was not able to apply sufficient brake stoppage" before the rapidly moving car hit the bottom of the shaft, with resulting injuries to the plaintiff.

In his complaint, containing several counts, the plaintiff alleged, among other things, that the defendant, as owner and lessor of the hoist had, in several specified particulars, violated a municipal ordinance and certain incorporated safety orders, all of which, he averred, had proximately contributed to the accident and his injuries. It was, and is, his theory that even though the operator of the hoist may have been negligent, such negligence did not break the line of causation and that the alleged negligence of the defendant was a concurrent proximate cause of the accident. In support of this theory he introduced in evidence a certified copy of the ordinance which it is claimed the defendant had violated. Ordinance No. 33, 512, N.S., as amended. So far as material here, the ordinance provided that:

"The Board of Mechanical Engineers shall have authority and jurisdiction over all * * * hoists, * * * and shall inspect and license the use and operation of any of the said apparatus, machinery or equipment as hereafter provided. * * *

"Sec. 26. Payment of Inspection Fees. It shall be unlawful for any person, firm or corporation to use or operate, or cause or permit to be used or operated, any of the equipment or apparatus mentioned in this ordinance until after the same shall have been inspected, all Permit and Inspection fees Paid, and a Certificate issued as herein provided, which Certificate of Inspection shall be good for a period of one year unless sooner revoked for cause. * * *

"Operating Without Certificate. It shall be unlawful for any person, firm or corporation to use, or to cause or permit to be used, any elevator or any equipment mentioned in this ordinance for the transportation of passengers or freight until the certificate of inspection of such equipment shall have been issued by the Board of Mechanical Engineers and said certificate posted in such elevator, or in a conspicuous place near the equipment inspected."

Plaintiff also put into evidence a certified copy of certain "General Construction Safety Orders" as the same had been published by the Industrial Accident Commission and which were expressly made a part of the cited ordinance. The portions of said safety orders relied on by plaintiff read as follows:

"Order 1114. Construction Material Elevators * * *.

"(w) Every hoising engine shall be equipped with proper brakes to sustain its maximum load in any position * * *.

"Order 1115. Construction Material and Man Elevators * * *.

"(c) The cable drum of the hoisting machine shall be rigidly and permanently attached to the driving mechanism. Friction gearing or clutch mechanism shall not be used.

"(d) All hoising machines shall be provided with an automatic brake of sufficient holding power to prevent rotation of drum in either direction when the power is cut off from the machine.

"(e) All hoisting machines shall be provided with an efficient device which will automatically bring the cage to a stop at the top and bottom limits of travel."

Plaintiff adduced other evidence which disclosed that, contrary to the provisions of the ordinance, the hoise machine furnished by the defendant had not been inspected, that the cable drum of the machine was not rigidly and permanently attached to the driving mechanism but was connected by a clutch mechanism, that the machine was not equipped with an automatic brake to prevent rotation of the drum when the power was cut off and that it was not equipped with a safety device to bring the cage to a stop at the top and bottom limits of travel.

[1, 2] At this point we pause to state that we find no merit in the defendant's contention that the above quoted safety orders are without application here because of the terms of order No. 1100 to the effect that "These orders [as above quoted] shall apply to the construction, alteration, repairing, renovating, removal or wrecking of buildings or other structures within this state". We are of the opinion that the shaft and tunnel used and being constructed in the filming of the picture then in pro-

duction constituted the "construction" of one of the "other structures" contemplated in said safety orders. Its temporary character does not militate against such a conclusion. Certainly, it could not successfully be urged that the "construction, alteration, repairing, renovating, removal or wrecking" of a *building* essential to a movie set would not come within the purview of the safety orders, thus exempting the machinery employed in such work from the regulatory features thereof. The ordinance and safety orders fail to include any requirement that the "building" or "other structures" therein contemplated should be invested with any particular degree of permanency. The obvious purpose of the ordinance and the safety orders is to protect from injury and possible death all persons properly on, near or using the regulated machinery when employed in the construction, etc., of "buildings or other structures". As stated, in our opinion, the construction of the tunnel being filmed came within the phrase "other structures" so as to require the hoist machinery used in connection therewith to comply with the established regulations.

[3] Nor do we think that the ordinance and safety orders are here inapplicable because the defendant had leased the hoist machine to a third person. To indulge such a construction would be to disregard as surplusage many of their terms and would render meaningless the word "owner" and such phrases as "or permit to be used or operated", repeatedly appearing therein. It is our function to construe the ordinance and incorporated safety orders as they were enacted, without adding thereto or detracting therefrom. If defendant's construction were intended, the legislative body could well have omitted the language which we are here requested to read out of the ordinance.

The case of Gulzoni v. Tyler, 64 Cal. 334, 30 P. 981, offers no obstacle to our conclusion herein for in that case it was merely held that the transfer of the entire possession and control of property to another does not impose any responsibility on the transferor for the *"wrongful use or mismanagement"* [page 982] of it by the transferee. This is so under the rule of respondeat superior. Here, however, as already stated, the plaintiff has not proceeded against the defendant lessor because of any wrongful use or mismanagement of the hoist by the lessee but because of the defendant lessor's alleged negligence in furnishing an uninspected hoist, unequipped with the prescribed safety devices.

[4-6] We are satisfied that the plaintiff produced sufficient evidence to warrant the case going to the jury and that it was error for the trial court to grant the defendant's motion for nonsuit. It is well established that upon such a motion every favorable inference and presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiff. Entirely apart and aside from any negligence of the operator in the operation of the hoist machine, and for which, as stated, the defendant would not be answerable, we are of the view that there is evidence in the record upon which the jury might have found that the car would not have dropped to the bottom of the shaft if the defendant, as owner and lessor, had first caused the hoist machine to be inspected and equipped with the safety devices and automatic brake specified in the ordinance and safety orders. Section 408 of the Restatement of the Law of Torts states that "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be in the vicinity of its probable use, for bodily harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it". In comment "a" thereunder it is stated that "The fact that a chattel is leased for immediate use makes it unreasonable for the lessor to expect that the lessee will do more than give it the most cursory of inspections. The lessor must, therefore, realize that the safe use of the chattel can be secured only by precautions taken by him before turning it over to the lessee * * *." In comment "b" it is stated, in part, that "The rule stated in this Section is peculiarly applicable to persons who make a business of leasing chattels. In such a case, in the absence of an understanding to the contrary it may be assumed that both lessor and lessee understand that the article is leased as fit for immediate use." See, also, McCall v. Pacific Mail S. S. Co., 123 Cal. 42, 44, 55 P. 706.

[7-9] To state the matter another way, we are inclined to the view that a finding by the jury that the car would not have fallen if the defendant lessor had complied with the ordinance, might well render the

defendant liable to third persons not in privity with it, but properly using the hoist, under the dangerous instrumentality doctrine announced in Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013, and Kalash v. Los Angeles Ladder Co., 1 Cal. 2d 229, 34 P.2d 481. Of course, any liability of the defendant is dependent on a finding that its negligence was one of the proximate causes of the accident. Violation of the ordinance would constitute negligence per se and the question whether such negligence proximately contributed to the plaintiff's injuries would be one of fact for the jury. Gerberich v. Southern Cal. Edison Co., 5 Cal.2d 46, 51, 53 P.2d 948; McKay v. Hedger, 139 Cal.App. 266, 275, 276, 34 P.2d 221. Had the case gone to the jury, as it should, the jury might have found that defendant's negligence was continuing in character and concurred with any negligence of the operator in producing the accident and that the negligence of the operator, if any, did not break the line of causation. In this connection, section 439 of the Restatement, supra, declares that: "If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability." We had occasion to state this principle in Lacy v. Pacific G. & E. Co., 220 Cal. 97, 98, 29 P.2d 781, 782, wherein it is stated that: "The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury." In the cited case, this principle was applied to a situation where the plaintiff's injury resulted from the concurring negligence of defendant in leaving a pole in a driveway and the negligence of another in so operating his automobile as to collide with said pole. It was held that "in such a case either of the negligent persons would be liable to the plaintiff for his injuries". See, also, the early and leading case of Pastene v. Adams, 49 Cal. 87, and Springer v. Pacific Fruit Exch., 92 Cal. App. 732, 737-739, 268 P. 951.

Nor do we think the case of Stultz v. Benson Lumber Co., 6 Cal.2d 688, 59 P.2d 100, relied on by the defendant, compels a conclusion other than that here announced. The cited case came up on appeal from a judgment entered after a demurrer had been sustained to the complaint without leave to amend. Examination of the case discloses that the complaint therein had alleged that the defendant lumber company had sold to the employer of the plaintiff for use as a main support in a scaffolding a plank of lumber which it knew to be defective and inappropriate for the intended use. But, the complaint further alleged that plaintiff's employer also knew of the defect prior to using the plank in the construction of the scaffold which, by reason of such defect, collapsed and precipitated plaintiff to the ground. In exonerating the defendant lumber company from liability on the ground that the intervening negligence of plaintiff's employer in knowingly using the defective plank in the scaffold broke the chain of causation, the opinion declares [page 102]:

"It is true that the plaintiff alleges that the Benson Lumber Company was informed of the use to be made of the lumber and that it knew of the defects in the plank and its unsafe and dangerous condition for use as a main support in the construction of a scaffolding. But it is *not* alleged, nor is it contended that the condition of the plank was concealed in any manner or unknown to the purchasers, the Newbys. On the contrary, it is *expressly alleged* that the plank was full of knots and was cross-grained, and that this condition and its unsuitability for the purpose of a support for a scaffolding was likewise known to them, and *that they with such knowledge used it as a main support for the scaffolding.* * * *

"The conceded negligence of the Newbys must be deemed to be an intervening cause which served to break the chain of causation between the alleged negligence of the defendant Benson Lumber Company and the injury suffered by the plaintiff. * * * Whether the defendant Newbys' acts in constructing the scaffold with the defective lumber, had they been without knowledge of its defective condition, would still have been an efficient intervening act of negligence we are not called upon to decide. * * *

"When the defendants Newby constructed the scaffolding with the defective plank, *knowing it to be defective,* such negligence in the construction of the scaffolding be-

came their negligence and their responsibility and terminated the responsibility of the Benson Lumber Company as to the plaintiff * * *."

[10] It is thus apparent that the Stultz Case turned on the employer's deliberate use of the plank when he knew of its defective condition, a fact alleged by the plaintiff in his complaint. The opinion expressly leaves open the question whether the line of causation would have been broken by the employer's conduct in using the plank had he been without knowledge of its defective condition. In the present case, the hoist machine was furnished by defendant to the plaintiff's employer as a completed whole which, as stated above, the plaintiff's employer had the right to assume was ready to be used for the purpose for which the defendant had leased it. Plaintiff's evidence does not disclose, as did the complaint in the Stultz Case, that his employer had knowledge that the hoist was uninspected and unequipped with the required safety devices. Upon a motion for nonsuit, it must be assumed from the showing made that the jury would find that the employer was without such knowledge. Under such circumstances, there appears to be no reason why the instant case should be governed by a rule other than the usual and ordinary rule that the question of proximate cause is one of fact for the jury.

For the foregoing reasons the judgment is reversed with directions to the court below to proceed in conformity with the views herein expressed.

We concur: CURTIS, J.; LANDON, J.; HOUSER, J.; SHENK, J.; SEAWELL, J.



30 Cal.App.2d 370

GODFREY v. GODFREY.

Civ. 6050.

District Court of Appeal, Third District, California.

Jan. 16, 1939.

Hearing Denied by Supreme Court March 16, 1939.

1. Divorce ⇐167

Evidence relating to husband's connection with procuring of interlocutory divorce decree by wife about two months prior to their marriage in another state, to arrangement by which one-half of money from sale of husband's farm was to be conveyed to wife, and to husband's knowledge of wife's divorce suit against him, supported judgment refusing to set aside, on ground of fraud, divorce decree against husband, or to return to him money paid to wife.

2. Husband and wife ⇐232(3)

Evidence that wife lived and worked faithfully with husband for several years, contributing her separate funds to their household expenses and to maintenance of husband's property, established adequate consideration for contract by which husband conveyed to wife one-half of proceeds of sale of his property.

3. Husband and wife ⇐232(1)

Where husband, at time of executing deed to his property, agreed to pay wife one-half of proceeds and requested grantee to make wife a joint payee of note and a joint mortgagee, there was presumption that husband intended to convey to wife one-half of proceeds.

4. Estoppel ⇐90(2)

A husband who had contracted to pay wife one-half of proceeds of sale of his property was estopped from contending, in suit instituted several years later to recover money received by wife, that contract and conveyance of property were void.

5. Divorce ⇐172

A final divorce decree rendered against husband was res judicata of issues presented in husband's suit to set aside decree on ground that parties' marriage was void because consummated less than one year after interlocutory divorce decree procured by wife against former husband.

6. Divorce ⇐184(4)

In support of judgment refusing to set aside divorce decree, reviewing court was required to assume that trial court was vested with jurisdiction to try and determine divorce proceeding.

7. Judgment ⇐495(1)

In collateral attack upon judgment, court's jurisdiction over subject matter and parties will be presumed unless the contrary appears on face of judgment.

8. Divorce ⇐184(4)

On appeal from judgment refusing to set aside final divorce decree, where neither

pleadings, decrees, nor evidence of divorce proceeding were before reviewing court, it was required to assume that complaint was sufficient and that issues were determined upon competent evidence favorable to successful party and were properly incorporated in decree.

9. Divorce ⇦161

A husband who permitted a default in divorce suit after being served with process and talking with several attorneys was estopped, in suit to set aside decree, from challenging form of action, sufficiency of evidence, or conclusiveness of decree except for extrinsic fraud, notwithstanding that marriage was void ab initio.

10. Judgment ⇦512

A collateral attack upon a judgment or decree may not be sustained upon evidence of mere intrinsic fraud such as presenting of perjured testimony or forged documents.

11. Judgment ⇦375

"Extrinsic fraud" warranting setting aside of judgment consists of such false representations as will prevent a real trial of cause upon merits of issues involved, such as conduct inducing an interested party to refrain from appearing or participating in trial, a failure to serve timely notice or preventing presence of material witnesses.

[Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud," see Words & Phrases.]

12. Judgment ⇦375

A judgment will not be set aside where alleged fraud or coercion was of such nature that it might reasonably have been presented to court at trial, but interested parties failed or neglected to avail themselves of that opportunity

13. Divorce ⇦167

Where interlocutory divorce decree is procured by collusion of parties, equity will not interfere with final decree at instance of either of culpable parties.

14. Divorce ⇦161

Where husband with full knowledge of issues made personal appearance in divorce suit and then permitted rendition of judgment by default, court, in husband's suit to set aside divorce decree, was warranted in assuming that divorce suit was brought through connivance of husband, who was thereby barred from obtaining relief.

15. Divorce ⇦167

Although divorce decree procured by false testimony may possibly be set aside on court's own motion or at instance of an injured stranger, equity will not interfere with judgment at behest of either of culpable parties.

16. Divorce ⇦184(4)

Where evidence adduced at divorce proceeding was not before reviewing court on appeal from judgment refusing to set aside divorce decree, court could not assume that decree was procured on false testimony or that decision was not fully supported by pleadings and evidence.

17. Divorce ⇦172

A default decree in divorce suit rendered against husband who was aware of issues involved and had made a personal appearance was final and conclusive as between parties with respect to their legal status. Code Civ.Proc. § 1908.

18. Divorce ⇦167

A suit by husband to set aside divorce decree and to recover money received by wife from sale of husband's property was barred by laches, where husband, with full knowledge of circumstances, had acquiesced for eight years in transfer of money to wife, and for more than four years had failed to appeal from or object to divorce decree.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Suit by F. H. Godfrey against Johanne F. Godfrey, sometimes known as Johanne Fugleberg, to set aside a decree of divorce allegedly procured by fraud. Judgment for the defendant, and the plaintiff appeals.

Judgment affirmed.

Burton Briggs Crane, of Los Angeles, for appellant.

Leo B. Wayland and Hobart W. Gladden, both of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him in a suit to set aside a decree of divorce alleged to have been procured by fraud. It is asserted the court was without jurisdiction in the divorce proceeding to dissolve the marriage or to determine title to property rights incident thereto for the

reason that the marriage was void ab initio because it was contracted in less than one year from the time when defendant's interlocutory decree of divorce from her first husband was rendered. A reversal of the judgment in this case is sought on the ground that the findings and judgment are not supported by the evidence.

The respondent contends that this suit constitutes a collateral attack upon the decree of divorce which was procured without fraud, with the knowledge and consent of the appellant, and that it is therefore final and conclusive against him.

The defendant married Peter Fugleberg in 1905 and lived with him as his wife in South Dakota for many years. In 1923 she went to Los Angeles, where she met and frequently associated with the appellant. He was then unmarried. He had a small sum of money and owned a little farm in Idaho, a part of the proceeds of the sale of which is involved in this action.

With the knowledge and approval of the appellant, the respondent brought suit for divorce in Los Angeles county against her former husband, Peter Fugleberg, with the evident purpose of subsequently marrying F. H. Godfrey. The interlocutory decree of divorce from her first husband was awarded to this respondent February 21, 1924, but the entry of the final decree was inadvertently deferred until December 15, 1934. The appellant was advised and knew he could not lawfully marry the respondent until her final decree was rendered after one year from the granting of the interlocutory decree. Nevertheless, in about a month after the interlocutory decree was entered, he took her in his automobile to Idaho Falls, where they applied for and were refused a marriage license on the ground that her divorce was not complete. They then went to Dillon, Montana, where they procured a license and were married April 30, 1924, after which they lived together as husband and wife for several years. During the years they lived together as husband and wife, she contributed sums of money derived from her separate earnings before their marriage to help defray the household expenses and to aid in maintaining the appellant's property. Dissensions arose between them. The appellant was desirous of selling his farm to the Idaho Muskrat Corporation for the agreed price of $10,000. The respondent refused to sign the deed to that farm until he provided her with reasonable maintenance. The appellant then agreed to divide equally with her the proceeds of the sale of that ranch. He accordingly executed a written contract to that effect December 27, 1927. The land was then sold and the spouses joined in the deed of conveyance. Two thousand dollars of the purchase price was paid in cash, and divided equally between them. The remaining $8,000 was represented by a promissory note payable to them jointly, on or before April 15, 1930, with 6 per cent interest on deferred payments. The note was secured by mortgage on the property in which the spouses were named as mortgagees. The note and mortgage were drawn in that manner at the specific request of the appellant. The appellant's full share of that note was paid to him. He directed the payment of the balance of that note to the respondent. She received a portion of the interest, but at the time of the commencement of this suit there was due her on that obligation $4,000 and some accrued interest. That money was awarded to her in her subsequent divorce proceeding against the appellant.

In 1930 the spouses returned to Los Angeles. Their differences became irreconcilable. The respondent commenced suit in Los Angeles county for divorce against the appellant on the ground of extreme cruelty. He was personally served with copies of the summons and complaint. He consulted with several lawyers about the case, but employed none of them. He made a personal appearance in the cause, and then permitted judgment by default to be entered against him. The action was regularly tried and determined. Johanne Godfrey was granted an interlocutory decree of divorce against the appellant on the ground of extreme cruelty, on October 2, 1931. She was also awarded costs and counsel fees in the sum of $150, and she was determined to be the owner of the note with a balance of $4,000 and accrued interest unpaid thereon. A final decree of divorce was rendered against this appellant in that action October 5, 1932, dissolving the marriage and confirming to this respondent the award of property mentioned in the interlocutory decree. The appellant was fully informed of all proceedings in the divorce suit. No objection was made to the allegations of that complaint or to the terms of that decree. No appeal from either decree was taken. The judgment

became final and conclusive against him with respect to all the issues therein determined.

This suit in equity was filed March 7, 1935, to set aside the decree of divorce last mentioned and to recover from the respondent the money which she received from the sale of the Idaho farm on the ground that the marriage was void, since it was consummated in less than one year after the respondent's interlocutory decree of divorce was procured from her first husband. It is alleged the respondent deceived the appellant into believing she was legally qualified to marry him; that she fraudulently coerced him into executing the contract for, and in conveying to her, one-half of the proceeds of his Idaho farm; that the Los Angeles court was without jurisdiction to try or determine the divorce suit against him, and that the decree of divorce was procured by fraud and perjury on the part of the respondent.

Mrs. Godfrey answered the amended complaint in this action, denying the allegations of fraud and asserting that she married the appellant in good faith and lived in harmony with him as his wife for several years, believing she had a legal right to marry him in less than one year from the time her interlocutory decree of divorce was granted from her first husband, provided they were married in a state other than California. She denied that she deceived or coerced him into contracting or conveying to her one-half of the proceeds of the sale of his Idaho farm, and she alleged that the appellant at all times had personal knowledge of her exact legal status to marry and of the proceedings in the divorce case against him. The answer further sets up the special defenses of laches, the statute of limitations, and the bar of the final decree of divorce as res judicata of the issues in this case.

This cause was tried by the court sitting without a jury. Findings were adopted favorable to the respondent in every particular. Judgment was accordingly rendered against the appellant to the effect that he take nothing by his action. From that judgment this appeal was perfected.

[1] The findings and judgment in this case are adequately supported by the evidence. It satisfactorily appears that the respondent did not deceive or defraud the appellant into believing she was legally qualified to marry him before her final decree of divorce from her first husband was rendered. Nor did she fraudulently coerce him into making the contract or conveying to her one-half of the proceeds of the sale of his Idaho farm. He was familiar with every detail of her divorce proceeding against her first husband. The court was warranted in assuming from the evidence that he not only encouraged her, but no doubt induced her to procure the divorce from her first husband, so that they might marry. He not only knew when the interlocutory decree was granted against Peter Fugleberg, but he was advised that he could not legally marry the respondent until the final decree was entered after one year from the time of granting the interlocutory decree. He deliberately planned to avoid the law by taking her to another state for marriage, almost immediately after the interlocutory decree was granted. He was present in Los Angeles at a conference between the respondent and her witnesses regarding the divorce proceeding the night before the cause was tried. He was anxious to attend the trial with them, but was persuaded not to do so. When the interlocutory decree was granted it was immediately shown to him and he expressed great pleasure at her success. They planned to leave at once to be married in Idaho or Montana. Just before they left Los Angeles, about a month after the interlocutory decree was rendered, Mr. Carkin, a friend of the appellant told him, "You know she [the appellant] has just got a divorce and you can't legally marry her for a year," to which he replied, "Well, we can marry out of the state." They traveled together in his automobile to Idaho Falls, where they interviewed a judge regarding their proposed marriage. He advised them to procure a license. They went together and applied to the county clerk for a marriage license, which was refused with the statement to respondent made in the presence of appellant that "You haven't been divorced long enough to get a license." In spite of that information they subsequently procured a license and were married at Dillon, Montana, April 30, 1924. They lived together as husband and wife and worked for the mutual benefit of both parties for several years. Domestic trouble arose between them. In December, 1927, when he proposed to sell his farm, she refused to sign the deed to the land until he made some provision for her support. He then made the contract and arranged to convey to her one-half of the proceeds of that sale. She signed the deed and

the sale was consummated according to that agreement. They returned to Los Angeles in 1930. Their difficulties became irreconcilable. Evidently with his knowledge and consent, she brought suit for divorce against him on the ground of extreme cruelty. He was served with process and knew all about that proceeding. He permitted judgment by default to be rendered against him. The respondent was granted a divorce against him without objection. No appeal from that decree was taken. It became final and conclusive.

Under such circumstances it does not seem possible the appellant could have been deceived or defrauded by the respondent into believing she was legally qualified to marry him two months after her interlocutory decree of divorce from her first husband was granted. The appellant knew fully as much about her status to marry as she did. He was not susceptible of such fraud or deceit. With the knowledge and warning which he had, he certainly was placed upon inquiry to determine whether she then had a legal right to marry him. He was charged with knowledge of her disqualification to marry him. The finding of the court that he was not deceived or defrauded in that regard is fully sustained by the evidence.

[2] For the reasons heretofore stated, the finding of the court that the appellant was not deceived, defrauded or coerced into contracting with the respondent or conveying to her one-half of the proceeds of the sale of his Idaho ranch is also abundantly supported by the evidence. The same is true regarding the finding that that contract and conveyance were supported by adequate consideration. Knowing what the appellant knew regarding the illegality of their marriage, if he doubted the fact that a deed of conveyance of his separate property did not require her signature, he was certainly placed on notice requiring him to seek expert advice on that subject. She had lived and worked faithfully with him as his wife for several years, contributing her own separate funds to their household expenses and to the maintenance of his property. Equitably she was entitled to provision for her support. We are of the opinion the evidence furnishes adequate consideration for that contract and conveyance.

[3, 4] There is a presumption that by the execution of the deed to that property, with the accompanying agreement to pay Johanne Godfrey one-half of the proceeds of that sale, with the request for the grantee to make her a joint payee of the note and a joint mortgagee of the mortgage, the grantor intended thereby to convey to her the funds in dispute. 18 C.J. 409, sec. 482. His conduct estops him from contending that the execution of that contract and the conveyance of that property were void. H. W. Wright Lumber Co. v. McCord, 145 Wis. 93, 128 N.W. 873, 34 L.R.A.,N.S., 762, Ann.Cas.1912B, 92, 50 A.L.R. 807, note.

[5] We are of the opinion the decree of divorce which was rendered against the appellant is final and conclusive upon all the issues determined thereby; that the Los Angeles court was vested with jurisdiction of the subject-matter and of the parties to that divorce proceeding, and the record in this case is devoid of evidence of any extrinsic fraud exercised by the respondent in prosecuting the cause or procuring the divorce. The final decree of divorce which was rendered against the appellant is res judicata of the issues presented in this cause.

[6-9] In support of the judgment in this case, we must assume the Los Angeles court was vested with jurisdiction to try and determine the divorce proceeding against the appellant. In a collateral attack upon a judgment the jurisdiction of the court over the subject-matter and the parties involved will be presumed unless the contrary appears on the face of the decree. In the present case neither the pleadings, the decrees nor the evidence of that divorce proceeding are before us. They are not included in the transcript on appeal. He must, therefore, assume that the complaint alleges in adequate form a good cause of action for divorce on the ground of extreme cruelty, together with the ownership and right to an award of title to the property involved, and that those issues were determined upon competent evidence favorable to the respondent and properly incorporated in the final decree. That was not a suit for annulment. It was a suit for divorce in the usual form. The appellant was served with process in that action and suffered default after talking with several lawyers about the case. He is now estopped from challenging the form of that action, the sufficiency of the evidence or the conclusiveness of the decree, except for extrinsic fraud. Even though it be conceded the marriage was void ab initio because the respondent was not an unmarried woman

when it was consummated, the appellant is estopped by his conduct from disputing the validity and genuineness of the marriage.

[10, 11] The present case presents no evidence of extrinsic fraud which will justify a court of equity in setting aside the decree of divorce. The rule is thoroughly established in an unbroken line of authorities that a collateral attack upon a judgment or decree may not be sustained upon evidence of mere intrinsic fraud such as the presenting of perjured testimony or forged documents. Extrinsic fraud, which alone will warrant a court of equity in setting aside a judgment or decree, consists of such false representations as will prevent a real trial of the cause upon the merits of the issues involved, like the conduct which may induce an interested party to refrain from appearing or participating in the trial, a failure to serve timely notice of the hearing, or acts preventing the presence at the trial of material witnesses. Ringwalt v. Bank of America, 3 Cal.2d 680, 684, 45 P.2d 967; Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L.R.A.,N.S., 579; Clavey v. Loney, 80 Cal.App. 20, 25, 251 P. 232; Jeffords v. Young, 98 Cal.App. 400, 404, 277 P. 163; 9 Cal.Jur. 748, sec. 101; 17 Am.Jur. 373, sec. 455.

[12] When the alleged fraud or coercion is of such nature that it may reasonably be presented to the court at the trial so as to afford full and fair protection to the rights of the interested parties and they fail or neglect to avail themselves of that opportunity, a court of equity will not disturb the judgment rendered under such circumstances, but will leave the parties in the position in which they placed themselves. Hendricks v. Hendricks, 216 Cal. 321, 14 P.2d 83; Estate of Bell, 153 Cal. 331, 95 P. 372; Short v. Short, 106 Cal.App. 210, 288 P. 1111; 9 Cal. Jur. 751, sec. 104; 25 Cal.Law Rev. 79.

[13-17] When an interlocutory decree of divorce is procured by collusion of the parties to the action, equity will not interfere with the final divorce at the instance of either of the culpable parties. Hendricks v. Hendricks, supra; Bancroft v. Bancroft, 178 Cal. 359, 173 P. 579; Bruno v. Guglielmo, 113 Cal.App. 148, 297 P. 967; 15 Cal.Jur. 63, sec. 148. In the present case the plaintiff planned and conspired to avoid the California law against marriage within one year of the entry of an interlocutory decree of divorce, and he deliberately arranged the union and participated in the illegal marriage with defendant. He also returned with her to Los Angeles where she promptly instituted a suit for divorce, serving him with summons and complaint therein. With full knowledge of all the issues presented in that divorce proceeding, including the question regarding the illegal marriage, he made a personal appearance in the case and then permitted judgment by default to be rendered against him. The court was warranted in assuming the divorce suit was brought through the connivance of this appellant. His conduct bars him from seeking relief in equity from a situation brought about by his own connivance. Assuming that a decree of divorce procured by false testimony may be set aside under proper circumstances on the court's own motion or at the instance of an injured party who is a stranger to the proceeding, still equity will not interfere with such a judgment at the behest of either of the culpable parties. In the absence of evidence adduced at the divorce proceeding, we may not assume the decree was procured on false testimony, or that the decision of the court was not fully supported by the pleadings and the evidence. That decree, is, therefore, final and conclusive, as between the parties to that action, with respect to their legal status. Estate of Lee, 200 Cal. 310, 314, 253 P. 145; Blumenthal v. Blumenthal, 97 Cal. App. 558, 561, 275 P. 987; sec. 1908, Code Civ.Proc.; 9 R.C.L. 459, secs. 270-272; Averbuch v. Averbuch, 80 Wash. 257, 141 P. 701, Ann.Cas.1916B, 873. In the Blumenthal Case above cited it is said [page 988]:

"It seems to be the general rule, with respect to final decrees of divorce at least, that, as between the parties and privies, a decree granting a divorce is conclusive of the existence of the marriage dissolved thereby."

[18] We are of the opinion this cause is also barred by laches, since with full knowledge of the circumstances the plaintiff acquiesced in the transfer of one-half of the proceeds of the sale of land, without objection, for a period of eight years, and he failed to appeal from the decree of divorce or to object to the terms thereof for more than four years after the interlocutory decree was rendered.

The judgment is affirmed.

We concur: PULLEN, P. J.; ROSS, Justice pro tem.

30 Cal.App.2d 386

PEOPLE v. NOLAND.

Cr. 2044.

District Court of Appeal, First District, Division 1, California.

Jan. 18, 1939.

1. Indictment and Information ⇐87(3)

An information charging violation of Narcotic Act, dated June 7, filed on June 16, and alleging that offense was committed on or about April 25, was not objectionable as not alleging that offense charged was committed prior to filing of information. Pen.Code, § 979, subd. 5; St.1935, p. 2208, § 7.

2. Jury ⇐29(6)

In prosecution for violation of Narcotic Act, where accused's counsel stated that accused desired to waive jury trial and accused himself so stated upon insistence of state's counsel that accused himself should so state, whereupon jury was excused, accused's constitutional right to jury trial was not infringed as against contention that his counsel did not consent to waiver of jury trial. St.1935, p. 2208, § 7; Const. art. 1, § 7.

3. Poisons ⇐9

Evidence sustained conviction of unlawful possession of a preparation of morphine. St.1935, p. 2208, § 7.

4. Indictment and Information ⇐114

Where a charge of prior conviction is based on statute which contains no clause making the element of penal servitude under the prior conviction essential to imposition of a more severe penalty, it is not necessary so to allege.

5. Indictment and Information ⇐114

Where accused, who was charged with unlawful possession of a preparation of morphine, had been previously convicted of violation of state poison law, imposition of more severe penalty because of prior conviction did not require allegation of penal servitude for former conviction. St.1935, p. 2208, § 7; Pen.Code §§ 644, 666, 667.

6. Criminal law ⇐1202(6)

A judgment of conviction for unlawful possession of a preparation of morphine, which did not mention prior conviction of accused, was to be construed as imposing a sentence for a first offense only. St.1935, p. 2208, § 7; Pen.Code, §§ 644, 666, 667.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

James Noland was convicted of having in his possession unlawfully a preparation of morphine in violation of the Narcotic Act, and he appeals.

Affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

Appellant was accused by information of having in his possession unlawfully a preparation of morphine in violation of the provisions of section 7 of the state Narcotic Act. Stats.1929, p. 380, as amended. The information further charged that before the commission of said offense and on the 24th day of June, 1922, appellant was "received at San Quentin Penitentiary, having been convicted in the Superior Court * * * of the crime of felony, to wit: Violating the State Poison Law * * *." He pleaded not guilty to the charge of unlawful possession, admitted the prior conviction, waived a jury trial, and upon trial before the court was found guilty. He was sentenced to imprisonment in the state prison; and from said judgment of conviction he has taken this appeal.

[1] As first ground for reversal appellant contends that the information does not conform to the requirements of subdivision 5 of section 959 of the Penal Code, in that it does not allege that the offense charged was committed prior to the filing of the information. There is no merit in the point. The provisions of the code section relied upon read: "The * * * information * * * is sufficient *if it can be understood therefrom:* * * * 5. That the offense was committed at some time prior to the time of the * * * filing of the information." (Italics ours.) Here it was alleged in the information that the offense was committed on or about April 25, 1938; the information bears date June 7, 1938, and it was presented and filed in the superior court on June 16, 1938. The plain understanding to be had therefrom is, therefore, that the offense charged was committed at some time prior to the date of the filing of the information.

[2] Appellant's next point is that his waiver of a jury trial was not consented to

by his counsel. Sec. 7, art. 1, Const. of Cal. The point is not well taken. At the opening of the trial a panel of jurors was present, but counsel then representing appellant stated to the court that appellant desired to waive a jury trial. The district attorney insisted, however, that appellant himself should so state; whereupon for the purposes of the record appellant's counsel asked appellant whether he did waive a jury trial, and he answered in the affirmative. The district attorney then consented to the waiver; the panel of jurors was excused; the trial proceeded before the court; and the same counsel continued to represent appellant throughout the trial. It is quite evident that the proceedings thus had were legally sufficient to meet the requirements of the constitutional provision above cited.

[3] Also without merit is appellant's further contention that the evidence is insufficient to sustain the conviction. He was apprehended by a police officer about 1 o'clock in the morning while loitering in Jefferson park in San Francisco. In accounting for his presence there at that time he told the officer he had just parked his automobile in an alley nearby and was on his way to get a cup of coffee and to telephone to friends in Sonoma county; that he intended driving up there to see them if he found they were home. Appellant produced the keys to the automobile, and after some further questioning by the officer they proceeded to the alley where appellant had parked his car, and upon opening the car the officer found therein appellant's personal belongings, but the car was registered in the name of Paul Sanderup. Deeming further investigation necessary, the officer drove the car to the police station, taking appellant with him. There the officer made a more thorough search of the car and found approximately half an ounce of morphine hydrochloride wrapped in tin foil, inside the car, hidden on top of the ignition wires behind the dashboard. Later that same morning appellant was questioned by a state narcotic officer and according to the latter's testimony appellant admitted having purchased the morphine from a man whose picture he identified, and in connection with the identification stated, so the officer testified, that he "got a good buy", paying therefor only $105 an ounce. No question was raised at the trial by appellant as to the ownership or possession of the car at the time of its seizure. As stated, it was registered in the name of Sanderup, but according to appellant's testimony he was buying it from the registered owner, and he admitted having had exclusive possession of it and that he had been driving the same for two months or more immediately preceding his arrest, and that on this particular occasion he had parked the car and locked it just a few minutes prior to the seizure. It also appears from the evidence that appellant had been a user of drugs for more than fifteen years preceding his arrest, and on several occasions had served county jail sentences for unlawful possession.

Testifying as a witness in his own behalf, appellant denied having any knowledge of the presence of the morphine in his car. He intimated that it might have been left there by a man known to him as "Shorty" Wheeler, from Fallon, Nevada, who he said had been riding with him on the evening preceding his arrest, but whose whereabouts since then were unknown. In this regard he went on to say that he had known Wheeler some ten years before, at which time Wheeler informed him he was an addict. The authorities were unable to find any such person as Wheeler, nor could Sanderup be located. Appellant denied also having made any of the statements attributed to him by the narcotic officer. It is apparent, however, that appellant's entire testimony at the most created but a conflict with the evidence produced by the prosecution, and in view of certain contradictory statements made by him at the time of and following his arrest, the trial court, as trier of the facts, was doubtless warranted in resolving such conflict against him.

[4-6] Appellant's remaining point is that the prior conviction was defectively pleaded in that it was not alleged that pursuant thereto he had served a term in some penal institution. It has been held, however, that where the charge of prior conviction is based on a statute which contains no clause making the element of penal servitude under the prior conviction essential to the imposition of a more severe penalty, it is not necessary so to allege (In re McConnell, 5 Cal.2d 436, 55 P.2d 205); and this is such a case. The prior conviction is based on section 7 of the Narcotic Act, as amended by St.1935, p. 2208, which, unlike the Penal Code sections (see Pen. Code., secs. 644, 666, and 667) does not embody any such clause. It prescribes a more severe penalty "if such person has been previously convicted of a felony", and

omits all reference to the element of penal servitude as the result of such prior conviction. In any event, the question of whether or not the charge of prior conviction was insufficiently pleaded would seem to be entirely immaterial so far as appellant's rights are concerned for the reason that the judgment pronounced by the trial court makes no reference whatever to the prior conviction. It reads as follows: "And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment. Judgment. That whereas, the said Defendant James Noland, having been duly convicted in this Court of the crime of Felony, to-wit: Violating the State Narcotic Act. Sentence. It is therefore ordered, adjudged and decreed that the said Defendant, James Noland be punished by imprisonment in the State Prison of the State of California. The Defendant, James Noland, was then remanded to the custody of the Sheriff of the City and County of San Francisco, to be by him taken to the Warden of the State Prison at Folsom, California." Therefore, being silent upon the matter of a prior conviction, the judgment must be construed as one imposing a sentence for a first offense only. People v. Dawson, 210 Cal. 366, 292 P. 267; People v. Arnest, 133 Cal.App. 114, 23 P.2d 812. As so construed, the judgment is affirmed.

We concur: TYLER, P. J.; WARD, J.



30 Cal.App.2d 30

BOLTON v. LOGAN.

Civ. 2190.

District Court of Appeal, Fourth District, California.

Jan. 17, 1939.

Hearing Denied by Supreme Court Feb. 16, 1939.

Mines and minerals ⇐38(13)

In action to quiet title to mining claims where plaintiff claimed under execution sale and defendant claimed under a mortgage and judgment lien, ultimate question for trial court was validity of respective claims to title.

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

On petition for rehearing.

Rehearing denied.

For former opinion, see 85 P.2d 546.

Mayock & Lester of Los Angeles, for appellant.

W. W. Kaye, of Los Angeles, for respondent.

MARKS, Justice.

Plaintiff has filed a petition for rehearing and with great sincerity urges that this court has misstated the law of this state and has held that the judgment of foreclosure of the mortgage given to defendant's predecessor in interest bound plaintiff's predecessor in interest who was not a party to the foreclosure proceeding. Such was not the holding of this court and that question was not before us for decision.

Defendant claimed title to five of the mining claims under a mortgage that was recorded in Inyo county on November 2, 1933. Defendant claimed under the lien of a judgment obtained in Los Angeles county and recorded in Inyo county on November 6, 1933. The action was to quiet title in the plaintiff to six mining claims, and under a cross-complaint to quiet title in defendant to five of those claims. The ultimate question to be decided in the trial court is the validity of these respective conflicting claims of title. This involves priorities of recordation and notices of the respective liens as well as the legality of the two proceedings which resulted in the judicial sales.

The plaintiff was permitted to prove his title. Defendant was prevented from proving whatever title he may have had by objections of counsel for plaintiff which were sustained by the trial judge. We held these rulings to be prejudicially erroneous and the judgment for plaintiff was reversed for that reason.

On a retrial of the case the trial court will determine the question of which party acquired the paramount title to the property. The question is one of priority of liens and paramount title in which the fact of the failure to join the junior lienholder as a defendant in the action to foreclose the prior lien of the mortgage is only one of the questions to be considered.

The petition for rehearing is denied.

We concur: BARNARD, P. J.; GRIFFIN, J.

30 Cal.App.2d 369

BAUMANN v. HARRISON et al.

Civ. 12149.

District Court of Appeal, Second District, Division 1, California.

Jan. 14, 1939.

Appeal and error ⇐477

Where appeal was pending in Supreme Court from judgment rendered in original action which appeared to be in equity, and in connection with which a sale was ordered by superior court after a hearing in supplementary proceedings in aid of execution, Court of Appeal denied petition for writ of supersedeas to stay sale on ground that superior court or Supreme Court alone had jurisdiction to issue writ.

Action by Ana Baumann, as bondholder, etc., against H. O. Harrison, W. G. Lane, the Lane Mortgage Company, and others, wherein the last two named defendants filed a petition for a writ of supersedeas for the purpose of staying a sale of property ordered by the Superior Court of Los Angeles County to take place pursuant to an order of sale issued after a hearing in supplementary proceedings in aid of execution.

Petition denied.

C. H. Scharnikow and William J. Clark, both of Los Angeles, for petitioners.

PER CURIAM.

This petition for a writ of supersedeas was filed in the above-entitled matter in this court on the afternoon of January 13, 1939, for the purpose of staying a sale of property set for nine o'clock on the morning of January 14, 1939. Such sale was ordered by the superior court of Los Angeles county to take place at the stated time, pursuant to an order of sale issued after a hearing in supplementary proceedings in aid of execution.

It appears from the record herein that an appeal is pending in the Supreme Court of this state from the judgment rendered in the original action herein which action appears to be in equity, in that the said appeal is from a judgment rendered after an accounting for the amount found to be due after such accounting was had.

It therefore appears to this court that only the superior court or the Supreme Court would have jurisdiction to issue a writ of supersedeas herein.

By reason of this conclusion the other points raised in said petition are without merit.

The petition for writ of supersedeas is denied.



30 Cal.App.2d 135

UNITED AIR SERVICES, Limited, v. SAMPSON.

Civ. 11624.

District Court of Appeal, Second District, Division 1, California.

Dec. 22, 1938.

As Modified on Denial of Rehearing Jan. 13, 1939.

Hearing Denied by Supreme Court Feb. 20, 1939.

1. Appeal and error ⇐854(5)

On appeal from judgment on a directed verdict, the District Court of Appeal was not restricted to consideration of single ground stated by trial court as reason for directing a verdict, but could investigate all matters considered by the trial court on motion for the verdict.

2. Appeal and error ⇐854(5)

It is the action of the court and not the reasons given therefor with which the District Court of Appeal is concerned on appeal from judgment on a directed verdict.

3. Appeal and error ⇐927(6)

Every presumption is in favor of correctness of judgment on a directed verdict.

4. Appeal and error ⇐901

One appealing from judgment on a directed verdict must affirmatively show error.

5. Appeal and error ⇐662(2)

Statements or recitals in order or judgment on a directed verdict as to showing on which action was based constitute no part of the order or judgment, but basis can be shown only by record on appeal in preparation of which party in whose favor judgment was rendered has an opportunity by presentation of proposed amendments to make the record speak the truth.

6. Appeal and error ⇐662(2)

Neither party can be deprived by recitals in order directing a verdict or judgment based thereon of what record on appeal shows.

7. Appeal and error ⇐854(5)

Where all issues presented by the record were tendered to and were before trial court on hearing of motion for directed verdict, issues were to be considered by the District Court of Appeal in determining correctness of order, notwithstanding order recited that verdict was directed only because of lack of evidence on one issue.

8. Trial ⇐142

The power to direct a verdict is the same as the power to grant a nonsuit, and either may be granted only when, disregarding the fact that there is a conflict in the evidence, and giving full credit only to that portion of the evidence, whether produced by plaintiff or defendant, which tends to support the allegations in plaintiff's complaint, indulging in every legitimate inference which may be drawn from that evidence, there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict were given.

9. Trial ⇐139(1)

The trial court can properly direct a verdict for defendant only where there is no conflict of a substantial nature in the evidence and where the evidence is so conclusive against plaintiff that the court, if such directed verdict were not given, would be compelled to set aside a verdict in opposition thereto.

10. Principal and agent ⇐124(1)

In action for damages from loss of airplane rented by owner to defendant, whether pilot acted in respect to rental and operation of plane as an agent of defendant so as to justify owner in believing that an agency existed was for the jury.

11. Master and servant ⇐301(1)

One by whom airplane was rented could not avoid liability for its loss as result of alleged negligent operation by licensed pilot on ground that pilot could not have acted as his agent because he was not licensed to fly. St.1929, pp. 1875, 1876, §§ 5, 11(e); St.1933, p. 615, § 1.

12. Bailment ⇐33

In action for loss of airplane rented by owner to defendant, whether crash of airplane resulted from negligence of pilot as agent of defendant was for the jury.

13. Pleading ⇐129(2), 377

In action for loss of airplane which had been rented by owner to defendant, where answer denied that any act of pilot had caused destruction of plane and denied that plane was of value alleged by owner without challenging allegation that plane was totally destroyed, such allegation was deemed admitted by the answer so that no proof thereof was necessary and any proof to the contrary was to be disregarded.

14. Pleading ⇐126

In action for loss of plane which had been rented by owner to defendant, denials in answer that negligence of pilot had caused destruction of plane and that pilot was negligent and that plane was of the value alleged by owner, being in the conjunctive as to several distinct facts, were to be regarded as inadequate as specific denials of allegation in complaint that plane was totally demolished so that any facts in connection therewith thus attempted to be denied were to be taken as admitted.

15. Pleading ⇐126

A denial in answer that destroyed airplane was worth more than $1,000 at time of accident was a "negative pregnant" and was an admission that the plane was worth the sum of $1,000.

[Ed. Note.—For other definitions of "Negative Pregnant," see Words & Phrases.]

16. Pleading ⇐376

Admission in pleadings that airplane was completely destroyed was controlling on such issue, required no evidence to support it, and forbade consideration of evidence tending to refute it.

17. Pleading ⇐129(2)

In action for loss of airplane which had been rented by owner to defendant, where there was some evidence indicating that certain parts of plane retained some value after crash, but answer instead of denying allegation in complaint that plane was totally destroyed, denied merely that plane was of value alleged by owner, defendant could not take advantage of the evidence indicating value of parts after crash.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by the United Air Services, Limited, against Richard Hunt Sampson to recover damages for loss of an airplane. Judgment for defendant, and plaintiff appeals.

Reversed and cause remanded.

Gibson, Dunn & Crutcher, of Los Angeles (David P. Evans and George D. Jagels, both of Los Angeles, of counsel), for appellant.

Lasher B. Gallagher, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff instituted this action to recover damages for the loss of an airplane owned by it and rented by plaintiff for the purpose of enabling defendant and his party to fly to San Bernardino on July 9, 1934. On said date the airplane crashed shortly after it had left the ground at Shandin Hills Airport in San Bernardino on the intended return flight. The crash resulted in the deaths of the pilot, George Hague, and Sam Edwards, a passenger, while the defendant and another passenger, Harry Claiborne, survived. By his answer, defendant denied he hired the plaintiff's airplane; denied that the pilot, George Hague, was at any time an employee of defendant; denied that Hague was negligent in the operation of the airplane, and also placed in issue the value of the crashed plane. By way of special defenses, the defendant asserted that the pilot, Hague, was an independent contractor over whom defendant had no right of control, and that the plane was hired by the pilot, Hague, but that said plane was not airworthy, of which condition it was alleged plaintiff had knowledge, but of which condition plaintiff negligently failed to warn the pilot.

Following presentation of their case by both plaintiff and defendant, the court on motion of the defendant directed a verdict in his favor. The motion for a directed verdict was based on the following grounds:

"1. The evidence is insufficient to establish a case sufficient to go to the jury;

"2. The plaintiff has failed to prove by a preponderance of the evidence the material allegations of the complaint;

"3. There is no evidence in the case sufficient to establish agency, or the relation of master and servant between the defendant Sampson and George Hague."

Reconvening the jury, the court directed their verdict in the following language: "Ladies and gentlemen of the jury, I have discussed this matter with counsel upon hearing the motion, and I am directing you now * * * to give a directed verdict for the defendant. There is no evidence sufficient to go to the jury on the question of agency. That is all I am deciding now, as to the agency." Thereupon the jury returned a verdict accordingly. From the judgment entered thereon plaintiff prosecutes this appeal.

[1-4] Appellant places special emphasis in its brief upon the single ground stated by the court as being the basis for the order directing a verdict in respondent's favor. In this connection, we deem it appropriate to say that on appeal this court is not restricted to a consideration only of the single ground stated by the trial court as the reason for directing a verdict. Upon appeal from a judgment predicated upon a directed verdict, we are allowed to investigate all the matters considered by the trial court upon such motion for directed verdict. The record before us includes the reporter's transcript, containing all the evidence at the trial, including all grounds urged by respondent in presenting his motion for a directed verdict. While it is true the trial court specified in its order directing a verdict the single reason that "there is no evidence sufficient to go to the jury on the question of agency", still the reasons given by the court for its action are not always material. Power v. Fairbanks, 146 Cal. 611, 615, 80 P. 1075. The reason given for the decision or order may be good and the decision or order at the same time incorrect for other reasons. It is the action of the court, and not the reasons given therefor, with which we are concerned. Every presumption, it is true, is in favor of the order made, and it devolves upon the party appealing from a judgment based upon an order directing a verdict to affirmatively show error. This, however, may be done by presenting a record showing what was before the court on the hearing of the motion in question. The record before us indicates that the motion for a directed verdict squarely presented to the trial court the question as to whether or not "the evidence was insufficient to establish a case sufficient to go to the jury"; whether the "plaintiff has failed to prove by a preponderance of the evidence the material allegations of the complaint";

and whether there was "evidence in the case sufficient to establish agency, or the relation of master and servant between the defendant Sampson and George Hague".

[5-7] The order and the judgment based thereon simply indicate the action of the court, and not the showing upon which such action was based. Therefore statements or recitals in the order or judgment as to the showing made constitute no part of the order or judgment. These things can be shown only by the record on appeal, in the preparation of which the party in whose favor the judgment was rendered has an opportunity, by the presentation of proposed amendments, to make the record speak the truth. Neither party can be deprived by recitals in the order directing a verdict or the judgment based thereon of what the record on appeal shows. The record before us in the instant case presents for determination the question as to whether the evidence justified the trial court in granting the motion for a directed verdict; whether the evidence was sufficient to require the submission of the case to the jury; whether the plaintiff failed to prove by a preponderance of the evidence the material allegations of its complaint, and whether there was any evidence in the case sufficient to establish agency or the relation of master and servant between the defendant, Sampson, and George Hague, the pilot of the airplane. All these issues were tendered to and were before the trial court on the hearing of the motion for a directed verdict, and must be considered by us in determining the correctness of the order made in the court below.

[8] Appellant assails the judgment upon the ground that in the face of a conflict in the evidence, the trial court fell into error in taking the case from the jury and directing a verdict for the defendant. It is the well established and settled law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit; that a nonsuit or directed verdict may be granted only when, disregarding the fact that there is a conflict in the evidence, and giving full credit only to that portion of the evidence, whether produced by plaintiff or defendant, which tends to support the allegations contained in plaintiff's complaint, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such verdict were given In re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768.

[9, 10] Appellant contends there was substantial evidence from which the jury might have found that the plane was rented by defendant, and that the latter thereupon became responsible for the negligent operation thereof; while respondent claims there was no evidence from which the jury might have found that the plane was rented without the services of a pilot; but that the only inference which can be lawfully drawn from plaintiff's evidence is that the plaintiff rented to the defendant an airplane, and that the rental price included both an airplane and the pilot; that plaintiff was guilty of contributory negligence; that there was a total failure on the part of plaintiff to prove any negligence whatsoever on the part of the pilot, Hague, or to prove that the airplane was totally demolished or destroyed.

A review of the evidence in this case convinces us that it did not contain testimony from which in its entirety reasonable men could draw but one conclusion; but on the contrary, presented a factual situation that was debatable, and upon which reasonable minds might well disagree. In support of this conclusion, we find in the record the testimony of A. Paul Mantz, president of the plaintiff corporation, who testified that according to his best recollection, he was called on the telephone at his office the day before the fatal crash by the defendant, Sampson, who inquired whether the plaintiff's J–5 Lockheed airplane was available for rental, to which Mantz replied that the plane in question was expected back the afternoon of the same date and quoted the defendant an hourly rental charge. According to this witness, the defendant then asked if he could furnish his own pilot, to which plaintiff corporation's president replied that he did not like to rent the plaintiff's planes without its own pilot. That the defendant then stated he would prefer to have George Hague fly the plane. That after further discussion, the witness finally receded from his demand that one of plaintiff's own pilots be used, and requested defendant to send Hague over for explanation of the particular characteristics of the plane in question. The witness then testified that subsequent to such conversation

George Hague came to plaintiff's office at the airport where the plane was kept, and that thereupon the characteristics of the plane were explained by the witness to Hague. The witness further testified that a month or two following the crash he had a further conversation with the defendant, the latter of whom is an attorney at law, and in that conversation the witness stated that he felt that if the crash was the result of motor failure or other fault in the plane, the loss should be borne by the plaintiff, but that if the crash was the fault of Hague, the pilot, the defendant should pay for it; that the defendant thereupon replied that if the crash was Hague's fault, he (the defendant) owed the plaintiff money. In the testimony of the defendant himself we find the admission that on the morning of the trip he called the pilot, George Hague, by phone and told him that he (the defendant), Edwards and Claiborne wanted to go to San Bernardino, and asked Hague if the latter would take them there. The defendant further admitted in his testimony that at the time this arrangement was made he knew that Hague did not himself own a plane. The defendant further testified that he told Hague where he wanted to fly, when he would meet him to commence the trip, and when he wished to return to Los Angeles after the business in San Bernardino had been taken care of. Though there was evidence in conflict with the foregoing, nevertheless the trial court can properly direct a verdict only in cases in which there is no conflict of a substantial nature in the evidence; and where the evidence is so conclusive against the plaintiff that the court, if such directed verdict were not given, would be compelled to set aside a verdict in opposition thereto. The testimony just narrated was certainly of sufficient substantiality, if believed by the jury, to entitle it to conclude that Hague acted at all times in respect to the rental and operation of the crashed plane as an agent of the defendant, and even though Hague was not an expressly authorized agent of defendant, the conduct of defendant as testified to by plaintiff corporation's president was such that the plaintiff was justified in believing such an agency existed.

[11] It is the further contention of respondent, however, that since he was not himself licensed to fly the airplane, that Hague, a licensed pilot, could not act as Sampson's agent in flying the airplane, and that, because under the department of commerce regulations, plaintiff could not permit the airplane to be flown by defendant Sampson, who was not a licensed pilot, it follows, contends respondent, that plaintiff's delivery of the airplane to Hague could not constitute a delivery to Sampson. In support of this contention, respondent directs our attention to a California statute (Deering's Codes, Laws and Constitutional Amendments of California, 1933 Supplement, p. 1071, Act 151, approved June 18, 1929, as amended, Stats. 1933, p. 615), which has reference to the operation of aircraft within the State of California; and we are also referred to section 5 and section 11, subdivision (e), of Act 151, Statutes of 1929, page 1874, which provide respectively as follows:

"It shall be lawful for any person to operate or participate in the operation of any aircraft within the State of California or to act as an airman in connection therewith if such person is licensed and registered under the laws of the United States or any regulation made pursuant thereto, but it shall be unlawful for any person to act as an airman in any capacity, except that for which he is licensed under the laws of the United States or any regulations adopted pursuant thereto. * * *

"Any person who * * * operates or participates in the operation of any aircraft within the State of California or acts as an airman in connection therewith unless he is licensed therefor under the provisions of this section or is registered and licensed therefor under the laws of the United States and any regulations made pursuant thereto, is guilty of a misdemeanor. * * *"

Respondent argues that these California statutes make it unlawful for respondent, an unlicensed pilot, to act as an "airman" in any capacity whatsoever, and that not having a pilot's license, he could not be the master or principal of Hague, a licensed air pilot, in and about the operation of the airplane. This claim of respondent cannot be sustained. We are asked by respondent to hold, in effect, that the requirement that airplanes must be operated by licensed pilots precludes the relationship of agent and principal between such licensed pilots and the unlicensed persons for whom they may operate the airplane, or in other words, that an unlicensed person or corporation would not be liable for the negligence of pilots employed by it to operate its airplanes. Such a holding would be analogous to saying that unlicensed employers of licensed

elevator operators could not be held for the negligent operation of such elevators, and that a person who himself was not licensed to drive an automobile could not by his actions or conduct bring about the relationship of principal and agent or master and servant between himself and a licensed chauffeur. Obviously this is not the law. The mere fact that respondent, Sampson, could not under the law tell the licensed pilot when to "gun" the motor, to rise above or stay below the clouds, to bank, to turn or to slip, does not make impossible the existence of an agency relationship between him and Hague.

[12] There being in the record evidence of sufficient substantiality, if believed by the jury, to warrant a finding of the existence of an agency, actual or ostensible, between Hague and the defendant, we come now to a consideration of the evidence of negligence on the part of defendant through his pilot-agent, leading to the crash of plaintiff's airplane. In this connection we find in the record testimony to the effect that at the time of the final take-off the plane's motor was not missing, but appeared to be running perfectly; that after the take-off, when the pilot, Hague, was still traveling straight into the wind, he turned directly at right angles to the wind and thereupon began to lose altitude; that he then turned to the east and turned back to the airport with the wind at his tail, which in the words of one witness is "tough luck"; that from that point the plane started to lose altitude rapidly, but that during the entire time the ship was in flight, the witness at no time heard the motor missing. Amelia Earhart Putnam, testifying as an expert, who at the time had more than two thousand flying hours, and who herself had landed in the Shandin Hills Airport in a very similar plane, testifying in response to a hypothetical question, said that in her judgment the pilot Hague did not act prudently or as one who had experience should have acted. In her testimony as an expert, Miss Earhart further testified that the pilot committed the following pilot errors: (1) choosing the short runway under the conditions present on the day of the crash; (2) pulling the ship off the ground before it had flying speed; (3) if there was any absence of proper response on the part of the motor, the pilot's failure immediately to pull the throttle after crossing certain wires beyond the airport and thereupon landing in an open field which was straight ahead. The president of plaintiff corporation testified that before Hague took the plane he discussed its characteristics with the pilot in great detail, and also discussed the physical characteristics of the Shandin Hills Airport, making a sketch of it for the pilot. This witness further testified that on four or five occasions he had personally flown in and out of the Shandin Hills Airport with the very ship that crashed; that he had had approximately six thousand hours of flying time. In response to a hypothetical question, this witness testified that the pilot should have taken advantage of the longer runway in order to obtain additional speed; that if the pilot had encountered difficulty in climbing, he should, instead of attempting to return to the airport as he did, with a tail wind, have landed in a large open field straight ahead in the direction in which the plane took off; that the witness himself had on the day immediately following the crash here in question landed the same make of plane, with a larger motor, requiring more room to land than the crashed plane, in the aforesaid open field. While again there was evidence offered in opposition to the foregoing, nevertheless such evidence merely created a conflict; and in our opinion plaintiff's evidence was of that substantial character that precluded the court from withdrawing the case from the triers of fact as to this issue of negligence.

[13] With reference to respondent's contention that there was a total failure on the part of plaintiff to prove that the airplane was completely demolished or destroyed and that upon that ground alone the court was warranted in taking the case from the jury, it is sufficient to say that since the allegations of the complaint that the airplane was totally demolished and destroyed were admitted by defendant's answer, no proof thereof was necessary, and any proof to the contrary must be disregarded. In its complaint appellant alleges "that by reason of the aforesaid carelessness, recklessness and negligence of the defendant and his said agent and employee, George Orrin Hague, *the said airplane was totally demolished and destroyed*". (Italics added.) "That said airplane was of the reasonable value of Four Thousand Dollars ($4,000.00) and that as a proximate result of the carelessness, recklessness and negligence of said defendant and his said agent, servant and employee the said plaintiff has been damaged in the sum of Four Thousand Dollars ($4,000.00).

In so far as the allegation concerning the alleged total destruction of the airplane is concerned, we find in respondent's answer only the following averment:

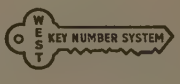
"Defendant denies that by reason of any carelessness or recklessness or negligence of George Orrin Hague the said airplane was demolished or destroyed and denies that said George Orrin Hague was guilty of any carelessness or recklessness or negligence and defendant denies that by reason of any act or omission on the part of this defendant the said airplane was demolished or destroyed. * * * This defendant has no information or belief upon the subject sufficient to enable him to answer the allegations contained in the second sentence of paragraph V, page 2 of plaintiff's complaint and placing his denial thereof upon said ground this defendant denies said allegations and each thereof and denies that said airplane was of any value in excess of the sum of $1,000. * * * This defendant denies that the plaintiff has sustained damage in the sum of $4,000 or in any other sum whatsoever as a proximate result of any act or omission on the part of this defendant."

[14-17] From the foregoing it is at once apparent that although by the portions of the answer above quoted defendant denies that any acts of the pilot, Hague, caused the destruction of the airplane, and denies that the airplane was of the value alleged by the plaintiff, nevertheless the allegation of the complaint that the airplane was totally demolished and destroyed is not challenged. Obviously the answer was intended only to controvert the *cause of the destruction* as alleged in the complaint, but not the demolition and destruction itself. In any event, these denials, being in the conjunctive as to several distinct facts, must be regarded as evasive and wholly inadequate as specific denials of the total demolition of the plane, and any facts in connection therewith thus attempted to be denied must be taken as admitted. Scott v. Superior Sunset Oil Co., 144 Cal. 140, 142, 77 P. 817. Added to this is the admitted fact that the defendant in moving for a directed verdict did not name failure to prove damages as one of the grounds therefor, nor was any such ground presented to the court for consideration in connection with the motion for a directed verdict. We conclude that the most that can be said of the allegations contained in defendant's answer with reference to this particular issue is that they are to the effect that the airplane was not at the time of the accident of the reasonable value of more than $1,000. This language is a negative pregnant and is an admission that the property was worth the sum of $1,000. It can be taken only to be an admission that the value of the airplane which was completely destroyed as alleged in the complaint was $1,000 instead of $4,000. That the airplane was completely destroyed is a fact admitted by the pleadings, and such admission is therefore controlling upon that issue. It requires no evidence to support it. In fact, it forbids the consideration of evidence which tends to refute that stipulated fact. Dressler v. Johnston, 131 Cal. App. 690, 695, 21 P.2d 969. Conceding that there may be some evidence in the record indicating that certain parts of the airplane retained some value after the crash, respondent cannot take advantage of such evidence, which is directly contradicted by an allegation in the complaint admitted by the answer.

No other points demand our attention. The motion for a directed verdict should not have been granted.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.



30 Cal.App.2d 383

STATE MUT. BUILDING & LOAN ASS'N v. LOS ANGELES COUNTY.

Civ. 10926, 10927.

District Court of Appeal, First District, Division 2, California.

Jan. 17, 1939.

Hearing Denied by Supreme Court March 16, 1939.

1. Taxation ⇐219

Notes secured by mortgages on Arizona land were not subject to taxation in California, under constitutional provision exempting obligation "when land is pledged as security for the payment thereof." Pol. Code, §§ 3627a, 3804; Const. art. 13, § 1.

[Ed. Note.—For other definitions of "Land," see Words & Phrases.]

2. Taxation ⇐219

Under constitutional provision that obligation shall not be considered property subject to taxation "when land is pledged as security for the payment thereof," the word "land" is not restricted to land within the state. Civ.Code, § 659; Const. art. 13, § 1.

3. Constitutional law ⇐14

It is to be presumed, in the absence of anything in the context to the contrary, that words in Constitution were used in the ordinary acceptation and as defined by the statutes in force at the time. Civ.Code, § 659; Const. art. 13, § 1.

4. Taxation ⇐204(2)

In interpreting the constitutional proviso exempting obligations secured by land from taxation, subsequently adopted amendments of pertinent statutes, referring to land within the state, are not controlling. Pol.Code §§ 3617, 3628, 3629, as amended by St.1929, pp. 124, 126, 127, §§ 1, 3, 4; Const. art. 13, § 1.

5. Appeal and error ⇐1175(5)

Where all facts involved were proved either by uncontradicted evidence or by stipulation, reviewing court would direct entry of judgments in reversing judgments for defendant.

Appeal from Superior Court, Los Angeles County; Henry M. Willis and Charles D. Ballard, Judges.

Two actions by the State Mutual Building & Loan Association against the County of Los Angeles, to recover taxes illegally collected. From judgments for defendant, plaintiff appealed, and the appeals were consolidated pursuant to stipulation.

Reversed with directions.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Holbrook & Tarr and W. Sumner Holbrook, Jr., all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

SPENCE, Justice.

Two actions were brought by plaintiff, pursuant to the provisions of section 3804 of the Political Code, seeking the refund of taxes alleged to have been illegally collected by defendant. In each of said actions, judgment was entered in favor of defendant after a trial by the court sitting without a jury. Plaintiff has appealed from each of said judgments and the two appeals have been consolidated pursuant to stipulation.

It appears that plaintiff invested large sums of money in mortgage loans—that is to say, in promissory notes secured by mortgages on land. Some of said notes were secured by mortgages on lands located in the state of California and others were secured by mortgages on lands located in the state of Arizona. All of said notes and mortgages were held by plaintiff at its office and principal place of business in the city of Los Angeles.

Plaintiff annually returned to the county assessor a financial statement showing its loans and designating the location of the lands securing said loans. No assessment has ever been made nor has any tax ever been collected on any of the notes secured by mortgages on lands located in the state of California. In each of the three years involved in these actions, to-wit, 1932, 1933 and 1934, the assessor did assess the notes which were secured by mortgages on land in Arizona. These were assessed under the description "Arizona mortgages" or "Mortgages". Thereafter plaintiff paid taxes thereon at the rate provided by section 3627a of the Political Code. The total amount paid was slightly in excess of $7,000 and plaintiff sought to recover said amount by these two actions.

[1] There is no dispute concerning the material facts above set forth and the question presented is whether said taxes were "illegally collected". It is plaintiff's contention that they were and that the trial court erred in entering judgments in favor of defendant. In our opinion, this contention must be sustained.

Section 1 of article 13 of the Constitution provides: "All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; *provided, that a mortgage, deed of trust, contract, or other obligation by which a debt is secured when land is pledged as security for the payment thereof, together with the money represented by such debt, shall not be con-*

*sidered property subject to taxation; * * *.*" (Italics ours.)

[2, 3] The italicized proviso was adopted in 1910. The language thereof is very broad and we find no ambiguity therein so far as its application to the facts before us is concerned. The proviso uses the word "land" without qualification or limitation. It does not purport to define said word and "It is to be presumed, in the absence of anything in the context to the contrary, that the words were used in the ordinary acceptation and as defined by the statutes in force at the time." City of Pasadena v. County of Los Angeles, 182 Cal. 171, 175, 187 P. 418, 420. The word "land" was defined by statute in force at the time of the adoption of said proviso. Civ.Code Cal. § 659. Defendant would have us read into said proviso the words "in this state" after the word "land" but we find no justification for so doing. If such limitation had been intended, it would have been a simple matter to have expressed it.

[4] There are portions of defendant's brief in which it is impliedly, if not expressly, conceded that a literal interpretation of the proviso sustains plaintiff's position. Defendant contends, however, that the limitation claimed by defendant is "indicated" (1) by the language of the section when read as a whole, (2) by the argument to the voters, (3) by court decision, and (4) by legislative interpretation. We find nothing in the first three which "indicates" such a limitation. Under the fourth, defendant calls our attention to the 1929 amendments to sections 3617, 3628 and 3629 of the Political Code (St.1929, pp. 124, 126, 127, §§ 1, 3, 4), in which the word "land" was followed by the words "in this state" or "situate within this state". Between 1910 and 1929, no such qualification or limitation was found in any of said sections. We do not believe said statutory amendments are controlling in interpreting the constitutional proviso which was adopted 19 years earlier. The situation is somewhat analogous to that presented in Pasadena University v. Los Angeles County, 190 Cal. 786, at page 788, 214 P. 868, at page 869, where the court said: "The decision of this case rests solely upon an interpretation of the language of the Constitution. Section 3613, subdivision 2, Political Code, was passed subsequent to the adoption of the constitutional amendment above set out, and it can in no way limit or extend the exemption therein granted." See, also, St. John's Church v. County of Los Angeles, 5 Cal.App.2d 235, 42 P.2d 1093.

[5] In view of the conclusions which we have reached, it appears unnecessary to consider the questions raised by plaintiff under the provisions of the federal Constitution. It further appearing that all of the facts involved in these actions were either proved by uncontradicted evidence or by stipulation, we believe it appropriate to direct the entry of judgments in favor of plaintiff.

The judgments are reversed with directions to the trial court to enter judgment in favor of plaintiff in each of said actions.

We concur: NOURSE, P. J.; STURTEVANT, J.



30 Cal.App.2d 382

MANNING v. MERCY HOSPITAL et al.

Civ. 2232.

District Court of Appeal, Fourth District, California.

Jan. 16, 1939.

Appeal and error ⇐787

Where transcript of clerk of superior court showed judgment was rendered and entered November 30, 1937, that notice of appeal was filed January 29, 1938, and neither reporter's transcript nor briefs were filed and no appearance made by appellant within time allowed, a motion to dismiss appeal was granted. Rules of Supreme Court and District Courts of Appeal, rules 1 and 5.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by J. A. Manning against the Mercy Hospital and others. From an adverse judgment, plaintiff appeals. On motion to dismiss the appeal.

Motion granted and appeal dismissed.

Halbert & Stone, of Porterville, for appellant.

Borton, Petrini & Conron, of Bakersfield, for respondent.

GRIFFIN, Justice.

This is a motion to dismiss an appeal from a judgment of the superior court of Kern county under the provisions of rules I and V of the Rules for the Supreme Court and District Courts of Appeal. The transcript of the clerk of Kern county shows that judgment was rendered and entered on November 30, 1937, and that notice of appeal to this court was filed on January 29, 1938. Neither the reporter's transcript nor briefs have been filed and no appearance has been made by appellant, although the legal time within which to do so has long since expired.

The motion is granted and the appeal is dismissed.

I concur: MARKS, Acting P. J.

BARNARD, P. J., being absent, does not participate herein.



30 Cal.App.2d 381

GRABLE v. SHIPP et al.

Civ. 2260.

District Court of Appeal, Fourth District, California.

Jan. 16, 1939.

Appeal and error ⇐787

Where certificate of county clerk showed that no request to the reporter or clerk to prepare a transcript had ever been filed and only notice of appeal was filed and legal time within which to perfect appeal had expired, appeal would be dismissed. Rules for the Supreme Court and District Courts of Appeal, rule 5.

Appeal from Superior Court, Fresno County.

Action by Don Grable against J. M. Shipp and another. From an adverse judgment, plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

John F. O'Sullivan, of San Francisco, for appellant.

Strother P. Walton, of Fresno, for respondents.

GRIFFIN, Justice.

This is a motion to dismiss an appeal from a judgment of the superior court of Fresno county under the provisions of rule V of the Rules for the Supreme Court and District Courts of Appeal. The certificate of the county clerk of the county of Fresno shows that no request or instruction to the reporter to prepare a transcript and no request to the clerk to prepare a transcript have ever been filed. No papers or documents have been filed with the clerk relating to an appeal from the judgment excepting the notice of appeal. The legal time within which to do so has expired.

The motion is granted and the appeal is dismissed.

I concur: MARKS, Acting P. J.

BARNARD, P. J., being absent, does not participate herein.



30 Cal.App.2d 340

In re CUSHING'S ESTATE.

POWELL v. PORTEOUS et al.

Civ. 1975—S.

District Court of Appeal, Second District, Division 1, California.

Jan. 12, 1939.

Hearing Denied by Supreme Court March 13, 1939.

1. Trial ⇐165

A nonsuit may be granted only when, disregarding conflict in evidence and giving to plaintiff's evidence all value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result would be a determination that there is no evidence to support verdict for plaintiff.

2. Trial ⇐165

Trial court's function on motion for nonsuit is analogous to that of reviewing court in determining, on appeal, whether there is evidence to support verdict.

3. Wills ⇐326

Evidence regarding whether execution of testatrix' will was procured by fraud and undue influence was sufficient, as against motion for nonsuit, to make a question for jury.

4. Wills ⇐326

Evidence was sufficient, as against motion of nonsuit, to make jury question regarding testatrix' competency to execute will, which disinherited testatrix' only surviving relatives, her half-brother and his daughter.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Proceeding in the matter of the estate of Emilie G. Cushing, deceased, wherein Andrew J. Powell filed a contest to the probate of the will of the deceased which was offered for probate by R. H. Porteous, executor of the estate of Emilie G. Cushing, deceased, and others. From an order admitting the will to probate, the contestant appeals.

Order reversed.

Frank E. Kilpatrick, Henry H. Kilpatrick, and Booth B. Goodman, all of Oakland, for appellant.

Knight & McCarthy and Newton M. Todd, all of Long Beach, and Fred A. Watkins, of San Francisco, for respondents.

DORAN, Justice.

This is an appeal from an order admitting to probate the will of Emilie G. Cushing, deceased. The order was made following a contest of the will, before a jury. At the close of contestant's case, the trial court granted a motion for nonsuit as to each of the grounds upon which the contest was based, namely, incompetency, undue influence and fraud. Letters testamentary were thereafter issued to respondent R. H. Porteous, executor without bond, and the principal devisee and legatee.

Testatrix at the time of her death on April 4, 1937, at Long Beach, California, was 81 years of age. Mrs. Cushing's children had died in their infancy, and her only surviving relatives were Andrew J. Powell, contestant herein, who was her half-brother (they were children of the same mother), and his married daughter, Helen Powell Doane. Dr. Powell, who was 74 years old at the time of the trial, was at one time a practicing dentist at Hayward, California, but had retired from active practice some twenty years previously due to ill health. He was not mentioned in the will.

The evidence reveals that in 1932, respondent R. H. Porteous, a married man 42 years of age, was employed on a parking lot in Long Beach, a short distance from the Elks Club. Mr. Ed Cushing, the husband of the decedent, who was a member of the Elks Club, and who resided at the Imperial Hotel located within a block of the club, became casually acquainted with Porteous at that time. A few days after their first meeting, Mr. Cushing, who was out walking with his wife, introduced her to Porteous, and from time to time thereafter Mr. and Mrs. Cushing would give Porteous a dollar or two as a present, because, as respondent testified, they "felt sorry" for him. Porteous joined the Elks Club in 1933, and shortly thereafter procured a position in the club as a servant. Upon only one occasion during Mr. Cushing's lifetime, and only for a few minutes, did Porteous visit the Cushings at the hotel where they resided; that occasion arose when he happened to walk home with them.

Mr. Cushing died in October of 1935. Within a week after Mr. Cushing's death respondent Porteous called upon Mrs. Cushing and informed her that her husband had told him to look after her. He began to visit her regularly every day at her apartment, and in 1936 these visits increased to an average of five times a day. He displayed great affection toward her, called her "Mother", and according to his own testimony, told her that he loved her just like his own mother. He usually kissed her upon arrival and upon leaving. Continuous gifts of money were given to him by Mrs. Cushing, with part of which he bought her flowers and candy, the balance being used to defray his own expenses.

In February of 1936 Mrs. Cushing suffered a fall requiring her to be confined to her bed for several months. Her condition became progressively worse, mentally and physically, and to facilitate the management and care of her property, and at the suggestion of Mrs. Cushing's banker, a Mrs. Mary C. Walters, who was employed as a day clerk at the apartment hotel for a number of years and who knew both Mr. and Mrs. Cushing during that time, was appointed guardian by the court on May 25, 1936. Four months later, to-wit, on September 28, 1936, Mrs. Cushing's condition having improved, and through action taken

by Mr. Porteous' attorney, she was restored to capacity. On the following day, namely, on September 29, 1936, Mrs. Cushing executed a general power of attorney in which Porteous was made her attorney in fact; and, on the same day, the will in question was executed.

In October of 1936 Porteous was given a new Dodge automobile by Mrs. Cushing and a two-carat diamond ring which had formerly belonged to her husband, and which Porteous had Mrs. Cushing give to him in front of his attorney so that he "would have proof that she gave it" to him.

In August of 1936 a Mrs. Gladys Livesey was employed as a practical nurse, secretary and companion to Mrs. Cushing. It appears that Mrs. Cushing's property and financial investments were largely in the hands of a man by the name of Frank Williams, who lived in Stockton, and who was an old friend of the Cushings.

On January 9, 1937, Mrs. Livesey wrote to Mr. Williams as follows:

"Private and Confidential.

"Dear Mr. Williams:

"Received your letter dated January 7th this morning; I was very glad to learn that you were interested and concerned in Mrs. Cushing's health.

"In my opinion, her health has improved considerably within the last six weeks, she now walks without her stick and when we go out walking she gets about without my help, only of course when she crosses the street. The cold and damp weather affects her sore leg, and unfortunately makes her extremely nervous. Her physical condition is excellent. She does not have the need of a doctor now. If, however, I saw the slightest failure in her health I would call in her doctor without a moment's delay.

"Mr. Williams, you can rest assured that if Mrs. Cushing felt sick, though only a little alarming, I would most certainly let you know. I shall, of course, do as you suggest, keep you personally advised how she is getting along.

"The business transaction has not as yet transacted. Mrs. Cushing had to make an offer (it was not up for sale) then the Estate had to advertise the sale of the lots and ask for bids, now they are waiting for the Court to fix a date to accept the bids. Though it was none of my affair, and I was not asked for an opinion, I was very alarmed and grieved when Mrs. Cushing spoke of changing her investments; at her age I do not think it advisable.

"I sincerely hope that everything will be all right. I thought it best to keep your letter confidential. Whilst I am in Mrs. Cushing's employ she will have the best of care, and the very best of everything. I am trying my hardest to make her life very happy, though it is pretty hard sometimes, me being a woman, and she doesn't care so much for them, but prefers men. Nevertheless I shall keep on keeping on. * * *

"Sincerely yours.

"G. Livesey."

The "business transaction", referred to in the letter, related to a contemplated purchase by Mrs. Cushing of three lots in Long Beach, which lots at that time were rented by a brother of Mr. Porteous for parking purposes. Subsequently these lots were purchased by Mrs. Cushing for a sum of around $29,500, and on February 19, 1937, the decedent made a gift deed conveying these three lots to Porteous.

Dr. Ralph B. Eusden, the physician who treated Mrs. Cushing during the years 1929 to 1936, testified that in 1931 Mrs. Cushing had well-marked manifestations of chronic heart failure, an infection of the bones of the skull, a severe bone infection in one leg, "plus senility and arteriosclerosis and all of those senile changes—principally of the circulatory system"; in 1935 two cancers appeared, which were treated with cautery and radium.

Dr. Eusden also testified that after Mrs. Cushing moved to the Sovereign Apartments in November of 1936, no calls were received by him to continue his professional visits. However, on March 7, 1937, about a month before the decedent's death, he received a call to visit her professionally and found the decedent in precarious health, having suffered what is commonly referred to as a "stroke". At that time an examination revealed numerous black and blue spots and contusions in various stages of duration upon Mrs. Cushing's body. Upon inquiry, the doctor learned that during the preceding two weeks Mrs. Cushing had been unsteady on her feet, weaving and falling, and that the bruises were the result of bumping into the tables and chairs and furniture about the room.

The evidence reveals that during this last period of Mrs. Cushing's life, and while her condition was very bad, letters were sent to Mr. Williams, signed by Porteous

to the effect that her condition was improving, and, in a letter dated March 18, 1937, Porteous wrote that they were expecting Mrs. Cushing to be "up and around again like her usual self in about ten days or a couple of weeks".

A little over a week later, however, and shortly before the decedent's death, Mrs. Livesey wrote to Mr. Williams as follows:

"March 27, 1937.

"Dear Frank:

"I daresay you have wondered why I did not notify you of Mrs. Cushing's illness, as I had promised I would if ever she showed signs of failing. Mrs. Cushing took suddenly sick on Sunday, March 7th, at about 3 a. m. I called the doctor as early as I could, and he came down here just as soon as he got the message. He examined her thoroughly and was very kind and sympathetic and said she had a slight stroke and he was afraid she would have to remain in bed for quite a while. After he left I drafted a night letter to you (so you would get it Mon. morn). Foolishly I mentioned the fact to Bob" (Porteous) "who suggested I wait until next day and send a day letter and perhaps by then her condition would be improved. Early Mon. morning Mr. Knight rung me up and said Bob had told him I was writing you, and he forbade me to do so saying Bob was in charge and had the Power of Attorney and he would attend to it. I noticed it was attended to 4 days after. Bob and Mr. Knight are lifelong friends and if I had words about it with one the other would be against me. Those two naturally put me to a disadvantage. I was undecided whether to write you anyway or leave it to them. I left it to them, but they have not as yet told you she is a very sick lady.

"Mrs. Cushing is very very weak indeed Frank. She has not been out of bed yet, and it may be a long time before she ever will *do*. You mentioned in this last letter you wrote to Mrs. Cushing that you may come south. I wish you would Frank. Perhaps it would be best if you would make it in the very near future. * * * G. Livesey."

A friend of Mrs. Livesey, one Juanita Nordman, testified that sometime in November of 1936, Mrs. Cushing told her that she (Mrs. Cushing) loved Robert Porteous, and that he and his wife were estranged and not living together. Mrs. Nordman further testified as to a statement made by Mrs. Livesey to Porteous shortly after Mrs. Cushing's funeral, at which time Mrs. Livesey was alleged to have said: "We led you in Green Pastures, and you took all the grass and left me nothing"; also, that in a conversation, in her presence, between Mrs. Livesey and Porteous, the latter stated that he desired the handles attached to Mrs. Cushing's casket in order that he might put them on his cabin door at Lake Elsinore.

It is contended in substance by appellant that from a review of the evidence it is obvious that the court erred in granting the motion for a nonsuit. Respondents, on the other hand, contend that appellant has failed to establish any of the elements of fraud or undue influence, and that evidence of incompetency is wholly lacking.

[1, 2] It is too well settled to require citation of authority that a nonsuit may be granted only when, disregarding the fact,—if such is the fact,—of a conflict in the evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result would be a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were returned. It is equally well settled that, "* * * the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict." Estate of Lances, 216 Cal. 397, 401, 14 P.2d 768, 769. The rule applies as well to a motion for a nonsuit.

[3, 4] It is evident from a review of the record, the foregoing of which is a substantial but not complete account, that the showing made by the contestant was abundantly sufficient as against a motion for a nonsuit, and that the issues raised were properly for the jury's determination.

The order is therefore reversed.

We concur: YORK, P. J.; WHITE, J.

AUSTIN v. HARRY E. JONES, Inc., et al.

Civ. 10924.

District Court of Appeal, First District, Division 2, California.

Jan. 13, 1939.

Rehearing Denied Feb. 11, 1939.

1. Account ⇐14

An action wherein plaintiff sought accounting in connection with building construction transaction between plaintiff's assignor who furnished lots and performed concrete work and defendants who superintended construction and attended to finances was action for "accounting" and not for "money had and received."

[Ed. Note.—For other definitions of "Accounting" and "Money had and Received," see Words & Phrases.]

2. Account ⇐18

In action for accounting in connection with building construction transaction between plaintiff's assignor who furnished lots and performed concrete work and defendants who superintended construction and attended to finances, evidence *held* insufficient to sustain finding relating to reasonable value of the cement work performed.

3. Account ⇐1

In action for accounting in connection with building construction transaction between plaintiff's assignor who furnished lots and performed concrete work, and defendants who superintended construction and attended to finances, plaintiff was not entitled to compensation for concrete work performed where evidence showed that assignor obtained title to lots and buildings and hence received benefits of the work.

4. Trial ⇐404(1)

A finding in the form of a "negative pregnant," attempting to negative an affirmative allegation, implies the truth of the allegation.

[Ed. Note.—For other definitions of "Negative Pregnant," see Words & Phrases.]

5. Trial ⇐398

Findings which are inconsistent and contradictory upon material issues in the case will not support the judgment.

6. Appeal and error ⇐1071(1)

If one part of contradictory findings of trial court would support judgment, and another part would necessarily upset it, the judgment must be reversed.

7. Trial ⇐404(1)

Finding that all allegations of certain portion of defendants' answer, which, if true, would preclude judgment for plaintiff, were not true, constituted finding in form of "negative pregnant" and in effect found such allegations as true, and hence did not support judgment for plaintiff.

8. Limitation of actions ⇐29(1)

The 4-year statute of limitations was applicable to action for an accounting. Code Civ.Proc. § 343.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Mary C. Austin against Harry E. Jones, Inc., and others for an accounting. The action was dismissed as to the named defendant before trial. From an adverse judgment, the defendants C. E. Boag and another appeal.

Reversed and remanded for new trial, with directions.

J. R. Moulthrop, of San Francisco, and William Kay Crawford, of Los Angeles, for appellants.

Edward C. Purpus, of Los Angeles, for respondent.

STURTEVANT, Justice.

The plaintiff filed a complaint against several persons asking for an accounting. She named certain fictitious individuals as defendants but she did not serve anyone claimed to be the fictitious defendant. She also named Harry E. Jones, Inc., a corporation, as one of the defendants. Before the trial the action was dismissed as to that corporation. The other two defendants, C. E. Boag and Loren D. Curtis, answered. The trial court made findings in favor of the plaintiff and from the judgment entered thereon the defendants have appealed.

[1] In form the action is one for an accounting. The defendants assert it is one for money had and received. For reasons that will hereinafter appear we think the assertion of the defendants may not be upheld.

Before proceeding it should be stated that in the early part of the year 1928, M. P. Austin and Mary C. Austin, his wife, were the owners of lots 98 and 118 of tract

1017, said lots being known as 4513 and 4504 Atoll street, Los Angeles, California. Both lots were paid for, but they did not have additional funds for building purposes. Mr. Austin was actively engaged as a contractor in the concrete business and as such in installing sidewalks, curbs, foundations and similar structures. Harry E. Jones, Inc., a corporation, was engaged in building and constructing dwelling houses. The defendant C. E. Boag was engaged in purchasing lots, building thereon, and then selling the lots together with the improvements. At about the time mentioned above he was the owner and interested in improving lots 4160, 4166, 4144 and 4148 on Camellia avenue. With him was associated the defendant Loren B. Curtis, who acted as his superintendent of construction. Whether Mr. Boag or Mr. Curtis, or both of them, engaged directly in the construction business the record does not show. Commencing in the early part of the year 1928, after holding various conversations, Mr. Austin and the two defendants entered into oral agreements hereinafter mentioned. As shown by the uncontradicted evidence, Mr. Austin and the two defendants entered into an agreement to build a bungalow on each lot owned by Mr. Austin. Mr. Boag undertook to negotiate the largest loan he could obtain on each lot and the three parties planned to build on each lot the best building they could build for the moneys so borrowed. Mr. Austin agreed to do the concrete work, Mr. Curtis agreed to superintend the construction, and Mr. Boag agreed to negotiate the loan and attend to the finances. To accomplish those purposes it became necessary that the title to the lots should be vested in Mr. Boag. Accordingly, both lots were deeded to him. He negotiated a loan of $4,000 on one lot and $3,750 on the other. Harry E. Jones, Inc., entered into contracts with him under the terms of which that company furnished, under the supervision of Mr. Curtis, the materials and labor and billed Mr. Boag therefor. The latter collected the moneys borrowed and paid the bills presented by Harry E. Jones, Inc. Mr. Austin did the concrete work. He did not personally pay for any labor or material except the concrete work. As to that work it was not claimed he was paid in cash nor otherwise than as will hereinafter be set forth. The defendants testified and supported their testimony by the vouchers of Harry E. Jones, Inc., that all moneys received by Mr. Boag were paid out for work and materials in constructing the bungalows. There was no evidence to the contrary. Mr. Boag also paid out of his own funds $175.51 to pay for said expenses. The houses were built and fully completed prior to July 12, 1928. On May 4, 1928, Mr. Boag reconveyed both lots to Mr. Austin. Acting under the directions of Mr. Curtis, the concrete work on the Camellia lots was done by Mr. Austin for Mr. Boag.

Claiming that the defendants had not accounted to him, Mr. Austin assigned his claim to this plaintiff and she commenced the above-entitled action. In her first amended complaint she pleaded an ordinary action for an accounting and set forth, in part, the transactions enumerated above. However, the plaintiff's allegations and her proof did not correspond. She alleged that Mr. Austin paid to the defendants $7,750 for the purpose of constructing the bungalows and that he installed for defendants concrete work of the reasonable value of $1,962.32. The court found said allegations to be true. The evidence did not directly prove said facts. There was evidence to the effect that as a fiduciary for her assignor Mr. Boag received moneys for the account of the former and also that Mr. Austin installed certain concrete work for Mr. Boag. The plaintiff also alleged that the defendants so became indebted to Mr. Austin for $9,712.42 and that they paid out $7,000 for his account, leaving a balance of $2,712.42 due Mr. Austin. The court found, however, that the balance was $1,962.32. As stated above, there was no evidence either defendant received any money for Mr. Austin which he did not pay out for Mr. Austin's account. The balance of $1,962.32 was, therefore, for concrete work. In their answer the defendants set forth two defenses. In the first one they made some admissions, pleaded some denials, and alleged affirmatively some new matter. The following paragraphs only, of the first defense, are material to an understanding of the contentions made as to that defense on this appeal.

"IV. Said defendants * * * allege that Harry E. Jones, Inc., constructed said bungalows and that the said defendant Harry E. Jones, Inc. received therefor for the account of Mr. P. Austin the sum of $7,569.01, which constituted the total cost of erecting said bungalows including five per cent of the cost thereof for the remuneration of said Harry E. Jones, Inc., for labor and materials furnished in said construction.

"Said defendants * * * allege that any moneys which may have become due to said M. P. Austin, or plaintiff herein, for any work performed or materials furnished on said bungalows as in the first part of said paragraph V set forth, or upon any other work alleged to have been performed by plaintiff or materials alleged to have been furnished by plaintiff and/or M. P. Austin as set forth in said paragraph V of said first amended complaint have been fully paid and that said M. P. Austin and said plaintiff and each of them have been fully compensated for the same.

* * * * * *

"VII. Said defendants * * * allege that the cost of the construction of said bungalows over and above any work performed thereon or materials furnished thereto by M. P. Austin himself amounted to $7,569.01, which was the sum received by defendant Harry E. Jones, Inc. and that no sum of money whatsoever was received by any of the other defendants herein for said construction. * * *"

As to all of the affirmative allegations regarding Harry E. Jones, Inc., it is sufficient to state there was not a particle of proof that said corporation was directly employed by the plaintiff. On the other hand the proof was quite clear that Harry E. Jones, Inc. was employed by Mr. Boag to construct and that it did construct the two bungalows on the lots formerly owned by Mr. and Mrs. Austin. During the trial of the action Mr. C. E. Boag was called as a witness. The story as told by him was substantially the story as told by the plaintiff and her husband except in a few very material respects. It was the testimony of Mr. Boag that the original agreement was to the effect that after the houses had been constructed they were to be sold; and that out of the proceeds Mr. Austin was to be paid $1,500 for each of the lots; that all of the bills were to be paid and that the balance of the proceeds was to be divided three ways, one-third to Mr. Austin, one-third to Mr. Curtis, and one-third to Mr. Boag. It was an admitted fact that on the 4th of May, 1928, a short time before the completion of the bungalows, acting upon the request of Mr. Austin, he reconveyed both lots and the improvements thereon to the former. He further testified he did so upon the agreement that Mr. Austin would, without charge, install the concrete work on the lots which Mr. Boag was improving on Camellia avenue, and Mr. Boag and Mr. Curtis would waive any claim to profits on the Atoll lots. The testimony so given by Mr. Boag was corroborated in detail by several other witnesses. However, after such testimony was introduced by the defendants they made no attempt to amend their pleading to conform to the proof. Moreover, except by inference, the trial court made no finding on the specific facts which we have just recited.

[2] The trial court rendered a judgment in favor of the plaintiff for $1,962.32. The defendants contend that the findings are not supported by the evidence. Finding number II is: "That all the allegations contained in Paragraph IV of plaintiff's first amended complaint are true." That paragraph of the complaint contains, among others, an allegation as to the reasonable value of cement work done by M. P. Austin. There is not a particle of evidence in the record showing the reasonable value or the agreed value of said cement work.

[3] The judgment as rendered was made up of two different items. One was $635.76 for cement work done on the two Atoll lots. That work was done and performed. But, as recited above, the lots together with the buildings were conveyed to Mr. Austin and he received the benefit, consequently he had no claim against the defendants therefor. In passing it may be stated that Harry E. Jones, Inc., rendered itemized bills which show affirmatively at no time was Mr. Austin or anyone representing him charged for said cement work. The other item entering into the judgment was $1,326.66, cement work done on the Camellia lots. The charge for that work, according to the testimony of Mr. Boag, was the consideration for the conveyance of both lots on Atoll avenue to Mr. Austin. Apparently in anticipation of Mr. Boag's evidence the defendants had alleged in the latter part of paragraph IV of their answer as hereinabove set forth that Mr. Austin had been compensated for all cement work done by him. That allegation was admitted by the findings as will hereinafter appear.

[4-7] The last statement brings us to the next point. The defendants claim the findings are contradictory. That is so in two material respects. Findings IX and XI are respectively as follows: "IX. That all the affirmative allegations contained in Paragraph IV of defendants' answer to plaintiff's first amended complaint are not

true; that it is not true as alleged in Paragraph IV of defendants' answer that the said plaintiff has been fully compensated for all work alleged to be furnished by plaintiff and/or M. P. Austin.

"XI. That all the allegations contained in Paragraph VII of defendants' answer to plaintiff's first amended complaint, are not true, and in this respect the court finds that there was due to the plaintiff's assignor, M. P. Austin, the sum of $1,962.32, for work performed and materials furnished thereto by the said M. P. Austin, plaintiff's assignor, in the construction of said bungalows." Each of those findings is in the nature of a negative pregnant as to ultimate facts material to the action. In Wiles v. Hammer, 66 Cal.App. 538, at page 540, 226 P. 651, at page 652, the court said: "It is apparent from the reading of this finding that it does not negative the allegations of defendant's answer above referred to, but is in the nature of a negative pregnant and implies the truth of at least some of these allegations without showing which ones, if any, are untrue. A finding in the form of a negative pregnant, attempting to negative an affirmative allegation, implies the truth of the allegation. Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814; Auerbach v. Healy, 174 Cal. 60–65, 161 P. 1157; Southern Pacific R. R. Co. v. Dufour, 95 Cal. 615–619, 30 P. 783, 19 L.R.A. 92. We find this condition exists in respect to the findings upon the issues in all three causes of action. The findings, therefore, being inconsistent and contradictory upon the material issues in the case do not support the judgment. 'The rule on this subject may safely be said to go this far, at least—that where there are contradictory findings about matters material to the merits of the case, and the determination of which, one way, or the other, is essential to the correctness of the judgment, there the judgment cannot stand. If one part of the contradictory findings would support the judgment, and another part would necessarily upset it, then the judgment must be reversed.' Learned v. Castle, 78 Cal. 454–460 [18 P. 872], 21 P. 11, 13." It is therefore clear that finding IX, in effect, found as true all that portion of paragraph IV of the answer of the defendants which we have quoted above. Finding XI, in effect, found as true all that portion of paragraph VII of defendants' answer which we have quoted above. But, if those facts are taken as found in favor of defendants, the plaintiff was not entitled to any judgment.

[8] Claiming that the action was barred by the statute of limitations the defendants pleaded section 335 and subdivision 1 of section 339 of the Code of Civil Procedure. As to the form of action pleaded by the plaintiff, an action for an accounting, the statute of limitations applicable was section 343 of said code. West v. Russell, 74 Cal. 544, 16 P. 392; McArthur v. Blaisdell, 159 Cal. 604, 115 P. 52. But plaintiff's action was filed well within the four-year period. Defendants' contention that the action was barred may not be sustained.

The judgment is reversed and the cause is remanded for a new trial. The trial court is directed to allow the parties to amend their pleadings in such respects as they may be advised.

We concur: NOURSE, P. J.; SPENCE, J.



30 Cal.App.2d 391

MAHAR et al. v. GOODSPEED et al.

Civ. 10921.

District Court of Appeal, First District, Division 2, California.

Jan. 18, 1939.

1. Appeal and error ⇐763

Appellants, printing their evidence and exhibit alone in supplement to their brief, did not fairly comply with rules, where issues raised on appeal were sufficiency of evidence to support material findings of trial court. Code Civ.Proc. § 953a.

2. Equity ⇐67

Laches is mixed question of law and fact.

3. Appeal and error ⇐1008(1)

When defense of laches is raised by answer and supported by proof that defendant is unable to present his case advantageously because of death of parties or witnesses, loss of papers, or similar causes, trial court's finding that delay was so unreasonable or inexcusable as to bar further prosecution of action is conclusive on appeal.

4. Appeal and error ⇐1010(1)

A judgment for defendants on trial court's findings, supported by substantial evidence, that plaintiffs had actual and constructive knowledge of matters complained of and that defendants were deprived of necessary testimony by many witnesses' deaths, so as to bar further prosecution of action on ground of laches, must be affirmed.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Suit by Katharine R. Mahar and others against Richard C. Goodspeed, G. Roy Pendell, L. S. Anderson, and others, to impress a trust on corporate securities, require an accounting, and recover damages for fraud. From a judgment of nonsuit as to defendant Pendell and a judgment for defendants Goodspeed and others, plaintiffs appeal.

Judgment for respondents affirmed, motion to dismiss appeal from judgment of nonsuit after respondent Pendell's death and substitution of Gayle C. Pendell, as executrix of deceased's estate, denied, and judgment of nonsuit affirmed.

Hansen & Sweeney, M. H. Holman, and H. A. I. Wolch, all of Los Angeles, for appellants.

Nichols & Mattoon, Mott, Vallee & Grant, and Goodspeed, McGuire, Harris & Pfaff, all of Los Angeles, for respondents.

NOURSE, Presiding Justice.

[1] Plaintiffs sued to impress a trust on certain corporate securities, for an accounting, and for damages in fraud. A nonsuit was granted as to defendant Pendell. The demurrers of certain other defendants were sustained and are involved in another appeal. After trial, judgment went for the remaining defendants. The plaintiffs have appealed from this judgment under section 953a, Code of Civil Procedure. They have printed in a supplement to their brief their evidence and their exhibit alone. This is not a fair compliance with the rules since the issues raised on the appeal are the sufficiency of the evidence to support material findings of the trial court. But the only difficulty presented on the appeal is in segregating the real issues from the mass of immaterial matter found in the briefs of both parties, one of which contains 389 pages of printing with a supplement of 353 pages, the other containing 373 pages.

The cause was tried on the theory that some of the defendants had assumed to act as trustees for plaintiffs and that they had, in conspiracy with other defendants, obtained possession of the trust res to their advantage. Plaintiffs were shareholders in a bank in San Pedro which held as security for a loan certain shares of another corporation—The Van Camp Sea Food Company. Some of the plaintiffs and some of the defendants were directors of the bank. Both the debt and the security were bad and, at the insistence of the bank examiners, the stock was sold at a pledgee's sale. Defendant Pendell was the purchaser—either for the bank, as contended by defendants, or for the shareholders, as contended by plaintiffs. At that time the bank organized the Harbor Holding Company, a Nevada corporation, and Pendell transferred the shares to the corporation. These transactions occurred in 1924 and 1925. Soon after the transfer last mentioned, the shareholders in the bank sold their interests to another banking corporation, but the San Pedro Bank held all the certificates of stock in the Harbor Holding Company until June 15, 1927. At that time certificates for shares in the Holding Company were mailed to all the former owners of shares in the bank proportionate to their interest in the pledged stock sold to Pendell. At the same time a letter fully explaining all these transactions was mailed to every shareholder, including each of the plaintiffs. The latter refused to accept these certificates. Some of the defendants accepted and became the active participants in the affairs of the Holding Company. The company became involved financially —the corporation whose securities had been purchased at the pledgee's sale having gone into the hands of a receiver. The Holding Company thereupon levied an assessment on all its shares and some of the defendants purchased the shares allotted to these plaintiffs. Full and due notice was given to the plaintiffs of these transactions. About seven years later the business of the Sea Food Company picked up and some dividends were paid. The plaintiffs then conceived that they had been defrauded sometime between 1924 and 1927. In 1934 they commenced this action, charging all their former associates who had accepted stock in the Holding Company

with fraud, misrepresentation, conspiracy, and breach of trust.

The trial court, after a protracted trial in which plaintiffs were given every reasonable opportunity to prove their voluble allegations, found that no trust relation, either constructive or resulting, existed between the parties, that there was no fraud, misrepresentation or conspiracy, and that the plaintiffs had full notice and knowledge of the transactions in 1927 and thereafter had full opportunity to acquaint themselves with the further operations complained of. Upon these findings the court drew the conclusions of law that none of the plaintiffs was entitled to any recovery against these respondents and that they were barred by their laches and by the statute of limitations.

[2, 3] Upon this statement of the case we will confine our opinion to the one issue of laches and disregard all other points discussed. Laches is a mixed question of law and fact. 10 R.C.L., p. 400. When the defense is raised by answer and is supported by proof that, through death of parties, loss of papers, death of witnesses, or similar causes, the pleader is unable to present his case to advantage, the finding of the trial court that such delay has been so unreasonable or inexcusable as to bar further prosecution of the action is conclusive.

[4] Here the trial court found in detail the relations of the parties throughout the transactions running from 1924 to the date the action was commenced showing that the plaintiffs had both actual and constructive knowledge of the matters complained of. It was also found that the defendants had been deprived by death of the testimony of many witnesses whose testimony was necessary in the formation of their case. These findings are fully supported by substantial evidence, and no contention to the contrary can be made. The judgment must stand affirmed upon this ground, hence there is no necessity for discussion of other points raised by appellants.

On their appeal from the judgment of nonsuit made in favor of defendant G. Roy Pendell the appellants advance many of the same points argued on the main appeal. Since the entry of judgment, this defendant deceased and, his personal representative having been substituted, a motion to dismiss the appeal was made upon grounds which need not be here stated. It is sufficient that enough of the evidence proving plaintiffs' laches was produced in plaintiffs' case in chief to support the finding heretofore noted and that, applying all the inferences available to them on the appeal from the order, there is nothing which would justify a further protraction of the litigation against the estate of deceased.

The judgment for all respondents is affirmed, the motion to dismiss is denied, and the judgment of nonsuit is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



30 Cal.App.2d 395

MAHAR et al. v. GOODSPEED et al.

Civ. 10920.

District Court of Appeal, First District, Division 2, California.

Jan. 18, 1939.

Appeal and error ⇐1135

A judgment for defendants after sustaining their demurrer to complaint with leave to amend, which plaintiffs declined to do, must be affirmed, where complaint did not sufficiently state facts tolling statute of limitations and excusing laches set up by demurrer.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron and Robert W. Kenny, Judges.

Action by Katharine R. Mahar and others against Richard C. Goodspeed, Thomas J. Evans, W. L. Davenport and others to impress a trust on corporate securities, require accounting, and recover damages for fraud. From a judgment for defendants Evans and Davenport, plaintiffs appeal.

Affirmed.

Hansen & Sweeney, M. H. Holman, and H. A. I. Wolch, all of Los Angeles, for appellants.

Goodspeed, Pendell & McGuire, Charles L. Nichols, Gerald F. H. Delamer, Oscar Zangwell Wiseman, and Mott, Vallee & Grant, all of Los Angeles, for respondents.

NOURSE, Presiding Justice.

Plaintiffs appeal from a judgment in favor of defendants Evans and Davenport after their demurrer was sustained with leave to amend.

The complaint is the same as the one upon which the same plaintiffs went to trial against the remaining defendants in the case just decided, Cal.App., 86 P.2d 382. The appellants herein stipulate that we may consider the record on the other appeal as though the two appeals were consolidated. Under these circumstances we can find no purpose in an academic discussion of the points raised on the appeal. The facts pleaded in an effort to toll the running of the statute of limitations and excuse laches were found not to have been well pleaded and not capable of proof in the trial of the main action. The plaintiffs were accorded the privilege of amending their complaint to state a case but declined to do so. The complaint rests upon charges of fraud committed more than ten years before the complaint was filed, and indicated knowledge by plaintiffs of the acts complained of for seven years. The allegation of facts to excuse such delay are to be examined most critically, and hence the special grounds of demurrer are sufficient to support the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



30 Cal.App.2d 347

ARMSTRONG v. FORD.

Civ. 6025.

District Court of Appeal, Third District, California.

Jan. 12, 1939.

As Modified on Denial of Rehearing Feb. 11, 1939.

1. Automobiles ⇐244(36)

Evidence supported jury's implied finding that defendant's negligence proximately caused accident resulting in injuries to plaintiff who was riding in automobile which was struck by defendant's automobile approaching from opposite direction while turning across highway to the left on curve within city limits.

2. Damages ⇐130(3)

$5,000 to 61-year-old watchman earning 35 cents per hour who sustained brain concussion, two fractured ribs, chest and hip injuries, and was confined to hospital for several days, was not excessive.

3. Appeal and error ⇐1004(1)

Unless amount of damages allowed by jury for personal injuries is so excessive as to shock the conscience or to require inference that it resulted from passion or prejudice, reviewing court may not interfere.

4. Trial ⇐76

In personal injury action, trial court did not err in receiving evidence of plaintiff's family relationship over defendant's objections, where no objection was interposed until questions had been answered, plaintiff's attorney promptly abandoned the line of evidence, and there was no motion to strike evidence from record.

5. Damages ⇐159(2)
Evidence ⇐317(4)

In personal injury action by watchman earning $2.50 per day, testimony that other workmen told him they were supposed to get 40 cents per hour was not incompetent as hearsay or because special damages for loss of wages were not pleaded.

6. Appeal and error ⇐1050(1)

Receiving evidence that watchman suing for personal injuries had received 35 cents per hour in previous year for different kind of work and that other workmen told him they were to receive 40 cents per hour for packing fruit was harmless, where watchman was working as a watchman at time of accident at a fixed wage.

7. Damages ⇐159(3)

In personal injury action, evidence of plaintiff's earning ability was competent under issue tendered by complaint in allegation that, because of permanent injuries received, his earning ability would be impaired.

8. Appeal and error ⇐1050(1)

Where motorist, sued for injuries sustained in automobile accident within city limits, testified that he was in a hurry to reach another city and that he had driven 70 miles per hour on straight stretches, overruling of motorist's objections to plaintiff's offer to prove distance from one city to the other was not prejudicial.

9. Damages ⇐95

In automobile accident case, instruction that measure of recovery, if any, was compensatory damages based on value of plaintiff's time during disability, loss of earning power and pain and suffering was not erroneous.

10. Damages ⇐159(3)

Under allegation of permanent injury, loss sustained on account of impaired earning capacity as a proximate result of injury may be considered under a general demand for damages.

11. Damages ⇐216(7, 8)

In automobile accident case, evidence justified instruction regarding anxiety or fear of future loss of earning capacity or pain because of arm injury sustained by watchman.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Charles Armstrong against Robert Davis Ford for injuries sustained in an automobile accident. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ray W. Hays, of Fresno, for appellant.

C. Ray Robinson, James D. Garibaldi, and Willard B. Treadwell, all of Merced, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $5,000 which was rendered against him in an automobile casualty case.

It is contended the evidence fails to show that the defendant was guilty of negligence which proximately caused the accident; that the damages which were awarded are excessive. It is asserted the court erred in receiving evidence and in giving to the jury certain instructions.

[1] The respondent was riding as a guest in a Chevrolet coach driven by Simmons Clevenger. At 7 o'clock on the morning of June 22, 1937, they were traveling southerly on the public highway through Atwater toward Merced. There were then very few automobiles on the highway. They were going to work in the Woods packing shed adjacent to the roadway on the easterly side thereof in the southern outskirts of the town, where the respondent was employed as a watchman at thirty-five cents per hour. He was sixty-one years of age and in good physical condition. The day was clear and the highway was dry and level. Approaching Atwater from the south the highway describes a long, gradual letter S curve which extends to within 400 feet of the city limits. As the Chevrolet machine approached this curve, where it was necessary to turn across the highway to the left to reach their place of business, the occupants of that automobile observed a truck approaching from the south. It was then only a short distance away. Following the truck at considerable distance around the curve they also saw the defendant's Buick machine traveling at what appeared to be a reasonable rate of speed. Clevenger reduced the speed of his machine to permit the truck to pass before he made the left-hand turn across the pavement. He looked both ways for other machines. When he started to turn the defendant's automobile was about 300 feet away. Clevenger was then traveling at a rate of only eight or ten miles per hour.

The defendant testified that as he approached the town of Atwater he was traveling sixty or sixty-five miles an hour. But he said that when he first saw the respondent's car he was running only about forty-five miles an hour. He said that the truck which preceded his machine concealed from his view the car in which the respondent rode, and that when he first saw it after the truck had passed, it was crossing the highway about a hundred feet ahead of him. The defendant's automobile struck the car in which the plaintiff was riding with such force as to knock it from the roadway and to cause it to collide with a telephone pole twenty-eight feet away. The impact of plaintiff's machine shattered the pole and demolished the car. The machine was a total wreck. As a result of the accident the plaintiff was rendered unconscious. He sustained a concussion of the brain, two fractured ribs, a severe injury to his left side and chest, an injury to his left hip, and numerous bruises and contusions. He was taken to the county hospital and treated for his injuries for several days. His eyesight was temporarily impaired. He suffered great pain throughout his side and chest. At the time of the trial, which was nearly five months after the accident occurred, he was still suffering pain and he was then unable to use his left arm to its full extent.

The cause was tried with a jury, which returned a verdict in plaintiff's favor for

$5,000. A judgment was accordingly entered for that amount. From that judgment the defendant has appealed.

We are of the opinion there is ample evidence to support the implied finding of the jury that the accident occurred as a proximate result of the defendant's negligence. The jury was warranted in assuming that he was running at an excessive rate of speed around a curve within the city limits where highway signs restricted the speed of vehicles to twenty miles per hour. The occupants of the car in which the plaintiff was riding saw defendant's machine at a distance of three hundred feet. After the truck had passed the plaintiff's machine was proceeding to cross the highway in clear view directly in front of the defendant's automobile. There was still about one hundred feet, in which space the defendant had an opportunity to stop his machine or divert its course so as to avoid the collision. There appears to be no reasonable excuse for him to have failed to observe the machine directly ahead of him, or to have stopped his automobile. In fact, the plaintiff's car was nearly across the paved portion of the highway when it was struck. The rear wheels of his machine had passed the central white line some distance. If the defendant had slackened his speed somewhat, he evidently could have avoided the accident. The negligence consists of excessive speed of the machine and inattention of the driver thereof.

[2, 3] We are unable to say as a matter of law that the judgment of $5,000 is excessive under the circumstances of this case. Doctor Jackson testified with respect to the plaintiff's injuries: "When I first saw him he had a concussion of the brain, he had two fractured ribs, an injury to the left side of his chest, an injury to his left hip region and severe bruising."

The plaintiff was confined to the hospital for several days. He suffered great pain and the use of his arm was impaired even to the time of the trial of this case, nearly five months after the accident occurred. The effect of broken ribs of a person of the age of plaintiff is frequently quite serious. Unless the amount of damages which is allowed by a jury to compensate for personal injuries received is so excessive as to shock the conscience or to enforce the inference that it was the result of passion or prejudice, it is not the province of a court of review to interfere with the reasonable discretion of the jury. In the case of Rannard v. Harris, 121 Cal.App. 281, at page 286, 8 P.2d 864, at page 866, under circumstances quite similar to the facts of this case, a judgment for $7,500 was sustained. The court there said:

"The determination of a sum of money which will be deemed to adequately compensate one for damage suffered on account of personal injuries sustained and the pain and suffering incident thereto, necessarily rests largely in the sound discretion of the trial judge or of the jury. This discretion may not be interfered with unless it clearly appears that the amount which is awarded is so grossly excessive as to shock the conscience or enforce the inference that it is the result of passion or prejudice. 20 Cal.Jur. 101, § 65; Even v. Pickwick Stages System, 109 Cal.App. 636, 293 P. 700."

The case of Hoover v. King, 134 Cal. App. 16, 24 P.2d 871, relied on by the appellant, is readily distinguishable from this case. In that cause the respondent received no fracture of bones. She was not taken to a hospital, but after remaining at the scene of the accident to examine the automobile, she walked to a drugstore, accepted a ride home and was merely treated with hot applications. The court said [page 872] "her injuries appeared to be quite superficial in their nature".

[4] The court did not err in receiving evidence over the objections of the defendant. In a series of half a dozen questions, without objection having been imposed until after they were all answered, the plaintiff testified that he was usually employed at manual labor; that he had a wife and six children. The attorney for the defendant then objected on the ground that evidence of the family relationship was incompetent. The attorney for plaintiff promptly abandoned that line of evidence with the reply, "All right." This constituted a voluntary withdrawal of the evidence. There was no motion to strike the evidence from the record. That ruling was not prejudicial.

[5, 6] Over objection of the defendant the plaintiff was permitted to testify that he had worked for the Woods Packing Company ten hours per day for a period of time the preceding season, for which he was paid thirty-five cents per hour, and that he was going to get "forty cents an hour" for his services during the season of 1938. He said he was "told * * * the wages we was supposed to get" by some

of the workmen. He further said, "I went [on duty] night watching at the Wood Packing Company at $2.50 a night." Just prior to the accident he had been working with that company about a month and a half.

There is no merit in the appellant's contention that the evidence regarding the plaintiff's wages is hearsay, or that it is incompetent because special damages for the loss of wages was not pleaded. The plaintiff testified positively that at the time of the accident he was employed as watchman for which he received the agreed sum of $2.50 per day. The compensation which he received the previous year for a different class of work was immaterial, but it was harmless. The fact that other workmen told him they were to receive forty cents per hour for packing fruit that season was also harmless. The difference between the wages paid the previous year and what the plaintiff had been told packers would receive in 1938 is trivial. The evidence is harmless since the plaintiff was working as a watchman at a fixed wage, and not as a fruit packer.

[7] The evidence of the plaintiff's earning ability was competent under the issue tendered by the complaint in the allegation that because of the permanent character of the injuries received his earning ability would be impaired. Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L.R.A. 498, 13 Am. St.Rep. 175; Dutro v. Castoro, 16 Cal.App. 2d 116, 60 P.2d 182; Graham v. Yellow Cab Company, 125 Cal.App. 141, 144, 13 P. 2d 773; 1 Bancroft's Code Pleading, p. 285, sec. 166; 13 Standard Ency. of Pleading and Practice, p. 374, sec. 4. In the authority last cited it is said in that regard:

"A complaint showing a physical and mental condition of plaintiff in consequence of the injuries, which would necessarily result in an impairment of future earning capacity, is sufficient to sustain a judgment therefor.

"Averments of inability to attend to the usual vocation, or to perform any labor, or of a permanent injury of such a character as indicates an impairment of earning capacity are sufficient to authorize recovery of damages for impairment of such capacity."

In 1 Bancroft's Code Pleading, page 285, section 166, it is said: "In an action for personal injury suffered, the plaintiff may recover all the damages proximately caused by the tort, under a general allegation of the whole of the amount of damage caused. And so, the plaintiff is entitled to recover damages for any impairment of his capacity, as a previously healthy person, to earn money, * * * under a general averment of damage."

In the present case, after alleging the specific nature of the injuries received, including broken ribs and a concussion of the brain, it is asserted, on information and belief, that the result of such injuries would be permanent, after which general damages amounting to $10,000 were demanded. The plaintiff contended at the trial that he had a permanent injury of his left side and arm which prevented him from working continuously. It is true that the physician said he thought he would fully recover in the course of time. But the issue of permanent impairment rendered the evidence of earning capacity competent.

[8] The defendant testified that he was expected to be in Rio Vista "sometime after 8 o'clock" that morning. It was not prejudicial error for the court to overrule defendant's objection to plaintiff's offer to prove the distance from Atwater to Rio Vista. This evidence was proffered as tending to show the excessive rate of speed at which the defendant's machine was running at the time of the accident. In plaintiff's offer to prove the distance, Mr. Robinson said in the presence of the jury that he had ascertained from the automobile association that it was 163 miles from Merced to Rio Vista. To this offer counsel for the defendant replied that the proof was immaterial. The court overruled his objection. Mr. Robinson said "Then that will be considered?" to which inquiry defendant's attorney replied, "I won't stipulate." Mr. Robinson said the court may take judicial notice of the distance, "so, we will leave the record that way". There was neither a motion to strike the statement of counsel from the record nor to request the jury to disregard it. The statement is not prejudicial. It adds nothing of importance to the facts already adduced. The defendant admitted that he was in a hurry to reach Rio Vista. He testified in that regard:

"Q. Did you tell him [the officer] you were in a hurry to get to Rio Vista? A. I may quite possibly have told him that."

The defendant admitted that he was in so much of a hurry that he drove his ma-

chine on straight stretches seventy miles an hour. He said, "In many of the straight stretches below Merced I had been traveling 70 miles an hour."

The appellant contends that the court erred in giving to the jury the following instruction:

[9, 10] "If you find that the plaintiff Charles Armstrong is entitled to recovery, the measure of his recovery is what is denominated as compensatory damages; that is, such sum as will compensate him for the injuries, if any, he has sustained. The elements entering into this damage are as follows: The value of his time, if any, during the period he has been disabled as a direct and proximate result of said injuries; if the plaintiff's power to earn money in the future has been impaired by the injuries, if any, such sum as will compensate him for such loss of power; such reasonable sum as the jury may award for physical pain and mental suffering, if any, or reasonably certain to be suffered in the future, from the injuries, if any. The last two elements are from necessity left to the sound discretion of the jury, but in any event the damages must be just, and cannot exceed the sum alleged in the complaint, to-wit: $10,000.00."

The foregoing instruction was neither misleading nor erroneous. An instruction containing the same language which is here complained of was approved by the Supreme Court in Storrs v. Los Angeles Traction Company, 134 Cal. 91, 66 P. 72. As we have previously said, under an allegation of permanent injury, which was made in the present case, the loss sustained on account of impaired earning capacity as a proximate result of the injury sustained may be considered under a general demand for damages.

[11] The record contains substantial evidence to justify the giving of the instruction regarding the anxiety or fear of future loss of earning capacity or pain on account of the injury which the plaintiff received to his arm. He testified in that regard:

"It was the pain I had in here from reaching, trying to reach out with different angles with that hand, the pain gets so severe I would have to quit work. * * *

"Q. Do you feel any worry or consternation about whether you will regain the use of that? A. I don't think much chance of regaining the use of it, it does worry me considerably."

The judgment is affirmed.

We concur: PULLEN, P. J.; ROSS, Justice pro tem.

On Petition for Rehearing.

PER CURIAM.

The petitioner contends that the court erred in stating in its opinion that a truck preceded his automobile as he approached Atwater from the south, asserting that on the contrary the truck had passed plaintiff's automobile and was traveling south. Upon examination of the record we are satisfied there is evidence that a truck preceded the defendant's automobile, traveling toward Atwater, as stated in the opinion. Mr. Clevenger testified in behalf of the plaintiff: "After making the turn out of Atwater toward Merced, after we passed the double line, which is just out of Atwater, there was a truck come a meeting us, they was too close to make the turn in to the wood shed where we was to work and there was a car come from behind us that wanted by."

On cross-examination, in reply to the question "So when you saw this car coming from behind you and the truck coming * * * toward you, you pulled off with your two left wheels still on the pavement?" he replied, "Yes. * * * After the truck and car had both passed."

Other facts related appear to be supported by the evidence or are so immaterial as to require no change.

With the above modifications, the petition for rehearing is denied.



30 Cal.App.2d 324

ZAGER v. F. W. WOOLWORTH CO.

Civ. 11646.

District Court of Appeal, Second District, Division 1, California.

Jan. 11, 1939.

Hearing Denied by Supreme Court March 9, 1939.

1. Sales ⇐441(3)

In buyer's action against seller for damages resulting from dermatitis caused by

use of cream, evidence indicating that buyer was allergic *held* to authorize finding that dermatitis was caused by buyer's "condition and constitutional composition", not by breach of warranty. Civ.Code, § 1735.

2. Appeal and error ⇐1010(1)

Where finding of trial court in favor of a separate and distinct defense is supported by some evidence, it is conclusive upon the reviewing court and cannot be disturbed.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Mrs. Lanol Zager against the F. W. Woolworth Company, for damages for personal injuries resulting from use of freckle cream sold by defendant. From a judgment for defendant, plaintiff appeals.

Affirmed.

Ben C. Cohen and George Cohn, both of Los Angeles, for appellant.

Homer L. Breidenbach, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment in favor of respondent corporation in an action brought against it by appellant for damages for personal injuries resulting from the application by her to her face and hands of a certain freckle cream which she purchased from respondent.

The first amended complaint contained three causes of action, the first upon the implied warranty arising from the sale of the cream that it was suitable for the purposes for which it was required and would be of merchantable quality and character; the second upon an express warranty that the cream was pure and wholesome and not dangerous. The third cause of action was directed against the manufacturer of the product upon the theory of negligence; however, said manufacturer was not served and no proof was offered at the trial in support of this cause of action.

The facts which form the basis of the first amended complaint may be summarized as follows: On November 11, 1936, appellant accompanied by her husband entered the store of respondent and asked one of the salesgirls if she had something to remove freckles, whereupon she was handed a package of Nadinola Freckle Cream. Appellant asked said salesgirl if it were dangerous, to which said salesgirl replied that it was not dangerous and that "Woolworth stands behind it and guarantees its satisfaction". Appellant then purchased a jar of the cream and left the store. That night after washing her face with soap and water, appellant applied a thin coating of said cream to her face and forehead. She then retired and about 1:30 o'clock was awakened by an itching and burning sensation in her face, and upon examination found it much inflamed and swollen. The following day she consulted a physician who made a patch test by applying the cream to her left thigh with the result that an eruption appeared on her leg where the test had been made. On November 14, 1936, she consulted Dr. Saul Robinson, who diagnosed her case as dermatitis venenata, and who continued to treat appellant until December 7, 1936, when the skin cleared.

In her first cause of action of the first amended complaint, appellant alleged that by reason of the purchase made by her from respondent, the latter then and there impliedly warranted and represented to her that the cream in question was pure, wholesome, harmless and fit for removing freckles and suited for the purposes for which said product was required, and that it was of merchantable quality and character. In her second cause of action, appellant alleged that she relied upon and was induced to purchase said cream by the statement made by the employee of respondent that said freckle cream was not dangerous and that respondent stood back of it and guaranteed its satisfaction. There were also allegations to the effect that said cream contained harmful ingredients including mercury and that as a result of applying said cream to her face appellant sustained the following injuries: "The face of plaintiff became swollen, erythematous, and covered with large and small blisters; the eruption also involved the ears, neck, upper chest, arms, forearms and hands of plaintiff in the form of erythematous vesicular and bullous areas." Further as result of said application of the said freckle cream, appellant suffered injuries to her eyes and kidneys, nervous shock, sleeplessness and severe pain and suffering, all to her damage in the sum of $2,900.

Respondent interposed a general and special demurrer which was overruled, whereupon respondent answered and denied specifically all the material allegations of said complaint setting up as a separate and distinct defense thereto "that whatever injury or damage, if any, was suffered by

plaintiff, whether as alleged or otherwise, that the same was the direct, proximate and sole result of plaintiff's physical and bodily condition and constitutional composition on, prior and subsequent to the 11th day of November, 1936".

Appellant offered evidence in support of the allegations of her first amended complaint, although she did not introduce into evidence the analysis which was made of the cream contained in the jar which she purchased, as aforesaid; neither did she produce as a witness the salesgirl from whom she purchased the jar of cream, nor the physician who made the test patch on her thigh the day after she used the said cream.

Respondent produced as a witness a physician who had seen appellant in his office accompanied by her attorney about a week or ten days prior to the trial of the action herein, at which time appellant, upon the advice of her attorney, refused to submit to a blood test. Apparently the purpose of this testimony was an attempt to prove the allegations of respondent's affirmative defense, as above noted. Other than this doctor, the only other witnesses produced by respondent were women who had used the same brand of freckle cream successfully and without harmful results.

Dr. Saul Robinson, who attended appellant, testified upon direct examination as follows:

"Q. The first occasion (referring to Nov. 14, 1936) you examined her, did you form a diagnosis? A. Yes, we would make a diagnosis of dermatitis venenata due to some external irritant to which the patient was sensitive. * * *

"The Court: What is that, an allergic condition?

"A. Well, it can be allergic and it can be called also an allergic dermatitis, meaning to some external source, but dermatitis venenata means something external. An allergic condition can be due to internal, some food. In this case it was external.

"Q. Did you form any opinion as to what that irritant might be that caused this condition? * * * A. Yes; of course, in making a diagnosis, especially in a skin disorder, we always start with a history; and the history in this case as given was the use of a certain proprietary freckle cream put on in the evening at 11 o'clock or 11:30, and within a period of four or five hours, I judge, after the application, at the site of the application of the cream, why, this dermatitis and swelling began, and that fits in with our common knowledge of what we call a dermatitis venenata, due to something—in this case in the cream, coming on in that period of time, and the fact that the eruption also was present on the hand which was used in the application of the cream, also tending to confirm suspicion that the cream was at fault. * * *

"Q. Will you state whether or not in your opinion Mrs. Zager's skin is sensitive? A. Well, from the history and the fact that she has appeared now—this is the third time since last November, and each time with an irritated dermatitis of the skin, I judge she has a sensitive skin.

"Q. Prior to the time of this happening? A. No, not necessarily. In this type of dermatitis, why, after a severe dermatitis venenata, such as this, it is not uncommon to find patients become susceptible to other things, such as dyes in clothing they wear or material such as wool or silk or plants which heretofore have not bothered them, and it is not unusual to see this history appear at various times since the onset of a severe dermatitis.

"Q. In other words, as I understand you, since dermatitis originally occurred, it is not unusual for a recurrence of dermatitis to other ingredients as a result of the original? A. Yes; the history here is that she had no dermatitis previous to the application of the cream, and she had been using various creams and been exposed to paint and varnish at times, and since that time she has been having trouble with her skin."

In answer to the question by the court, "You have had it (the freckle cream) analyzed, have you not?" the attorney for appellant replied: "It is impossible to have it completely analyzed. We have been able to have it analyzed to only a certain extent. In other words, the portion in the jar is incomplete for complete analysis. As far as our case is concerned, I might mention that I don't think that we would have to show an analysis. We just had this done as an extra precaution in case, but it is impossible for anybody, or the chemist, rather, to make a complete analysis. We know there is mercury in the cream, and that is all we do know—and I cannot see why we cannot bring out the fact, assuming that there is mercury, that that would constitute an irritant. There may be a hundred elements in that cream. We do not know that one of the elements, or combination of elements, probably caused this particular thing."

Upon cross-examination, Dr. Robinson was asked:

"Now, is it fair to say, if Mrs. Zager prior to the application of this freckle cream had some other irritant in her life which caused a dermatitis, and then she took this freckle cream, it would simply bring to a head the condition that was already there? * * * Isn't that true? A. That is she had trouble before? Q. Yes. A. Yes. * * * More specifically, she would have a prior existing condition before that, due to a severe reaction to freckle cream, by the ingredients in the cream, there is no question that she had an idiosyncrasy, or an idiosyncrasy, that is very uncommon to have such a marked reaction.

"Q. You are satisfied that she had an idiosyncrasy, are you not? A. Yes, she had it to this particular cream.

"Q. Now, will you tell us, Doctor, in view of your bringing up the word, how idiosyncrasy differs from an allergy? A. It is the same thing.

"Q. And it all boils down to the meaning of 'hypersensitive' does it not? A. Yes, you have to say 'hypersensitive'.

"Q. It means the same as allergy? A. Yes, that is what it is. * * *

"Q. Now getting down to the point we were discussing this morning * * * might there be a dermatitis from exposure to an irritant without contact? By that I mean by being in the same room? A. Yes, there may be, but it would not be localized around the point or places which were so definitely defined in her face.

"Q. Dermatitis always breaks out where contact occurs? A. Yes, that is the site of the most involvement, that is the place where direct contact is. * * *

"Q. You don't mean to say that when you saw her November 14th she had a localized dermatitis? A. Yes, there were masses on the face and on portions of the hand where the cream had touched her hand, and all other areas there were free.

"Q. All other areas free? A. Except the place touched by the hand where the irritant was pressed. * * *

"Q. And on the left thigh there was a localized dermatitis? A. Yes.

"Q. And on the right limb and on the remaining portion of the left limb, was it clear? A. Yes. There is one thing about this type of dermatitis, it tends to spread. You must remember I saw her several days afterwards, and there was the secondary area of the skin, secondary to the localized areas.

"Q. What portions of her body were involved when this condition was at its worst? A. When this condition was at its worst, her face, her neck, and her hands were involved; the forearms were involved; and there was an area on the left thigh where this test had been done. * * *

"Q. During the course of treatment of Mrs. Zager, did you ever ask for an examination of her blood? A. No, I didn't ask for any blood examination.

"Q. Did you have, as a result of your examination and treatment of Mrs. Zager, any knowledge of the condition of her blood? A. No, I didn't, for the reason that there was nothing in her blood that would have anything to do with this particular skin disorder.

"Q. There was nothing in her blood that had anything to do with it? A. The examination of the blood infers the Wasserman test for syphilis and there are no lesions in syphilis that would produce a skin lesion such as she had, it was not present; and another thing, in the blood would be possibly anemia, which had nothing to do with the acute dermatitis of this nature; and further, if the blood had something wrong with it, it would be just a coincidence and have nothing to do with this skin disorder, inasmuch as nothing was done for the blood, and yet her skin disorder cleared up in quite a short time. * * *

"Q. Did you ask Mrs. Zager what kind of soap she had used? A. No, I don't think I asked Mrs. Zager that question for the simple reason that most of her condition was about the eyes. If the soap was at fault, I expect the dermatitis would be uniform. * * * I did not see the connection with dermatitis, soap does not positively produce a dermatitis of this nature. I may say, with my experience with dermatitis, without knowing the ingredients here, I am sure the fact that mercury was probably at fault in the marked erythema and redness and swelling commonly found in mercurial dermatitis.

"Q. But you did not ask what kind of soap she had been using? A. No.

"Q. Or you did not know whether the soap she had used contained mercury? A. No.

"Q. The first thing she told you was she used freckle cream and you said 'That is

it', isn't that true? A. She made a patch test with the freckle cream. That is quite conclusive evidence that it was a strong irritant to her skin. She had evidence to show me on the leg.

"Q. Did you ask whether or not she had washed that portion of her leg with soap? A. If she did, she would have to be very clever, because it was quite square and triangular. She would have to go around corners to do it."

At the conclusion of the trial, the court made, among others, the following findings of fact: (1) That appellant purchased the cream but that respondent did not impliedly warrant or represent to her that the freckle cream was either pure, wholesome, harmless or fit for removing freckles or suited for the purpose for which it was required, or that it was of merchantable quality or character; (2) that the freckle cream was fit for removing freckles, contained no harmful ingredients, whether mercury or otherwise; that respondent had no knowledge of the nature of the cream; that appellant suffered some dermatitis and inflammation of the skin of her face and hands, but that the itemization of her injuries was not true; (3) that said cream was not dangerous and was fit for use as a freckle remover and was of merchantable quality and character; (4) that in making her purchase of said jar of freckle cream, appellant did not rely upon any representations whatsoever and that no warranties were made; (5) that "whatever dermatitis or inflammation existed is not of a permanent nature and plaintiff has not been damaged in any sum whatsoever in so far as the F. W. Woolworth Company defendant is concerned"; (6) that appellant incurred medical expense in the sum of $80 for which respondent is not responsible; (7) that "no warranties whatsoever, whether implied or expressed, were made as alleged by plaintiff by the F. W. Woolworth Company, and further that Nadinola Freckle Cream, including that purchased by plaintiff, was fit for the purpose for which it was intended". It was further found by the court that "whatever dermatitis or inflammation plaintiff experienced was the result of her physical and bodily condition and constitutional composition on, prior and subsequent to the 11th day of November, 1936".

As conclusions of law the court found that respondent made neither an implied nor an express warranty to appellant; that the cream was reasonably fit for the purpose for which it was intended and that appellant was entitled to take nothing as against respondent. Judgment was thereafter entered accordingly.

Upon this appeal it is urged by appellant that (a) the finding of fact and conclusion of law that there was no implied warranty upon which appellant relied in her first cause of action, is wholly unsupported by the evidence and is contrary to law; (b) the finding of fact and conclusion of law that there is no express warranty resulting from the purchase of the freckle cream by appellant from the respondent is entirely unsupported by the evidence and is contrary to law; (c) the finding of the court that the dermatitis was the result of appellant's physical and bodily condition and constitutional composition on, prior and subsequent to the 11th day of November, 1936, is wholly unsupported by, and finds no warrant whatever in the evidence; (d) the finding of the court that respondent had no knowledge of the contents or ingredients of the cream or its dangerous character, shows that the court misconceived the issues, as such knowledge is chargeable to the defendant by law; (e) the trial court entirely misconceived the scope and effect of the law with respect to warranties, express or implied, and this failure to apply the correct principles of law to the facts resulted in a miscarriage of justice; (f) the finding that there were no harmful or injurious ingredients in the freckle cream finds no support whatever in the evidence.

Appellant based her action herein upon the provisions of section 1735 of the Civil Code, to-wit:

"Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

[1] While it must be conceded that the evidence introduced on behalf of respondent was weak, there is sufficient evidence in the record to support the allegations of respondent's separate and distinct defense to the action, and also to support the finding of the trial court that "whatever dermatitis or inflammation plaintiff experienced was the result of her physical and bodily condition and constitutional composition". The evidence to which we refer was brought out by respondent's counsel in his cross-examination of Dr. Robinson, hereinbefore quoted.

[2] While the complaint was based upon the implied or express warranties arising from the sale of the cream itself and not upon any negligence of respondent, the theory of respondent's separate and distinct defense was that because of appellant's hypersensitive skin and her constitutional composition which made her allergic to certain irritants, respondent could not be held liable in damages even though an implied warranty might attach by reason of the sale itself, or because an express warranty might attach thereto because of the statement made to appellant by the salesgirl who sold her the freckle cream. Under well-settled principles of law, it became a question of fact for the court to determine which of the two theories presented should prevail. While the record contains evidence which might have supported contrary findings, the evidence to which we have referred justifies the inference that appellant's constitutional composition was the proximate cause of the dermatitis which she suffered. It therefore follows that the finding of the court in favor of respondent's separate and distinct defense is supported by some evidence, and is therefore conclusive upon this court and cannot be disturbed upon appeal. DePuy v. Shay, 127 Cal.App. 476, 16 P.2d 158; Armbrust v. South, 128 Cal.App. 53, 56, 16 P.2d 692; Kienlen v. Holt, 106 Cal.App. 135, 140, 288 P. 866.

The judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

12 Cal.2d 591

Ex parte WILLING.

Cr. 4185.

Supreme Court of California.

Jan. 18, 1939.

1. Food ⇐2

The purpose of the act dealing with the stabilization and marketing of fluid milk and cream is to eliminate economic disturbances and unfair trade practices in the milk industry and to safeguard the public supply of fluid milk and cream. St.1933, p. 60.

2. Food ⇐1

The state may require those engaged in distribution of important food products to obtain a license and bond to pay producers.

3. Constitutional law ⇐208(6)
Food ⇐1

The provision of the act for stabilization and marketing of fluid milk and cream, requiring distributors purchasing milk from producers to obtain license and file bond, but not requiring retail stores purchasing milk from producers to do so, is not unconstitutional "class legislation," in view of the fact that distributors purchase milk in bulk and retailers purchase milk in bottles. St. 1933, p. 60, § 737.5.

[Ed. Note.—For other definitions of "Class Legislation," see Words & Phrases.]

4. Constitutional law ⇐208(1)

Only where class legislation is arbitrary and unreasonable is it invalid.

5. Food ⇐2

The term "distributor," as defined by the act dealing with the stabilization and marketing of fluid milk and cream, refers to distributors of fluid milk and cream, and does not include those who manufacture and sell dairy products. St.1933, p. 60, § 735.3(f).

[Ed. Note.—For other definitions of "Distributor," see Words & Phrases.]

6. Constitutional law ⇐208(6)
Food ⇐1

The provision of the act for stabilization and marketing of fluid milk and cream, requiring distributors purchasing milk from producers to obtain license and bond, but not requiring persons purchasing milk from producers for manufacturing purposes to do so, is not unconstitutional "class legislation," since milk products are not as important as milk and cream and are less perishable. St.1933, p. 60, § 737.5.

7. Constitutional law ⇐42

One complaining of unconstitutional class legislation must belong to the class discriminated against.

In Bank.

Proceeding in the matter of the application of William Willing for a writ of habeas corpus.

Writ discharged and petitioner remanded to custody.

See, also, 80 P.2d 1027.

Erling S. Norby and A. B. Reynolds, both of Marysville, for petitioner.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and Joseph L. Heenan, Dist. Atty., of Marysville, for respondent.

SEAWELL, Justice.

Petition for writ of habeas corpus. Petitioner was arrested for violating section 737.5 of the Agricultural Code (St. 1933, p. 60), in that as a distributor he purchased fluid milk from a producer without obtaining a license from the state director of agriculture and furnishing a bond. The District Court of Appeal, Third Appellate District, heretofore issued a writ, but after hearing dismissed the proceeding and remanded petitioner to custody. In re Willing, Cal.App., 80 P.2d 1027.

Petitioner contends that the section is unconstitutional class legislation for the reason that while requiring distributors purchasing milk from producers to obtain a license and file a bond, it does not apply to retail stores purchasing milk from producers, nor to persons purchasing milk from producers for manufacturing purposes, and for the further reason that it requires a surety company bond, thereby denying the right to file a bond with personal sureties. The latter contention is concluded by In re Cardinal, 170 Cal. 519, 526, 150 P. 348, L.R.A.1915F, 850, where this court upheld an ordinance provision which required the operator of a jitney bus to give a surety company bond to pay all damages arising from negligent operation as a condition to obtaining a license. See, also, Argo Oil Corp. v. Atwood, 274 Mich. 47, 264 N.W. 285; Ferguson-Hen-

drix Co. v. Fid. & Dep. Co. of Md., 79 Wash. 528, 140 P. 700.

The bond required by section 737.5 is conditioned on the payment of amounts due to producers for fluid milk and fluid cream purchased by the distributor, and must be filed before a license is issued to him. An action may be brought on the bond by the director of agriculture on behalf of producer-creditors. Said license is in addition to all licenses required by other provisions of division 4 of the Agricultural Code. Sections 492, 621, 622 provide for permits and licenses to be issued after investigation of sanitary conditions of plants dealing in milk and milk products.

Section 737.5 is found in a chapter of the Agricultural Code entitled "Stabilization and Marketing of Fluid Milk and Fluid Cream". It authorizes the director of agriculture to establish marketing areas and, upon the application of those who produce 65 per cent of the milk of an area, or 65 per cent of the cream, to put into effect a milk or cream stabilization and marketing plan. Such plan must provide minimum prices to be paid producers by distributors, and may provide for an equalization pool with uniform prices for milk purchased for pasteurization. Sections 735–736.4, Agricultural Code. The director may also fix minimum wholesale prices for sale of milk and cream by distributors to retail stores, and minimum retail prices for sale by distributors and retail stores to consumers. The license and bond provisions of section 737.5 apply regardless of whether a stabilization and marketing plan is in effect in an area.

[1] The purpose of said chapter, as announced in section 735, is to eliminate economic disturbances and unfair trade practices in the milk industry which threaten both the quality and adequacy of the supply of fluid milk and cream. The section declares that health regulations alone are insufficient to prevent disturbances which threaten to destroy and seriously impair the quality and supply of milk. Thus provisions which protect the producer by establishing a fair price to him and affording him security for payment of the price due him for milk and cream by means of a bond are incident to the broader purpose to protect the public milk supply. Economic security to producers will tend to encourage compliance on their part with sanitary regulations and the maintenance of dairy herds sufficient to provide an adequate milk supply at reasonable prices to consumers.

The price-fixing provisions are not under attack. But since they are part of the plan to afford a measure of economic security to those engaged in the milk industry in the interest of protecting the public milk supply, of which plan section 737.5, providing for a bond to secure payment to the producer is another feature, it is pertinent to cite the recent decisions of the United States Supreme Court sustaining statutory provisions for the fixing of milk prices. Nebbia v. New Lork, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 56 S.Ct. 453, 80 L.Ed. 669; Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835; see, also, 7 So.Cal. Law Rev. 325.

[2] We are of the view that the weight of authority, as well as the decisions of this state, sustain the right of the state to require of those engaged in the distribution of important food products a license and bond to pay producers. People v. Perretta, 253 N.Y. 305, 171 N.E. 72, 84 A.L.R. 636; People v. Beakes Dairy Co., 222 N.Y. 416, 119 N.E. 115, 3 A.L.R. 1260; Payne v. State of Kansas, 248 U.S. 112, 39 S.Ct. 32, 63 L.Ed. 153, affirm. State ex rel. v. Mohler, 98 Kan. 465, 158 P. 408; Hickey v. Levitan, 190 Wis. 646, 210 N.W. 111, 48 A.L.R. 434; Ferguson-Hendrix Co. v. Fidelity & Dep. Co., supra; Lasher v. People, 183 Ill. 226, 55 N.E. 663, 47 L.R.A. 802, 75 Am.St.Rep. 103; State ex rel. Beek v. Wagener, 77 Minn. 483, 80 N.W. 633, 778, 1134, 46 L.R.A. 442, 77 Am.St.Rep. 681; contra: State v. Porter, 94 Conn. 639, 110 A. 59; Maine v. Old Tavern Farm, Inc., 133 Me. 468, 180 A. 473, 101 A.L.R. 810, note, 10 So.Cal.Law Rev. 83.

In this state the Deciduous Fruit Dealers' Act (Stats.1929, p. 665, now secs. 1285–1288, Agric.Code) requires dealers in deciduous fruits to obtain a license and file a bond to comply with all contracts with growers and to account for proceeds. The validity of these provisions was upheld in People v. Jarvis, 135 Cal.App. 288, 312, 27 P.2d 77. (See, also, People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331, involving other provisions of the act.) In Moulton v. Williams Fruit Corp., 218 Cal. 106, 21 P.2d 936, this court affirmed judgment against the surety on a bond filed

under the Produce Dealers' Act (Stats. 1927, p. 1812, now sections 1261–1273, Agric.Code) after failure of the dealer to pay the grower a guaranteed price.

This brings us to petitioner's contention that the exemption of retail stores and of purchasers of milk for manufacturing into dairy products renders our bond statute invalid. The exemption of retail stores is by express provision. Section 737.12, Agric.Code. Retail stores purchase milk in the final bottled form. Milk can be sold by retail stores only in standard bottles (sec. 479, Agric.Code), and must be bottled mechanically where pasteurized in bottles sterilized on the premises where filled. Sections 479, 482. If one engaged in the retail store business should also maintain a plant for the processing and bottling of milk, we do not doubt that such operations, constituting a different business than the conduct of a retail store, would subject such operator to the license and bond requirements of section 737.5. See definition of distributor, sec. 735.3, subd. (f). The result is that a retail store which is not subject to the bond requirement purchases direct from a producer only where such producer himself pasteurizes and bottles his milk, that is, where the producer is a producer-distributor. According to respondent, retail stores buy from producers less than five per cent of all milk going to consumers. The usual course through which milk sold at a retail store has passed is from producer to distributor to retail store. The distributor, unlike the retail store, purchases milk in bulk and thereafter pasteurizes and bottles it.

[3] This circumstance—that retail stores not subject to the license and bond provisions purchase from a producer only when he is also a distributor of bottled milk—furnishes a constitutional basis for their exemption. The statute does not require a bond to secure payment for milk purchased from a distributor, but only for milk purchased from a producer. The selection of the producer of food products as the special object of legislative protection designed to safeguard the food supply has long been sustained, and is not challenged by petitioner herein. (Cases cited, supra.) The effect of the exemption of retail stores, therefore, is to put producing distributors in the same category with non-producing distributors, for whose protection no bond is required, and to place all purchases of bottled milk by retail stores, whether from a producing or non-producing distributor, on the same footing.

[4] The separate classification of distributors and retail stores is, therefore, constitutional. It is only where class legislation is arbitrary and unreasonable that it is invalid. Bacon Service Corp. v. Huss, 199 Cal. 21, 248 P. 235; In re Weisberg, 215 Cal. 624, 629, 12 P.2d 446; Lloyd Garretson Co. v. Robinson, 178 Wash. 601, 35 P.2d 504, 506.

In its brief the state says that bulk milk is sold according to butter fat content, ascertained by the purchaser, upon whose honesty the producer is, therefore, dependent, whereas bottled milk is sold to retail stores at a fixed price per bottle which can be computed on delivery and a cash sale provided for, and that this distinction furnishes additional grounds for exempting retail stores from filing a bond to secure payment for milk purchased. But these facts were not established by evidence, are incomplete, in particulars are not without dispute, and are not facts of which the court can take judicial notice. Therefore we decide the case without reference to them.

[5] The other exemption upon which petitioner relies in support of his claim of unconstitutionality—the exemption of those purchasing milk from producers for manufacture into dairy products—results from the fact that section 737.5 requires a bond and license of "distributors". The term distributor, as defined by section 735.3, subdivision (f), refers to distributors of fluid milk and cream, and does not include those who manufacture and sell dairy products.

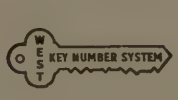
[6] The purpose of affording economic protection to the producer of milk, as announced in section 735, is to safeguard the public supply of fluid milk and cream. We are of the view that it was competent for the legislature to afford safeguards to the supply of fresh milk and cream without giving the same protection to manufactured dairy products, such as cheese, condensed milk, butter, ice cream, ice milk and flavored milk drinks, which in the main may be said to be less important in the public diet than fresh fluid milk and cream, largely the food of infants. That such products are also important foods is evidenced by the numerous provisions in regard to them in divisions 4 and 6

of the Agricultural Code. But it is not required that the legislature give to said products the identical protection given to fresh fluid milk and cream. It is also suggested as a possible reason for not requiring a bond of manufacturers, that manufactured dairy products are relatively less perishable than fluid milk and cream, and by reason thereof constitute an asset of the debtor-purchaser which the creditor-producer may reach.

[7] If it should be held by reason of the definition of fluid milk contained in section 735.3, subdivision b, that a manufacturer who sells the products there listed, to-wit, ice cream, ice milk, flavored milk drinks, buttermilk, cottage cheese and butter, is selling fluid milk and cream, and is therefore a distributor under section 735.3, subdivision f (and this seems a strained construction), the result would be that manufacturers of the named dairy products would be subject to the license and bond requirements of section 737.5. With the validity of such a classification within the class of manufacturers we are not here concerned. If invalid the result would be that *all* manufacturers would be free from obtaining the license and filing a bond. But petitioner makes no claim that he is a manufacturer of dairy products. A party complaining must belong to the class discriminated against. In re Weisberg, 215 Cal. 624, 12 P.2d 446; Fox-Woodsum Lumber Co. v. Bank of America etc. Ass'n, 7 Cal.2d 14, 59 P.2d 1019; 5 Cal.Jur. 623.

The writ is discharged and the petitioner is remanded to custody.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.



30 Cal.App.2d 356

MAXWELL et al. v. CARLON.

Civ. 6093.

District Court of Appeal, Third District, California.

Jan. 12, 1939.

1. Husband and wife ⇐267(3)

Where husband acquired alleged community property in May, 1919, absence of wife's signature to mineral lease executed by husband in December, 1934, did not render lease void but merely voidable at wife's option. Civ.Code, § 172a.

2. Evidence ⇐441(4)

In action to quiet title to mineral rights, excluding evidence regarding conversation between lessor and lessee at time of execution of memorandum which had been superseded by a formal lease was not error.

3. Evidence ⇐441(1)

Things said and done prior to execution of contract are inadmissible to change or modify terms of contract.

4. Estoppel ⇐50

Where husband executed mineral lease covering community property and wife thereafter by quitclaim deed conveyed her interest in such property to the husband-lessor, the husband's after-acquired title passed to the lessee. Civ.Code, § 1106.

5. Estoppel ⇐50

A deed which purports to convey a fee passes after-acquired title regardless of any intervening deed to another grantee with notice of the prior deed, and such rule applies where grantor at time of execution of deed owned an undivided interest. Civ. Code, § 1106.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by R. E. Maxwell and another against T. H. Carlon and others to quiet title to mineral rights. From a judgment for plaintiffs, the named defendant appeals.

Affirmed.

Lafayette J. Smallpage and Forrest E. Macomber, both of Stockton, and Hjelm & Hjelm, of Turlock, for appellant.

E. T. Taylor, J. W. Hawkins, and Hawkins & Hawkins, all of Modesto, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiffs brought an action against T. H. Carlon, Joseph M. Brunette, Roy O. Heisel, and certain fictitious defendants to quiet title to the mineral rights in certain lands belonging to defendant Carlon. From a judgment in favor of plaintiffs, defendant Carlon appeals.

T. H. Carlon was the owner of large tracts of land lying in the counties of Stan-

islaus, Tuolumne and Mariposa. Dr. R. E. Maxwell and Roy O. Heisel wished to acquire the mineral rights in these lands, and Heisel undertook to obtain from Carlon the right to develop these lands for which Dr. Maxwell was to advance the money necessary therefor, in return for which he was to receive an undivided two-thirds interest in the lease, and Heisel was to retain a one-third interest. Accordingly on December 6, 1934, Heisel and Carlon met by arrangement in Merced, where Carlon, for $1,000, signed a lease which had been drafted by Heisel, granting to him the mineral rights, and water rights necessary to the operation of mines. This agreement gave to Heisel a right to prospect for minerals and develop the property for mining purposes but did not specifically describe the property other than the general description "all properties in Stanislaus, Tuolumne and Mariposa counties on record as being owned by me, T. H. Carlon on this date". The agreement further provided "the descriptions of the individual properties to be supplied within thirty days from this date to Roy O. Heisel, and same to be incorporated with the body of this contract;" and also provided "any properties to date owned by me whatsoever in lease, should such revert back to me, T. H. Carlon, shall immediately become part of this contract". Heisel therein agreed to pay Carlon "twenty per cent of whatever profit he (Heisel) received direct for himself".

After this agreement was signed Heisel took it to Dr. Maxwell, who submitted it to his attorney, J. W. Hawkins of Modesto. Mr. Hawkins told Dr. Maxwell the contract was not satisfactory, and that Heisel should obtain definite descriptions of the property to be leased, and to bring Mr. Carlon to his office in Modesto on the Saturday following to execute a more formal document. On that day Mr. Carlon and Mr. Heisel went to the office of Mr. Hawkins where more definite descriptions were taken from the tax rolls of the counties in which Mr. Carlon's property lay, and a new lease prepared.

This document purported to convey the same property as that referred to in the original draft. When, however, the lease was read to Mr. Carlon he stated he did not want to include the Ivite sheep ranch, the Coulter grain field, the McCormick property and the Woofling property. These exceptions were thereupon set forth in the lease. Mr. Carlon then stated that perhaps the assessors of the counties might have included property in the tax bills, from which the descriptions set forth in the lease were obtained, which he did not own, and Mr. Hawkins thereupon inserted the following: "If any of the land heretofore described does not legally belong to me, the undersigned, then such land is excluded from the terms of this agreement."

Mr. Hawkins then asked Carlon if all the lands were his separate property, and he replied in the affirmative, except as to the Pino Blanco land, which was community property. Mr. Hawkins then dictated the following: "All of the land herein described is my separate property except a piece of land containing about 160 acres, and known as the Pino Blanco land * *."

As a final exception Mr. Carlon wanted to exclude any lands within the Yosemite National Park, which was done. This lease was then read to Mr. Carlon, and was then duly executed. Sometime thereafter Heisel assigned to Dr. Maxwell an undivided two-thirds interest in the lease, and later, in May, 1935, Heisel sold and assigned his undivided one-third interest to R. V. McBride, one of the plaintiffs herein.

In February, 1936, Carlon executed a conveyance of the mining rights in the Pino Blanco property to one Joseph M. Brunette. In June, 1936, Brunette conveyed to Roy O. Heisel, all of his interest in the Pino Blanco land, and Heisel began to prospect thereon, which precipitated the present action.

It is here the contention of appellants that by virtue of the fact Pino Blanco was community property it was expressly excepted from the agreement of December 8th by the provision "If any land * * * does not legally belong to me." It was also claimed that if Pino Blanco was not excepted by that provision then by reason of the ambiguity therein, parole evidence should have been admitted to explain the meaning thereof.

Appellants urge the trial court erred in holding that the Pino Blanco ranch was included in the December contract, and in further holding that even if the Pino Blanco ranch was excluded it had passed to plaintiffs herein by virtue of an after-acquired title of grantor Carlon. It seems to be the claim of appellants that inasmuch as the Pino Blanco property was community property it was thereby expressly excepted from the lease.

The answer to that contention is to be found in the construction of section 172a

of the Civil Code. The Pino Blanco property was acquired in May, 1919, two years after the enactment of section 172a of the Civil Code. That section provides: "The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered. * * * No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate * * *."

Here it is admitted that Carlon executed a grant deed of community property without his wife joining therein, but it is also clear that more than a year has expired and no action has been brought by the wife to set aside the deed.

In Schelling v. Thomas, 96 Cal.App. 682, 274 P. 755, the court held that the provisions of section 172a of the Civil Code as it existed in 1922, made the instrument voidable and not void, and at the instance of the wife only. In Rice v. McCarthy, 73 Cal.App. 655, 239 P. 56, the question was considered at some length, and the same conclusion, that the transfer is not void but merely voidable, was reached.

In Mark v. Title Guarantee, etc., Co., 122 Cal.App. 301, 9 P.2d 839, the husband assigned a contract for the purchase of real property to a purchaser for value, who was ignorant of the marriage relation between the assignor and plaintiff, his wife. Within one year the wife brought an action to set aside the assignment on the ground of the fraud practiced by her husband. The purchaser was declared to be an innocent purchaser for value. In discussing the case the court considered the effect of granting the wife relief and held that the setting aside of the assignment would not in fact restore any title in the wife but that it would revert the legal title to the husband. This the court refused to do as it would restore property to the husband at the expense of one who had been deceived by his false representation that he was unmarried, as thereby the husband would be profiting by his own wrong. Other cases holding that the wife, under section 172a of the Civil Code, as amended, had no vested interest in the community property, are McKay v. Lauriston, 204 Cal. 557, 269 P. 519; Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22; Stewart v. Stewart, 199 Cal. 318, 249 P. 197; Riley v. Gordon, 137 Cal.App. 311, 30 P.2d 617.

[1] It would, therefore, appear that the appellant was the legal owner of the property in question on the date of the execution of the lease, and that the absence of the signature of the wife to the grant did not render the same void but merely voidable at her option.

[2] Another error assigned by appellant is that the court erred in refusing to permit evidence of a conversation between Carlon and Heisel at the time of the execution of the first memorandum. In this we find no error, for that memorandum was not at issue in this case. It had been superseded by a more formal lease and it clearly appears in evidence that Carlon and Heisel had expressly agreed at that time that the instrument of December 6th was to be considered as null and void.

[3] It is not necessary to cite authority in support of the well-known rule that under these circumstances things said and done prior to the execution of a contract would be inadmissible to change or modify the terms of a subsequent agreement.

[4] Furthermore, the wife of Carlon, after the execution of this lease, by a quitclaim deed, conveyed to him any interest she had in the Pino Blanco property which enured to the benefit of respondents. Section 1106 of the Civil Code provides: "Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors."

[5] A deed which purports to convey a fee, passes after-acquired title regardless of any intervening deed to another grantee with notice of the prior deed (Merrill v. Clark, 103 Cal. 367, 37 P. 238), and this rule applies where the grantor, at the time of the execution of the deed, owned an undivided interest (Emeric v. Alvarado, 90 Cal. 444, 27 P. 356), and it would even apply where the grantor had no title whatsoever (Merrill v. Clark, supra). The judgment and finding are amply supported by the evidence.

The judgment should be affirmed, and it is so ordered.

I concur: THOMPSON, J.



30 Cal.App.2d 397

DRAGICH v. LOS ANGELES COUNTY.
MASON v. SAME.

Civ. 10922, 10923.

District Court of Appeal, First District, Division 2, California.

Jan. 19, 1939.

Hearing Denied by Supreme Court March 20, 1939.

1. Counties ⇐190(1)

The word "freight," used in constitutional provision exempting certain vessels, engaged in transportation of freight, from local taxation, generally denotes property transported by carrier from consignor to consignee, means in one sense hire or compensation paid for transport of goods, and implies transportation of property for hire. Civ.Code, § 2110; Const. art. 13, § 4.

[Ed. Note.—For other definitions of "Freight," see Words & Phrases.]

2. Counties ⇐190(1)

The word "passenger," used in constitutional provision exempting certain vessels, engaged in transportation of passengers, from local taxation, means "a traveler by some established public conveyance," implies carriage for hire, and is generally used in contradistinction to "guest." Const. art. 13, § 4.

[Ed. Note.—For other definitions of "Passenger," see Words & Phrases.]

3. Counties ⇐190(1)

The phrase, "engaged in the transportation of freight or passengers," in constitutional provision exempting certain vessels so engaged from taxation, except for state purposes, means "engaged in the transportation of property or persons for hire," so that fishing boats not so engaged are not exempt from taxation by county. Const. art. 13, § 4.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Consolidated actions by Nich Dragich and by Tom Mason, respectively, against the County of Los Angeles, to recover taxes alleged to have been illegally collected. Judgment for plaintiffs, and defendant appeals.

Reversed with directions.

Everett W. Mattoon, former Co. Counsel, J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, all of Los Angeles, for appellant.

Hanna & Morton, of Los Angeles, Arch E. Ekdale and J. F. Harvey, both of San Pedro, Sloane & Steiner, of San Diego, and Sawyer & Cluff, of San Pedro, for respondents.

SPENCE, Justice.

Two separate actions were brought to recover taxes alleged to have been illegally collected. Said actions were consolidated for the purpose of trial and the trial resulted in judgments in favor of plaintiffs. Defendant appeals from said judgments and the appeals are presented on one set of briefs.

There is no dispute concerning the facts and the sole question involved is whether the fishing boats owned by the plaintiffs were exempt from taxation under the provisions of article 13, section 4, of the Constitution. Said section reads as follows: "All vessels of more than fifty (50) tons burden registered at any port in this State and engaged in the transportation of freight or passengers shall be exempt from taxation except for State purposes * * *." Said section is the same in substance as the original section 4a which was adopted in 1914 and which was effective by its terms only until 1935. The present section was adopted in 1932 and it continued the same exemption until 1955. The background of said section is discussed in the briefs, but we need only call attention to the fact that the original section was adopted by the people in November, 1914, which was two years after the passage of the Panama Canal Act of 1912 (37 Stat. 560) and about two months after the opening to commerce of the Panama canal. It is conceded that there were no fifty-ton fishing boats in California in 1914 and that fishing boats of that size first appeared here several years later.

The fishing boats of the plaintiffs were of the type known as "purse seiners" and they were enrolled and licensed at San Pedro. Each was over the specified ton-

nage. Said boats were engaged in fishing and were not engaged in any other business. They would leave San Pedro for various places where schools of fish might be found. After making their catches by means of the purse-seine nets, they would return to San Pedro or some other port and sell said catches.

It is appellant's contention that the fishing boats of respondents were not exempt as they were neither "registered" nor "engaged in the transportation of freight or passengers" within the meaning of the above-quoted section. In support of the proposition that respondents' boats were not "registered", appellant cites numerous authorities which discuss the distinction between "registered" vessels on the one hand and "enrolled and licensed" vessels on the other hand. The Mohawk, 3 Wall. 566, 70 U.S. 566, 18 L.Ed. 67; Huus v. New York & Porto Rico Steamship Co., 182 U.S. 392, 21 S.Ct. 827, 45 L.Ed. 1146; Bolinders Co. v. United States, 11 Cust.App. 69; Wheaton v. Weston & Co., D.C., 128 F. 151. While there may be merit in the point, we find it unnecessary to pass upon it here, as we believe it clear that respondents' boats were not exempt as they were not "engaged in the transportation of freight or passengers" within the meaning of said section.

[1-3] It is at once apparent that said section was not intended to exempt all vessels of the specified tonnage but only those "engaged in the transportation of freight or passengers". This phrase must be given some meaning. If it be given the broad meaning contended for by respondents, it would only be necessary that the vessel be used for the conveyance of property or persons. But to give this phrase such meaning would be to render it meaningless as all vessels are used for the conveyance of either property or persons or both.

In discussing said phrase, respondents lay great stress upon the broad meaning accorded by the authorities to the word "transportation". In our opinion, the meaning of others words is of equal if not greater importance in determining the proper interpretation of said phrase. Furthermore the reading of the phrase as a whole is of paramount importance. The word "freight" has more than one meaning but it generally denotes property transported by a carrier from a consignor to a consignee. Civ.Code, § 2110. In one accepted sense, it means "the hire or compensation paid by anyone for the transport of goods * *". (Webster's New Inter. Dictionary, 2d ed.), and when used to denote the property transported, it carries the definite implication that the transportation is for hire. A similar implication is found in the use of the word "passengers". A "passenger" is defined as "A traveler by some established public conveyance, as a coach, omnibus, steamboat, railroad train, etc." Webster's New Inter. Dictionary, 2d ed. Said definition implies carriage for hire and it further appears that the word "passenger" is quite generally used in contradistinction to the word "guest". McCann v. Hoffman, 9 Cal. 2d 279, 70 P.2d 909; Restatement of the Law of Torts, sec. 490. With these definitions in mind and reading the phrase as a whole, we cannot escape the conclusion that the phrase "engaged in the transportation of freight or passengers" as found in said section means "engaged in the transportation of property or persons for hire". It is conceded that respondents' vessels were not so engaged and therefore they were not exempt from taxation by appellant. It follows from what has been said that the trial court erred in entering judgments in favor of respondents.

The judgments are reversed and the trial court is directed to enter judgment in favor of the defendant in each of said actions.

We concur: NOURSE, P. J.; STURTEVANT, J.



30 Cal.App.2d 419

PEOPLE v. WILLIS et al.

Civ. 5960.

District Court of Appeal, Third District. California.

Jan. 19, 1939.

1. Trial ⇐76

A party to take advantage of admission of improper testimony must object to its admission when offered.

2. Trial ⇐105(1)

If evidence, not otherwise admissible, is admitted without objection, a finding based thereon is proper.

3. Eminent domain ⇐202(1)

In condemnation proceeding, testimony as to value of land if irrigated could not be rejected on the ground that it was based on conjecture where there was sufficient evidence to justify an implied finding that irrigation was available.

4. Eminent domain ⇐221

In condemnation proceeding, credibility of witnesses and weight of evidence is for the jury no matter how weak the evidence may be.

5. Evidence ⇐474(18)

A witness who lived for 16 years in vicinity of property sought to be condemned and who leased nearby premises and who once contracted to buy property was qualified to express opinion of value of condemned property.

6. Appeal and error ⇐971(2)
Evidence ⇐498½

Whether witness has been shown to be qualified to express opinion is largely within discretion of trial court, and its ruling will not be disturbed unless discretion is clearly abused.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Condemnation proceeding by the People of the state of California, acting by and through the Department of Public Works, against Burk Willis, also known as James Burk Willis, and others. From the judgment, the People of the state appeal.

Affirmed.

Clarence W. Morris, Lincoln V. Johnson, Halloway Jones, Clifford D. Good, and George C. Hadley, all of San Francisco, for appellant.

Carter, Barrett, Finlay & Carlton, of Redding, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought by the State of California for the purpose of condemning an easement for a highway to be constructed across the lands of defendant. The jury rendered a verdict assessing the value of the land taken at $625, and fixed the severance damages at $225. This appeal is taken from the judgment entered upon such verdict.

The sole ground urged for reversal is alleged error committed by the trial court in admitting certain testimony relative to the elements and factors involved in evaluating the land taken, and in the assessment of the severance damages.

The only specification of error reads as follows: "The trial court erred in permitting defendant's witnesses to evaluate the 2.53 acres sought to be condemned, and in permitting defendant's witnesses to estimate severance damages to defendant's remaining property, upon the basis and assumption of speculative conjectural and nonexistent conditions."

[1, 2] At the outset we might observe that a greater portion of the argument of appellant might more properly have been addressed to the jury which tried the case. The testimony of most of the witnesses for defendant is attacked upon the ground that it was conjectural and speculative, but in the cases of two witnesses only, was there an attempt by way of motion or otherwise, to call the attention of the trial court to the objections here made. If there were other objections, the brief of appellant fails to mention them, and we do not feel called upon to examine the record of several hundred pages to discover them. "The rule that objections not made in the trial court will not be considered on appeal applies to the objection that evidence was erroneously admitted. If a party would take advantage of the admission of improper testimony, it is necessary that he object to its admission when it is offered." 2 Cal.Jur., p. 263. Consequently, we will confine our opinion to the testimony of two witnesses for defendant—Leland Anders and Charles O. Willis, as objection appears to have been made by plaintiff in respect to the testimony of each of them. As to the remainder of the testimony of defendant, we may assume that it was admitted without objection. It is therefore subject to the rule that "If evidence, not otherwise admissible, is admitted without objection, a finding based thereon is proper." Smith v. Golden State Syndicate, 43 Cal.App. 346-349, 185 P. 209, 210.

[3] Witness Anders, for defendant, testified that the land had a value of from $250 to $300 per acre. On cross-examination he stated that without irrigation it would be worth only $30 per acre. He stated it was all cleared. He further

testified that he was a farmer, and had been such for twenty-three years; that he owned 400 acres of farming land in eastern Shasta county; and that land was valuable for alfalfa and truck gardening. Plaintiff moved to strike out all the testimony of this witness upon the ground that it was "based upon conjectural and speculative matters". It would seem as though such a motion would more properly be directed toward the weight of the testimony rather than to its admissibility. The contention of plaintiff is that there is no evidence in the record to show that there was irrigation water available for use upon said land; hence the testimony of the higher value, based upon the assumption that there was such water, should have been stricken out. Ordinarily, such matters are entirely for the consideration of the trial court or jury. But assuming that the contention is properly before us, there is, in our opinion, sufficient evidence in the record to justify an implied finding by the jury to the effect that such irrigation was available. The following testimony by this witness would seem to be in point:

"Q. Let me ask this first: Was or was (not) there any water on this Willis property? A. There were wells.

"Q. And where were those wells located with reference to this Exhibit A, this being the northerly portion of the property? Where was water accessible? A. Water was accessible right in here.

"Q. And would you say that the wells that you could get there were good wells? A. Good pumping wells, yes. This strip down through here was practically all clear land. It had a natural slope right down this way from a point in here and could be very easily irrigated from a well and raise very fine alfalfa on that property and also truck garden.

"Q. Do you mean by that, Mr. Anders, that wells could have been dug up in here where they were available as you have testified to and irrigated this whole portion on northerly? A. Yes.

"Q. It is true, is it not, that land slopes in a northerly direction? A. Yes."

[4] Witness Willis testified that, within 700 feet of the property, there was a well with an "inexhaustible supply" of water. Witness Haynes testified that there was, due to the geological structure, a "big volume" of water underlying the property. There was other testimony of this general nature. It may be true, as contended by appellant, that serious doubt is cast upon the credibility of this witness by his cross-examination, and through the testimony of other witnesses on both sides. It is not our province to thus weigh the evidence and reconcile such conflicts. Such function is committed by law to the jury alone, no matter how apparently weak the supporting evidence may be, providing, always, that such evidence is substantial in itself. Reed v. Cornell, 54 Cal.App. 179-181, 201 P. 608. The same observation applies to plaintiff's contention that while apparently the verdict was based upon the premise that the land was all cleared, in fact, the evidence shows that some of it was covered with pine. All of such questions offer ideal material for an argument to the jury, but it is quite obvious that we cannot consider them here. If, of course, the testimony was inherently improbable, a different situation would be presented. Pedrow v. Federoff, 77 Cal. App. 164, 247 P. 212. No such contention is made here.

[5, 6] Witness Willis testified that there was a well with an inexhaustible supply of water within 700 feet of the property. This witness was asked, on direct examination, what was the best use to which the property was adapted. He replied, "Campground site". No objection was interposed. At the close of such examination, he was asked to give his opinion of the value of the property. Objection was made by the plaintiff on the ground that the witness was not qualified. It was overruled, and that ruling is assigned as error. He testified that he had known the property for sixteen years, and had lived in that vicinity during that time. He was, at the time of the trial, leasing a place known as the "Four Corners", about 700 feet from the property. He had once contracted to buy the property in question. It is the rule that whether a witness has been shown to be qualified to express his opinion, is one largely within the discretion of the trial court, and its ruling will not be disturbed unless a clear abuse of discretion appears. Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545-547, 147 P. 238. We cannot say that the trial court here abused its discretion in holding that this witness was qualified.

The record is free from error, and it is therefore ordered that the judgment be affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



TEATER et al. v. GOOD HOPE DEVELOPMENT CORPORATION et al.*

Civ. 2184.

District Court of Appeal, Fourth District, California.

Jan. 20, 1939.

Rehearing Denied Feb. 16, 1939.

Hearing Granted by Supreme Court March 20, 1939.

1. Fixtures ⇐5

Machinery used in working or developing a mine is deemed to be affixed to the realty comprising the mine. Civ.Code, §§ 660, 661.

2. Fixtures ⇐21

Articles annexed or structures erected by a purchaser in possession who has not yet obtained title cannot ordinarily be removed without vendor's consent, in view of presumed intent that the structures or articles should be part of the land.

3. Fixtures ⇐27(1)

The statutes defining fixtures are subject to the exception that parties themselves may, in dealing with chattels annexed to or used in connection with realty, fix upon them whatever character, as realty or as personalty, that they desire. Civ.Code, §§ 660, 661.

4. Fixtures ⇐27(1)

Under contract for purchase of mine, providing that "appurtenances, and all buildings and other improvements" should be forfeited to vendors in event of default, and that machinery and equipment could be removed by purchaser in absence of default but should be deemed security for payment of installments, certain appurtenances, buildings and other improvements became fixtures, but other machinery and movable tools did not necessarily become part of the realty. Civ.Code, §§ 660, 661.

5. Fixtures ⇐21

Property constituting fixtures belongs to vendor in event of default by purchaser, and purchaser or purchaser's creditor cannot remove it.

6. Fixtures ⇐35(1)

Where a fixture annexed to a freehold is tortiously severed, right of immediate possession is created and owner of realty may, at his option, treat the fixture as personalty and recover it in replevin.

7. Replevin ⇐8(4)

The right to immediate and exclusive possession of the property at time of commencement of action is a prerequisite to maintenance of replevin, and existence of preliminary act or condition precedent to be performed precludes maintenance of the action.

8. Action ⇐65

An after-acquired interest will not support replevin.

9. Chattel mortgages ⇐1

Where the purpose and effect of a transaction is to create a lien on specific personalty as security for the payment of a debt, there is a "mortgage" irrespective of the language used.

[Ed. Note.—For other definitions of "Mortgage," see Words & Phrases.]

10. Chattel mortgages ⇐158

Ordinarily, with some possible exceptions, a mortgagee is not entitled to possession of the property unless authorized by express terms of the mortgage. Civ.Code, § 2927.

11. Fixtures ⇐35(2)

In replevin by vendors of mine to recover machinery, tools, and equipment removed from mine by purchaser after default, evidence *held* to authorize findings that certain machinery placed upon the premises was merely mortgaged, by virtue of contract provision that unattached and movable equipment should be considered additional security, rather than part of the realty.

12. Appeal and error ⇐1008(3)

Where trial court's construction of an instrument appears reasonable and consistent with the party's intent, appellate courts will not substitute another interpretation, though it seems equally tenable.

*For subsequent opinion see 93 P.2d 112.

13. Fixtures ⇐35(2)

In replevin by vendors of mine against purchasers after default, evidence *held* to establish that windows removed from mill building were part of the realty, and hence that vendors had right of possession thereof. Civ.Code, §§ 660, 661.

14. Chattel mortgages ⇐63, 129, 155.

Where chattel mortgagees did not comply with statutes governing affidavit of good faith, acknowledgment, and recording, they obtained a lien as against the mortgagors and subsequent purchasers with notice, but could not become absolute owners before foreclosure of the lien. Civ.Code, §§ 2957, 2973.

15. Replevin ⇐103(1)

To support judgment quieting title to defendants in replevin, trial court should make findings concerning defendants' knowledge of plaintiffs' chattel mortgage, and concerning actual possession of the property.

16. Replevin ⇐10

In replevin action, possession by defendants is a necessary prerequisite.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Velna L. Teater and another against the Good Hope Development Corporation and others, to obtain possession of described property, wherein defendant Dill Lumber Company filed cross-complaint to recover possession. From an adverse judgment, plaintiffs appeal.

Affirmed in part, and reversed in part, with instructions.

Newby & Newby, by Dee Holder, of Los Angeles, for appellants.

Mayock & Lester, by Welburn Mayock, all of Los Angeles, for respondents.

Best & Best, of Riverside, for respondents Dill Lumber Co., Eugene Best, Bank of Perris, Carl F. Rayburn, and C. R. Stewart.

GRIFFIN, Justice.

Velna L. Teater was the owner of certain real property known as the "Good Hope Mine", situated in the county of Riverside. M. M. Teater is the husband of Velna L. Teater. On June 1, 1933, these appellants, as husband and wife, entered into a written contract for the conditional sale of this property to Clifford H. Marker. This contract was duly recorded September 13, 1934. Under its terms, among other things, it was provided that Marker should pay to appellants for this property the sum of $55,000, payable $3,500 upon the execution of the contract and the balance in specified monthly instalments; that title to the property should remain in Mrs. Teater until the full purchase price should be paid, at which time she would be required to deed the property to Marker. A given percentage of all ore was to be reserved to the seller, together with a 10 per cent royalty. Marker was to have possession of the property and retain it so long as he should "fully perform each, every and all the terms, covenants and conditions of the within contract". It was further provided that he should pay all bills and prevent any and all liens of mechanics and materialmen from being filed against the property; that time should be the essence of the agreement, and upon the violation of any of the covenants or conditions of the contract it should, at the option of the seller, terminate; that upon such violation the seller should be released from all obligations in law and equity, to convey the property, and the property *"and the appurtenances, and all buildings and other improvements shall become forfeited to second parties"*; that 30 days' notice should be given to Marker of the sellers' intention to exercise the option to terminate; that he should, upon the termination of the contract for "any cause" execute and deliver to seller, Velna L. Teater, a quitclaim deed; and deliver to her quiet and peaceable possession of the premises. Paragraph 15 of the contract provides that upon its termination, *"all machinery and tools and other unattached and moveable equipment* which may be placed upon said premises by first party may be removed therefrom within forty-five days after the termination of the within agreement, provided, however, that no such tools or machinery shall be removed while first party may be in any manner indebted to second parties for past installments due under the obligation of the within contract, and such machinery and equipment shall be deemed security for the payment of such installments".

After execution of the contract Marker entered into possession of the premises. Thereafter the contract was assigned to respondent Good Hope Development Corporation (hereinafter referred to as the

Development Corporation), which proceeded to attempt the mining of the property and the performance of the terms of the contract. The assignment of this contract was followed by a period of expansive and expensive development which resulted in placing on the property by the corporation of certain improvements, buildings, machinery and equipment. In the year between June, 1933, and June, 1934, the respondent Dill Lumber Company furnished certain lumber and materials to the Development Corporation and at different times the respondent Bank of Perris loaned money to it. At the time of the assignment and subsequent thereto, Marker was the secretary of the Development Corporation.

On July 1, 1935, an instalment of the purchase price in the amount of $5,000 became due and payable and the purchasers were unable to make this payment. On July 3, 1935, appellant Mrs. Teater served respondents Marker and the Development Corporation with notice to pay this instalment within 30 days or she would terminate the contract if the payment was not made.

On August 1, 1935, the respondent Development Corporation filed in the superior court of Riverside county a petition under the California State Moratorium Act (Stats. 1935, p. 1208). A hearing was had upon the petition and on November 14, 1935, that court made an order granting it nine months' extension of time to make the instalment payments on the purchase price under the contract.

Under the terms of this order the Development Corporation was permitted to remain in possession of the property and to mine it in a certain way and appellants were prevented from taking possession of the property or terminating the contract, "while said petitioners are complying with the terms and conditions of this order, and until the further order of this court, but in no event *not later* than February 1, 1937". Respondent Development Corporation was also required to pay to appellants $250 per month upon the instalments of the purchase price, 8 per cent interest upon the unpaid instalments and an 8 per cent royalty. The purchasing parties remained in possession of the property, by virtue of this order, until June 30, 1936.

While in possession of the property under this order, the purchasers failed to comply with its conditions and terms in many respects. They failed to pay appellants the monthly instalments of $250 for all months subsequent to March, 1936. They failed to pay the royalties due for the months of May, June, and July, 1936. They failed to pay their laboring men and in June, 1936, were indebted to them in the sum of $900. Marker advised the unpaid laborers to file claims for liens against the property, which they did. The Development Corporation ceased actual work on the mine by June 11, 1936. On June 18, 1936, the purchaser was indebted to appellants under the terms of the contract (but not under the court order) in an amount in excess of $18,000 for instalments past due, and about $400 for royalties which they failed to pay over to appellants. On June 18, 1936, there was located on the premises a building, certain machinery, and equipment consisting in general of a mill erected upon the property by the purchaser and his assignee, together with the necessary machinery and equipment used in milling the ore obtained from the property.

Plaintiffs and appellants in their complaint allege that they are entitled to the possession of the following described property and seek return thereof: "windows from corrugated iron mill building, 1 jaw crusher—14 in., 1 conveyor belt—14"—200 ft., 1 marathon rod mill—4 x 8, 1 feeder and ½ HP motor, 9 amalgamation plates, 1 classifier, 1 Torster-flotation bell, 1 Plato concentrator, 1 flotation blower, 1 regrind barrel, 1 reagent feeder, 1 25-HP motor, 2 5-HP motor, 1 50-HP motor, 3 3-HP motor, 1 motor for regrind barrel, 2 15-HP motors in supply house, all machinery belts and pulleys, 1 electric hoist and cable, 1 Ingersoll-Rand compressor, 3 ore lears, 1 skip, 2 Denver hammers, 1 Cochise-stoper, 1 Cameron pump, 1 Ingersoll-Rand motor pump, 1 American centrifugal pump, 1 circular saw and mantle and motor, 1 7½ HP motor on reservoir, 1 15-HP motor in mine, 1 40 HP motor on compressor, 1 Auto-Car dump truck, 1 Kissel truck, ⅞ in., drill steel, shovels, picks, around 1200 ft. of track, estimate of about 1500 ft. of 1 in.—1½ in.—2 in.—2 in.—2½ in. and 2 in. pipe, 1 blacksmith shop, complete; following from assay office: 1 pr. button balances, 1 pr. pulp balances, 1 steel safe, 1 assay furnace, 1 Braun pulverizer, 1 jaw crusher, 1 muffle burner, 1 2 or 3 HP motor and belt, 3 tables, cooking utensils, dishes, 1 General Electric refrigerator, 6 steel cots and mattresses, 1

3-burner coal-oil stove, 2 tables, 2 benches, * * *." (The method of the affixation of this machinery and equipment will be discussed later.)

All of respondents, by their various answers, admit that the sheriff, Carl Reyburn, by virtue of the writ of attachment, took into his possession on June 24, 1936, the property *"described in plaintiff's complaint"* and *"sold the same"* under the writ of execution to the Dill Lumber Company, which now has possession thereof; that at the time of the taking, the Good Hope Development Corporation was in possession of said property.

Commencing on June 18, 1936, and continuing over the week-end holidays, the above-described equipment was claimed to have been removed from the premises by direction of Mr. Marker and stored in warehouses in the town of Perris for the Development Corporation. These warehouses were under the control of the Bank of Perris. There is a dispute as to the reason for the removal of the property. Marker testified that he was fearful that the equipment might be stolen while the mine was shut down; that he discussed the matter of the removal of the machinery with Teater.

Appellants claim that they had no notice that the equipment was to be removed from the mining property. Removal of these fixtures and equipment was completed on Sunday, June 21, 1936. On the evening of this day, Mr. Teater claims that by chance he visited the mining premises and saw the last of the machinery being removed and that he registered an objection with the person hauling the same away and was told that the only thing that could stop the removal would be a court order. On June 22, 1936, Mr. Teater and one of his attorneys went to look for the machinery and upon inquiry of a Mr. Stewart, president of the respondent bank, they were told that he (Stewart) had arranged to pay the man for the work in removing the machinery to his warehouses. Stewart, however, denies such arrangement at the time stated. Teater then informed Stewart that the contract between Marker and Mrs. Teater prohibited the severance and removal of the machinery and that the removal thereof was wrongful.

On June 23, 1936, an action was commenced in the name of the Dill Lumber Company against the Good Hope Development Corporation wherein the plaintiff sought to recover, in its first cause of action, the sum of $773.68 for materials supplied to Marker, James M. Hyde and Fred E. Keller, between the dates of July 22, 1933, and June 21, 1934. In its second cause of action it sought to recover the sum of $2,400 upon the note of the Development Corporation, assigned to it by the respondent Bank of Perris. In its third cause of action it sought to recover the sum of $1,450, on account of a bill for legal services claimed to have been rendered to the Development Corporation by Alford P. Olmstead and assigned to the Dill Lumber Company by said attorney. It is to be noted that Mr. Olmstead was attorney for the Development Corporation and Mr. Marker during the transactions related. A fourth cause of action sought recovery of the sum of $100, being a bill for legal services claimed to have been rendered by the respondent Eugene Best, which bill was also assigned to the plaintiff in said action. Best made this charge for representing the Development Corporation in the moratorium proceedings wherein the contract of purchase above mentioned was thoroughly discussed. As a fifth cause of action the plaintiff sought to recover the sum of $2,633.42 for an alleged debt owing from the Development Corporation to Maude C. Marker, the mother of respondent Clifford H. Marker. On June 23, 1936, a writ of attachment was, at the direction of Mr. Best, attorney for the Dill Lumber Company, issued in that action and levied upon the machinery stored in the warehouses. The defendant Development Corporation filed no answer to the complaint but permitted its default to be taken and a judgment entered in the action for the full amount claimed in the prayer. No third party claim was filed by appellants but on June 27, 1936, the respondents Marker, Good Hope Development Corporation, Dill Lumber Company, Best, Olmstead, Mrs. Maude Marker and the Bank of Perris were notified in writing of the claim of the appellants that the removal of the machinery from the mining property was wrongful and a demand was made upon each of them to return the machinery or relinquish their claims thereto.

On July 11, 1936, an execution sale was held at the direction of Mr. Best, upon the default judgment and the property was purchased at the execution sale by the

Dill Lumber Company. Best, Olmstead and Marker attended the sale.

Mr. Stewart of the Bank of Perris testified that no consideration was paid by the Dill Lumber Company for the note, but that it was understood in reference to the assigned claims that if the attachment was made, the Lumber Company would sell the machinery and divide the proceeds among the various claimants named in the attachment suit.

On July 17, 1936, the appellants notified the Development Corporation and Marker that they were in default under the contract of purchase and demanded a performance thereof within 30 days or, upon failure to perform, a forfeiture of the contract. Those respondents failed to comply with the terms of the contract and on August 24, 1936, they were served with formal notice of the forfeiture. At the time this last notice was served, the nine months' period of extension granted by the moratorium order had expired.

On June 30, 1936, appellants filed this action alleging generally that they were the owners and entitled to the possession of the property described and that the defendants wrongfully and without right "severed from said real property and removed therefrom all of said property"; that all of them were in wrongful possession of the property and were detaining the possession of it against the will of plaintiffs who were entitled to a return of the property or in lieu thereof, damages, both compensatory and exemplary.

The respondents answered and denied generally and specifically the allegations of the complaint, except as hereinafter mentioned. Respondent Dill Lumber Company filed a cross-complaint to quiet title to the property sold under the attachment proceeding.

The trial court found that "It is not true that said property (fixtures) or any part or portion thereof is now or ever was affixed to the real property known as the Good Hope Mine hereinbefore described, so as to become a part thereof".

Appellant attacks this finding and claims that it is not supported by and is contrary to the evidence.

There is some conflict as to the facts in reference to the manner of affixation and the uses to which the various articles were put. The witness Marker testified generally that the will was placed in a rather substantial mill house that was built over it afterwards; that the building had certain mud sills on top of an old stone wall, certain mud sills on the ground, and that the building built thereon was just framework of 2 x 4's; that in the center of the building there were some 8 by 8 posts; that the building was covered with a corrugated iron roof and corrugated iron sides and had windows in it; that the dimensions of the building were 60 x 70 feet and about 8 to 10 feet in height; that the rod mill was composed of about three fixed parts and about a half dozen moving parts; that there was a base upon which the other fixed parts sat and the base sat upon the top of a concrete block 10 by 15 feet in dimensions and about 8 feet deep; that the mill was fastened to these cement blocks by bolts and nuts; that the mill was placed there originally to mill certain values out of the dump of the Good Hope Mine, and afterwards they milled whatever ore there was in the mine to mill; that a 60-cycle, 3-phase, 440-volt electric motor drove the mill and it sat upon a block on top of the floor; that all the other machinery in the millhouse was affixed differently; that the concentrating table was set upon some rocking arms that were set upon three little concrete pillars; that the amalgamation plates rested upon wooden tables, the legs of which were nailed to the platform; that the tables were pretty heavy; and that the blower sat on a little concrete block about 2½ by 3 feet and one-foot thick, and it was bolted to the little block.

One witness testified that all of the machinery in the millhouse constituted a connected and inter-related milling system and that if one machine was taken out, such as the table or plates, the whole mill would be shut down, because the values would be gone; that it was an entire operating unit.

The witness Marker testified that there was no relationship between the various parts that were removed and that they were in no way fastened one to the other.

The trial court, after hearing the evidence, made certain additional findings, i. e., (1) that the plaintiffs were not at any time the owners of or entitled to the possession of the property described in their complaint; (2) that a portion of the property was used in working and developing the mine; (3) that none of the defendants ever took possession of the property except as heretofore related by them; (4) that since the 11th day of July, 1936, the Dill Lumber Company has been in possession *of said*

property; (5) that plaintiffs, prior to the commencement of this action, never demanded that respondents deliver the property to them; (6) that no part or portion of the property was ever affixed to the real property or severed therefrom; (7) that plaintiffs were not in possession of the real property at the time of the commencement of this action, but the Development Corporation and C. H. Marker were. The court then found that the Dill Lumber Company was the owner of and entitled to the possession of the following described property which was removed from the mining premises:

"1 Jaw crusher—14 in.
1 Conveyor belt—14"-200 ft.
1 Marathon rod mill—4 x 8
1 Feeder and ½ HP motor
9 Amalgamation plates
1 Classifier
1 Torster-flotation bell
1 Plate concentrator
1 Flotation blower
1 Regrind barrel
1 Reagent feeder
1 Ingersoll-Rand motor pump
1 Circular saw and mantel and motor
1 40 HP motor compressor
1 Braun pulverizer
1 Muffle burner
1 25 HP Motor—2 HP Motors
1 50 HP motor—3 3 HP motors
1 Motor for regrind barrel
2 Motors 15 HP
1 Electric Hoist and cable
1 Ingersoll-Rand compressor
3 Oar lears
1 Skip
2 Denver hammers
1 Cochise-Stoper
1 Cameron pump
1 American centrifugal pump
1 15 HP motor
1 Jaw crusher
Quantity of odds and ends, mining equipment

Odd lot of tools, shovels, and pipe, etc."

And entered judgment quieting title to this property in the Dill Lumber Company, decreeing that appellants had no right, title or interest in any of the property. It is to be noted from a comparison that the list of equipment claimed and described in appellants' complaint and admitted by the answers to have been removed differs materially from the list of articles described in the decree. From the pleadings it would appear that the Dill Lumber Company is now in possession of many of the articles not mentioned therein, such as "windows from the corrugated iron mill building", which clearly seems to have been a part of the realty; also one Kissel truck; one Autocar Dump; 1200 feet of track; 1500 feet of pipe; one steel safe; one blacksmith shop complete; one General Electric refrigerator; and many other items. However, the certificate of the sheriff received in evidence discloses a list of articles taken by him under the writ of attachment and sold, which compares closely with the list of articles set forth in the decree. From a study of the record, which contains about 485 pages, we are able to discover that the Autocar Dump Truck was left with Mr. Bert Stewart, the Kissel Truck was not taken from the property, and the 1200 feet of track was left at the mine, as well as the ore cars and skip, most of the pipe, some of the blacksmith shop equipment, a table, six steel cots and bedding and boarding house equipment. The General Electric refrigerator was left in Elsinore.

[1, 2] The real property involved in this action was mining property. Where this is the case, the machinery which is used in working or developing the mine is deemed to be affixed to the mine. Malone v. Big Flat Gravel Mining Co., 76 Cal. 578, at page 583, 18 P. 772; Civ.Code, secs. 660 and 661. Articles annexed or structures erected by a purchaser of land who is in possession by virtue of his contract of purchase but who has not yet obtained title to the premises, cannot ordinarily be removed by him without the consent of the vendor, the presumption being, from his interest under the contract and expectation of acquiring absolute title, that he intended the structures or articles to be a part of the land. Pomeroy v. Bell, 118 Cal. 635, at page 638, 50 P. 683; 26 Cor.Jur. 675, sec. 36; Lavenson v. Standard Soap Co., 80 Cal. 245, at page 250, 22 P. 184, 13 Am.St. Rep. 147; Oakley Co. v. Butler, 15 Cal.App. 2d 572, 59 P.2d 826.

[3] There is an exception to the rule specified in sections 660 and 661 of the Civil Code which may be thus stated: that the parties themselves may, in their dealings with chattels annexed to or used in connection with real estate, fix upon them whatever character, as realty or as personalty, they desire and the courts will give to the property the character which the parties themselves have fixed upon. Miller v. Struven, 63 Cal.App. 128, 218 P. 287;

Fratt v. Whittier, 58 Cal. 126, 41 Am.Rep. 251.

Under paragraph 13 of the conditional sales contract we find this language: "It is agreed * * * upon the violation of any of the covenants and/or conditions herein contained, the same shall, at the option of the second parties (Teaters) terminate * * * and said premises * * * *and the appurtenances,* and *all buildings and other improvements* shall become forfeited to second parties * * * provided, however, that second parties shall not exercise the within option until they have given to first party (Marker) (30) days' written notice to cure his default * * *."

The other provision in the contract relating to the purchaser's rights may be found in paragraph 15, which in part provides as follows: "It is mutually understood and agreed that upon the termination of the within agreement, for any reason whatever, that *all machinery* and *tools and other unattached* and *movable equipment* which may be placed upon said premises by first party may be removed therefrom within forty-five days after the termination of the within agreement. Provided, however, that no such tools or machinery shall be removed while first party may be in any manner indebted to second parties for past installments due under the obligation of the within contract, and *such machinery and equipment shall be deemed security for the payment of such installments.*"

[4] It was to be anticipated from a fair construction of this entire agreement, that certain appurtenances, buildings and other improvements would under sections 660 and 661 of the Civil Code, become fixtures to the real property, and that there would be certain other machinery and tools that were movable and unattached that would not of necessity become a part of the realty.

[5, 6] Property constituting fixtures to the land belongs to the vendor in case the purchaser subsequently defaults in his contract, and he has no right at any time to remove it, and no creditor has any greater right. Conde v. Sweeney, 14 Cal.App. 20, 110 P. 973; Pomeroy v. Bell, supra; Chowchilla Colonization Co. v. Thompson, 39 Cal.App. 517, 179 P. 411; In re Potee Brick Co. of Baltimore City, D.C., 179 F. 525, 528; Ewell, Fixtures [2d] p. 73, sec. 49. Where a fixture annexed to a freehold is tortiously severed, the owner of the realty, at his option, may treat the fixture as personalty and recover the same by the action of replevin. Bronson, Fixtures, p. 380, sec. 1106. The right to the immediate possession of this property by the vendor was created by the act of the vendee. Leonard v. Stickney, 131 Mass. 541.

[7, 8] Appellants' action in this case was one of replevin and, of course, the essential prerequisite to such an action is the right to the immediate and exclusive possession of the property at the time of the commencement of the action (Fredericks v. Tracy, 98 Cal. 658, 33 P. 750) and hence, if there be any preliminary act or condition precedent to be performed before the unqualified right of possession attaches the action cannot be maintained, and an after-acquired interest will not support replevin. People's Savings Bank of Fresno v. Jones, 114 Cal. 422, 46 P. 278; 5 Cal.Jur. 160, sec. 4. It must be conceded that on the date of the commencement of this action Mrs. Teater was the owner of the Good Hope Mine (the real estate) subject to the contract of sale to the Development Corporation; that certain payments under the terms of that contract were in default but no forfeiture had been declared and that the appellants were enjoined from declaring such forfeiture. It must be conceded further that the Development Corporation purchased the personal property here in controversy and originally was its owner. Therefore, unless the title and ownership thereto were lost or encumbered between the date of its purchase in 1933 and the sale under the levy of the attachment by the Dill Lumber Company in 1936, the findings of the trial court on the cross-complaint must be upheld.

The main question then presented to the trial court was whether the act of locating the machinery on the mine and using it in and about its development amounted to an absolute transfer of title and change of ownership or whether the transaction amounted merely to the giving of security on personal property.

[9-11] It is the general rule that where the purpose and effect of the transaction is to create a lien on specific property as security for the payment of a debt it constitutes a mortgage, irrespective of the language used by the parties. Ferguson v. Murphy, 117 Cal. 134, 48 P. 1018; 5 Cal. Jur., p. 44, sec. 5; 5 R.C.L., p. 384. The rule is well stated in Sterman v. Ziem, 17 Cal.App.2d 414, 418, 419, 62 P.2d 160, where it was held that a chattel mortgage does

not transfer title to the mortgaged property and that the mortgagee has only a lien thereon as security for the payment of the debt. Even though the parties agree to the contrary, yet where the relation of the parties is that of debtor and creditor and the property is regarded as security for the payment of the debt, there is no transfer of title. A mortgage ordinarily does not not entitle the mortgagee to the possession of the property unless authorized by the express terms of the mortgage (sec. 2927, Civ.Code; 5 Cal.Jur. 117), with some possible exceptions. Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243; Bank of Ukiah v. Moore, 106 Cal. 673, 39 P. 1071; Wixom v. Davis, 57 Cal.App. 620, 207 P. 694.

It seems clear that the placing of *all machinery and tools and other unattached and movable equipment* upon the premises was to be considered as additional security for the overdue installments of the purchase price in the face of the language of the contract between the parties.

[12] The question now presents itself: Would the tools, machinery and equipment removed come under and be classified by the second provision of the contract or were they a part of the realty? When the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of a party, appellate courts will not substitute another interpretation though it seems equally tenable. Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34; Estate of Boyd, 24 Cal.App.2d 287, 74 P.2d 1049.

It is quite evident from the record that the Teaters considered the equipment described to be mortgaged for the payment of delinquent installments due, and were quite satisfied to allow the development corporation to remove it if the installments were paid.

[13] We have carefully examined the entire record as to the manner of affixation of the various parts of the machinery described, and as to a great portion of it there seems to be little doubt as to the correctness of the court's finding. As to other portions (although the record is very confusing) there may be some question. It is quite apparent to us that the windows at least, which were removed from the corrugated iron mill building, were a part of the realty notwithstanding the finding of the trial court. This being so, the appellants, under the case of Chowchilla Colonization Co. v. Thompson, supra, would have the right of possession as to this property. Under the present state of the pleadings and the evidence before us we are unable to determine in whose possession the balance of the property not described in the decree may be found.

Section 2957 of the Civil Code, as it existed in 1933, on the date of the execution of the contract of purchase, provided:

"A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless:

"1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors;

"2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property."

[14, 15] This section is modified by section 2973 of the Civil Code, making such an instrument valid between the maker and persons who, thereafter parting with value, have actual notice thereof. It is apparent that appellants have not complied with sections 2957 and 2973 of the Civil Code. Therefore the mortgage is valid between the parties and persons who, before parting with value, have actual notice thereof. The trial court has failed to find on this issue. It was held in Stewart v. Leasure, 12 Cal.App.2d 652, 55 P.2d 917, that where a lease provides that the landlord shall be the owner of all crops until the rent has been paid, the agreement must be construed as intending to give security to the landlord for the rental and to create a lien upon the crops, and that it was an attempt to obtain the advantages of a chattel mortgage without complying with the provisions of the statute upon the subject. In our opinion, the instant contract, in referring to the machinery and tools and other unattached and movable equipment, should be subject to the same rule of construction, viz., that as between the parties and subsequent purchasers with notice, appellants had a lien upon the property but were not the absolute owners of the same and could not become so until they took the necessary steps to foreclose such lien. Stewart v. Leasure, supra; Ronning v. Way, 18 Cal. App. 527, 123 P. 615. There is considerable evidence in the record that would support the finding that the Dill Lumber Company, or at least some of the assignors of

its various claims, had notice of the provisions of the contract of purchase. It therefore becomes material to the issue presented to determine this fact in support of the judgment quieting title to the property involved. Tomlinson v. Ayres, 117 Cal. 568, 49 P. 717; Douglass v. Willard, 129 Cal. 38, 61 P. 572; Ronning v. Way, supra; 5 Cal.Jur., p. 50, sec. 9.

If the evidence of notice of the lien of appellants on the personal property would support a finding of lack of notice of appellants' lien at the time respondent parted with value, and if such a finding were made, then the judgment rendered on the cross-complaint could be supported. Such finding would leave undetermined the right of possession and ownership of the property described in the complaint, which may have been a part of the realty and which is not described in the cross-complaint nor in the judgment. The evidence shows rather conclusively that the admission in the answers that the sheriff took possession of all of the property is not correct. It is not clear what became of the property not described in the judgment. If the sheriff still has possession of some of it, the trial court should make some proper finding concerning it. This is also true if possession is in the Dill Lumber Company or the Development Corporation. Because of this uncertainty, the judgment in favor of these respondents cannot be affirmed. As to the judgment on the cross-complaint in favor of the Dill Lumber Company, there also remains for determination the question of notice of the lien of appellants before this respondent parted with value, and also whether it did in fact part with value. (Sec. 2973, Civ.Code.)

[16] Certain respondents admittedly did not have possession of any of the property, a necessary prerequisite in a replevin action. Therefore the judgment in favor of those respondents, namely, Bank of Perris, C. R. Stewart, sued under the name of H. G. Stewart, C. H. Marker, James H. Hyde, Maude C. Marker, Eugene Best and Alford P. Olmstead is affirmed. As to the Dill Lumber Company, a corporation, Carl Reyburn, sheriff of Riverside county, and the Good Hope Development Corporation, the judgment is reversed with instructions to the trial court to take further evidence, if necessary, to allow an amendment of the pleadings to conform to the proof and make the necessary finding on the issue of notice of the appellants' lien, value parted with, if any, by cross-complainant, and determine what property described in the complaint was affixed to the realty, which was not described in the judgment, and enter judgment consistent with the findings and the views herein expressed.

We concur: BARNARD, P. J.; MARKS, J.



30 Cal.App.2d 409

GASKINS v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 11667.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1939.

1. Insane persons ⇐64

Conduct of bank's trust officer, who was guardian of incompetent's estate and guardian of estate of incompetent's minor children, with regard to contract entered into by prior guardian for care of minor children, amounted to recognition that incompetent notwithstanding infirmity was nevertheless liable for reasonable value of things furnished to him necessary for the support of his family. Civ.Code, § 38.

2. Limitation of actions ⇐50(4)

Obligation of incompetent father to support minor children was continuing duty, against which statute of limitations did not run during time that children needed care and support. Civ.Code, § 38.

3. Limitation of actions ⇐46(3)

Where plaintiff agreed to care for incompetent's children for an indefinite period, to terminate when youngest minor reached majority, action for services performed in caring for children, commenced within two years after youngest child attained majority, was not barred by limitations. Code Civ.Proc. § 339, subd. 1.

4. Limitation of actions ⇐66(1)

Where person agreed to care for incompetent's minor children until youngest child attained majority, fact that demand was made for advances upon the total sum before expiration of term of contract would not

change provisions of the contract with respect to time when payment would be due. Civ.Code, § 38.

5. Exemptions ⇐62

Under statute exempting veterans' benefits from claims of creditors, obligation of father to support his minor children is not a "debt," but is an obligation growing out of the parental status and public policy, the performance of which can ordinarily be compelled by imprisonment as well as judgment and writ of execution. 38 U.S.C.A. § 454a.

[Ed. Note.—For other definitions of "Debt," see Words & Phrases.]

6. Exemptions ⇐62

The statute exempting benefits due veterans from claims of creditors does not apply to debts or claims against an incompetent veteran for the care of his minor children. Civ.Code, § 38; 38 U.S.C.A. § 454a.

7. Frauds, statute of ⇐50(1)

Contract to care for incompetent's minor children until they reached majority, if not in writing, was not void because its performance was not by its terms postponed beyond one year, since all of the minor children might have died within the first year. Civ. Code, § 38; § 1624, subd. 1.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Ethel Wilhoit Gaskins against the Security-First National Bank of Los Angeles, guardian of Louis Mathew Wooley, an incompetent, and others, to recover for services rendered in caring for the minor children of the incompetent. From an adverse judgment, named defendant appeals.

Affirmed.

Hahn & Hahn and A. Hale Dinsmoor, all of Pasadena, for appellant.

Lester V. Peterman, of Pasadena, and Edward Brody, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by defendant Security-First National Bank of Los Angeles, guardian of Louis Mathew Wooley, an incompetent person, from a judgment for plaintiff in the principal sum of $6,850 and interest thereon at seven per cent per annum until paid, for services rendered by the latter in caring for the minor children of said incompetent, and which judgment further subjected the assets of said incompetent's estate to the payment of the judgment.

The pertinent facts are that respondent is a sister of the incompetent, the latter of whom was on March 16, 1920, declared incompetent through appropriate proceedings instituted for that purpose in the superior court of Los Angeles county, and Elbert T. Wooley, father of the incompetent, was appointed guardian of his estate. The incompetent person is the father of four children, three of whom were living in the state of California in the summer of 1922, while the fourth child lived in Texas during the entire period involved in this litigation. The account current of the guardian showed a balance of some $12,000 in the estate.

At the request of Elbert T. Wooley, then guardian of his incompetent son's estate, respondent came to California from St. Louis, Missouri, September 13, 1922, and except for periods of time aggregating approximately twelve months, took care of three of the minor children of such incompetent until they either left home or attained the age of twenty-one years. In August, 1928, Elbert T. Wooley, father of the incompetent, resigned as guardian of the latter's estate, and the corporate banking predecessor of appellant herein was named guardian.

Louis Mathew Wooley, Jr., the incompetent's youngest son, attained his majority March 2, 1935. Respondent brought this action February 6, 1937, against appellant in its capacity as guardian of the incompetent's estate, alleging that her services were performed pursuant to an express agreement on the part of the guardian, Elbert Wooley, to pay her for her services, and also set up a separate count for the reasonable value of such services.

By its answer appellant bank, as the guardian, denied the existence of a contract to pay respondent for her services in looking after the minor children of said Louis Mathew Wooley, incompetent, and denied that appellant had requested her to care for said minor children pursuant to any agreement with the former guardian, Elbert T. Wooley. Also as special defenses to the complaint appellant alleged (1) that all of the funds of the estate of said incompetent which appellant had in its possession came within the provisions of the act of Congress exempting such funds from the claims of creditors, by reason of the fact that the same were paid by the United States government to said incompetent as a

disabled American World War veteran; (2) that the portion of respondent's claim for services alleged to have been rendered prior to February 6, 1935, is barred by the statute of limitations under section 339, subdivision 1, of the Code of Civil Procedure. With the issues thus framed, the cause proceeded to trial before the court, sitting without a jury, resulting in judgment for respondent as aforesaid.

The evidence shows without material conflict that in the summer of 1922 Elbert Wooley wrote respondent a letter in which he asked her to come to California and help him look after the minor children of Louis Mathew Wooley, incompetent; that this letter was lost by respondent and was not produced at the time of trial. Respondent testified that in the letter Elbert Wooley agreed to pay her the sum of fifty dollars per month and her room and board for taking care of said children. Elbert Wooley, the party writing the letter, testified that he had no recollection as to whether or not he made any promises to pay her the said sum.

Respondent testified that pursuant to such letter and the agreement therein contained, she came to California and took care of the minor children of Louis Mathew Wooley, or at least one of them, from September 13, 1922, until March 2, 1935, except for periods of time aggregating twelve months, during which time she moved away from the home where said children were living.

Respondent's testimony showed that within a month after beginning to care for said minor children, she demanded of Elbert Wooley payment for her services. Again in February, 1923, which was approximately four or five months after respondent began to care for said children, she requested payment of Elbert Wooley, and he told her to wait until the children became of age and then put in her claim for her services. When the bank was appointed guardian of the estate of Louis Mathew Wooley, incompetent, in the fall of 1928, respondent again demanded payment for her services. Respondent further testified that she demanded payment for her services every four or five months from the time that the bank was appointed guardian over Louis Mathew Wooley, incompetent.

On June 27, 1934, which was prior to the date that Louis Mathew Wooley, Jr., youngest son of Louis Mathew Wooley, incompetent, became twenty-one years of age, respondent wrote a letter to appellant herein, notifying appellant of her agreement with Elbert Wooley, and requesting payment of a portion of the sum claimed to be owing for her services. Appellant wrote a letter to respondent in reply denying that appellant had made any arrangements to pay respondent for her alleged services and refusing to allow her claim.

Appellant's first ground of appeal is that the trial court erred in finding that appellant through its vice-president, as guardian of the incompetent's estate and also as guardian of the estate of the minor children of said incompetent, requested respondent to care for said minor children. In this connection, respondent testified that in October, 1928, following appellant's appointment as guardian, she had a conversation with H. H. Lehman, vice-president of the bank and in charge of a portion of appellant's trust business in which conversation respondent detailed to Mr. Lehman the nature of the services she was performing for the incompetent's minor children, and the terms of her compensation therefor, whereupon, according to respondent, Mr. Lehman replied in part, "Well, if it stands like that, we are just going to let it stand that way; we are not going to try to make any changes in it, we are just going to pick up where Mr. Wooley left off, try to get things straightened out, to see if we can't carry things on on a smoother basis." Later in respondent's testimony the following interrogatories were propounded to her and the following answers by her given:

"Q. Now, at the time Mr. Lehman at the bank stated to you that he wanted you to continue to work and care for these children, under the same terms and provisions that you were working by virtue of your agreement with Elbert Wooley, would you have continued to work and care for these children had there been no promise to pay you for those services? A. No.

"Q. In other words, had they not agreed to carry on this agreement, you would not have cared for the children, would you? A. No."

[1] Appellant contends that the statements attributed to its vice-president do not contain a request to respondent to do anything. With this claim we cannot agree. By his statement that appellant was "just going to let it stand that way", certainly Mr. Lehman intended to convey to respondent that the guardian desired her to continue in the future as she had in the past The

conduct of appellant's trust officer amounted to a recognition on the part of appellant that the incompetent, notwithstanding his infirmity and lack of understanding, was nevertheless liable for the reasonable value of things furnished to him necessary for the support of his family. Civ.Code, § 38. The evidence was sufficient to support the court's finding in this regard. In any event, the ward, being bound to care for his children and the prior guardian having entered into a valid and legal contract with respondent which was then in effect for the care of the minor children, it would be immaterial whether appellant bank approved or disapproved of the terms of such contract.

[2-4] It is next claimed that the court fell into error in holding that subdivision 1 of section 339 of the Code of Civil Procedure did not bar recovery of compensation for services rendered by respondent prior to February 6, 1935. In support of this contention, appellant argues that there was no written contract between appellant and respondent bank, and that the latter is not bound by any written agreement, and that in any event the latter is not bound by any written agreement between respondent and Elbert Wooley, the prior guardian; and further, that where services are performed, without an express agreement to pay therefor, an action to recover for such services must be commenced within two years after the accrual of the cause of action. The obligation of the incompetent father to support his minor children was a continuing duty, against which the statute of limitations did not run during the time that such children needed care and support (Fernandez v. Aburrea, 42 Cal.App. 131, 183 P. 366); and in the instant case there is no showing by appellant that such need for care and support did not persist until Louis Mathew Wooley, Jr., became of age. Further, under the provisions of section 1502 of the Probate Code, every guardian of an estate must, among other things, apply the income, as far as may be necessary, to the comfortable and suitable support, maintenance and education of the ward and his family; and if the income is insufficient for that purpose, he may sell or give a deed of trust upon any of the property, as in the Probate Code provided. In the case before us, the contract was for an indefinite period, and there is abundant evidence in the record that the time for payment was agreed to be when the youngest child attained his majority. The agreement being for a term ending with the twenty-first birthday of the youngest minor son, and the action having been brought within two years thereafter, it was not barred by the statute. The mere fact that respondent at different times made demand for advances upon the total sum that would be due upon the expiration of the term of the contract does not change the provisions of the contract to the effect that payment would not be due until Louis Jr. attained his majority. Wax v. Adair, 16 Cal.App. 2d 393, 60 P.2d 904; Turell v. Anderson, 16 Cal.App.2d 445, 60 P.2d 906.

Appellant next urges that the trial court erred in holding that the compensation and the war risk insurance money received by the estate of Louis Mathew Wooley, the incompetent, from the United States of America under the provisions of the World War Veterans' Act of 1924 as amended, 38 U.S.C.A. § 421 et seq., is not exempt from the claim of respondent for services rendered in caring for the minor children of said incompetent. It is conceded that all of the assets held by appellant as guardian of the incompetent's estate consist of funds received from the United States government under the provisions of the aforesaid act, or property purchased with such funds and the increment thereof. So far as applicable to the facts of this case, the World War Veterans' Act of 1924 provides as follows: "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans * * * shall be exempt from the *claims of creditors* * * * either before or after receipt by the beneficiary." 38 U.S.C.A. § 454a. Citing section 3430 of the Civil Code, appellant maintains that if there is any obligation in this case existing upon the part of appellant guardian in favor of respondent, that the latter is appellant's creditor; that government allowances to an incompetent World War veteran are exempt from the claims of creditors even after the money has been received by the veteran or his guardian, and that the latter cannot waive the veteran's right to claim such exemption. In re Murphy's Committee, 134 Misc. 683, 236 N.Y.S. 343; Yake v. Yake, 1936, 170 Md. 75, 183 A. 555; Derzis v. Yafes, 227 Ala. 471, 150 So. 461; Wilson v. Sawyer, 177 Ark. 492, 6 S.W.2d 825; Speer v. Pierce, 1934, 18 Tenn.App. 351, 77 S.W.2d 77.

[5, 6] In Guardianship of Giambastiani, 1 Cal.App.2d 639, 37 P.2d 142, the question arose whether a claim for moneys advanced for the maintenance and support of an in-

competent by his guardian de facto constitutes the claim of a creditor, and the court, at page 646, 37 P.2d at page 146, held: "A claim of a de facto guardian for expenditures on behalf of the ward, set up in his subsequent accounting, *is not the claim of a creditor.* It is a *charge arising during administration* of the ward's affairs and estate, the same as if under a de jure guardianship." (Emphasis added.) Further, the beneficent purpose manifested in the act of Congress is to preserve the disabled soldier's fund against imposition on the part of designing people or depletion by the soldier's own improvidence, and thereby to afford and insure continued support of persons suffering because of their military service. That Congress has the power to so preserve these funds provided by the government for the support of disabled incompetent soldiers and their dependents is well settled, but we cannot conceive that it was the purpose of the government to prevent the probate courts in guardianship proceedings from authorizing the application of these funds to the needs of the Veteran's children, even though the funds are derived from the government. The obligation of a father to support his minor children is not a *debt* contemplated by this act of Congress, but is an obligation growing out of the parental status and public policy, the performance of which can ordinarily be compelled by imprisonment as well as judgment and writ of execution; and we cannot assume that the Federal government ever intended to throw around these federal funds legal strictures that would permit or enable the beneficiaries thereof to refuse to discharge their duty to support their children. Appellant cites us to section 1661 of the Probate Code, which is part of chapter 15 of said code, entitled, "Uniform Veterans' Guardianship Act", wherein it is provided that a guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person *other than his ward,* except upon order of the court upon hearing had following prescribed notice to the United States Veterans' Bureau. We conclude that this section does not apply to debts or claims against the ward, of the character of the one before us. As was said in Estate of Schluter, 209 Cal. 286, 289, 286 P. 1008, 1009, with reference to moneys properly expended by a guardian on behalf of his ward: "That it was also within the power of the court to authorize reimbursement of all sums rightfully expended by said guardian on behalf of said ward and to allow her the full amount to which equity entitles her is also plain, for in the above cause [referring to Estate of Clanton, 171 Cal. 381, 153 P. 459] the court further said: 'Some of the items of the account approved by the court were for expenditures without formal allowance previously made by the court. Under our liberal system, if the expenditures of the guardian have been just and equitable, they will be allowed, regardless of the obtaining or failure to secure orders of the court authorizing them. "The criterion for determining whether a past maintenance should be allowed is whether a chancery court would have authorized it in advance." In re Beisel's Estate, 110 Cal. [267] 276, 40 P. 961, 42 P. 819. The same rule is declared in Estate of Boyes, 151 Cal. [143] 155, 90 P. 454.'"

[7] Finally, appellant contends that the court committed error in holding that subdivision 1 of section 1624 of the Civil Code is not applicable in this case. This claim is without merit, because the trial court found upon competent evidence that the contract with the former guardian was in writing, and therefore it is not invalid by reason of the statute of frauds. When appellant bank assumed the duties of guardian, it became charged with the obligation on behalf of the ward to continue with the performance of the contract in question. It could also be said that even assuming the contract with the original guardian was not in writing, its performance was not by its terms postponed beyond one year. In the case at bar the contract was to care for the minor children of the incompetent during their minority with payment to be made when the youngest attained majority. Obviously such a contract might be fully performed in one year from the date of its execution, as, for instance, would be the case should all the minor children have died within the first year. In 27 Corpus Juris 184 it is said with reference to the statute of frauds: "A parol agreement to board, or to support * * * a person during his life or other indefinite period, is regarded as having been made by the parties thereto in contemplation of the possible contingency of the person's death within the year, and, being capable of complete performance within a year, is not within the statute. The same is so of an oral contract to support a person until he reaches his majority or attains a certain age, the contingency being implied that he may die within the year. The same contingency of death being implied, an oral

agreement to pay for the maintenance or education of a child is not within the statute. It has even been held that an agreement to support another for a fixed period greater than one year is not within the statute."

The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.



FRANKINI v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.*

Civ. 5951.

District Court of Appeal, Third District, California.

Jan. 18, 1939.

Rehearing Granted Feb. 17, 1939.

1. Appeal and error ⇐1097(1)

The decision of District Court of Appeal on former appeal, in case wherein evidence was practically identical with that on subsequent trial, is law of case on second appeal.

2. Banks and banking ⇐154(9)

Evidence of discrepancies between bank depositor's signatures on card filed with bank and signatures of his name as maker of forged checks *held* sufficient to take to jury question of bank's negligence in cashing such checks.

3. Banks and banking ⇐148(1)

It is bank teller's duty to acquaint himself with depositor's signature, though ordinary commercial practice may not permit constant comparison between signatures on his signature card and checks drawn on his account.

4. Banks and banking ⇐154(9)

Whether bank was negligent in paying forged checks is usually for jury.

5. Banks and banking ⇐154(9)

Whether bank depositor exercised due care in promptly examining his passbook, paid checks, or statement of his account, is question for jury in his action against bank for amount of forged checks paid thereby.

6. Banks and banking ⇐154(9)

It is error to withraw case from jury in depositor's action against bank for amount of forged checks paid by defendant, if there is any substantial evidence to support bank's liability therefor.

7. Banks and banking ⇐148(1)

Generally, bank is warranted in paying out depositor's money only in accordance with his genuine order, and no degree of care will excuse it from liability for amount of forged checks paid by it, in absence of circumstances creating equitable estoppel as against depositor or latter's prior negligence contributing to payment of checks.

8. Banks and banking ⇐148(3)

A bank's failure to use ordinary care in detecting forged signatures to checks on depositor's account excuses depositor from performing his duty to use diligence in examining statement of his account after receiving it from bank.

9. Banks and banking ⇐154(9)

A defense of account stated, predicated on bank depositor's acquiescence in statement of account, sent him by bank, by failure to object thereto within reasonable time, is not such absolute defense to his action against bank for amount of forged checks paid thereby as to preclude jury from passing on question of defendant's negligence in failing to detect forged signatures.

10. Banks and banking ⇐154(9)

Whether bank depositor examined statement of his account, sent him by bank, within reasonable time, and reported errors therein, were questions for jury in his action against bank for amount of forged checks paid thereby.

11. Limitation of actions ⇐14

Parties to contract may stipulate therein for limitation period shorter than that fixed by statute, and such stipulation violates no principle of public policy, if period fixed be not so unreasonable as to show imposition or undue advantage.

12. Limitation of actions ⇐14

Unreasonableness of limitation period fixed by contract depends on particular facts of case as well as words of contract.

13. Evidence ⇐20(2)

It is matter of common knowledge that banking business is conducted in California by relatively small number of corporations through branches or affiliates.

*Subsequent opinion 88 P.2d 790.

14. Limitation of actions ⇐14

It is court's duty to scrutinize carefully agreement by parties to contract for shorter limitation period than that fixed by statute, particularly with reference to matter of its reasonableness.

15. Banks and banking ⇐148(4)

A contract, whereby bank depositor authorized bank to mail statements of his account and cancelled checks to him and promised to notify bank of any error and claim credit or refund within ten days after expiration of time covered by statement, *held* so unreasonable as to render it void and ineffective for any purpose.

16. Appeal and error ⇐979(1)

The granting or denial of new trial on ground that evidence was insufficient to justify jury's verdict rests so fully in trial court's discretion, where there is substantial conflict in evidence, that its ruling is conclusive on Court of Appeal, unless abuse of discretion appears.

17. New trial ⇐70

The trial court had right to grant plaintiff new trial in exercise of sound discretion, if not satisfied of sufficiency of evidence to sustain jury's verdict for defendant in depositor's action against bank for amount of forged checks cashed by it, and did not abuse such discretion, where there was evidence justifying finding of defendant's negligence, which was not conclusively negatived by defenses set up.

Appeal from Superior Court, Sacramento County; J. G. Bruton, Judge.

Action by Louis Frankini against the Bank of America National Trust & Savings Association to recover the amount of forged checks charged to plaintiff's account by defendant. From a judgment on a directed verdict for defendant as to part of the checks, plaintiff appeals, and from an order granting plaintiff's motion for a new trial as to a jury's verdict for defendant with respect to other checks, defendant appeals.

Judgment on directed verdict reversed, and order granting motion for new trial affirmed.

Frank L. Murphy and Ralph Lui, both of Sacramento, for plaintiff.

Devlin, Devlin & Diepenbrock and Horace B. Wulff, all of Sacramento, and S. J. Tosi, of San Francisco, for defendant.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action brought to recover from the defendant bank the aggregate amount of a number of forged checks which were charged to the account of plaintiff. The trial court directed the jury to bring in a verdict in favor of the bank on those checks cashed during the months of November and December, 1931, and January of 1932, and such a verdict was rendered.

On checks cashed during the month of February, 1932, the issues were submitted to the jury, and a verdict found for defendant. The judgment was that plaintiff take nothing by reason of the action. Thereafter, the court granted a motion for new trial as to the verdict found by the jury with respect to the February checks, on the ground of insufficiency of the evidence. Plaintiff now appeals from the judgment resulting from the directed verdict, and defendant appeals from the order granting the motion for new trial.

There is a little dispute as to the material facts of the case. The plaintiff, Louis Frankini, was a depositor in defendant bank, and had been such for many years prior to the commencement of the action. In the year 1928, at the request of the bank, plaintiff signed and delivered to the bank the following agreement:

"AUTHORIZATION TO MAIL STATEMENT AND VOUCHERS. Louis Frankini name of account. To Bank of Italy National Trust and Savings Association. You are hereby requested and authorized to send by mail not registered the statement of the deposit account of the undersigned, together with all canceled checks pertaining to it, unless otherwise directed herein, to the undersigned at the following address: In consideration of your compliance with this request, the undersigned promises *to notify you of any error, and to make any claim for credit or refund within ten days after the expiration of the time covered by this statement.* This request and authorization is to remain in force and effect until revoked in writing. Signed: Louis Frankini, 5208 Folsom Boulevard." (Italics ours.)

Pursuant to said contract defendant mailed to plaintiff monthly written statements of his account, together with canceled checks paid during the months of November and December, 1931, and January

of 1932. Plaintiff admitted the receipt of each of the three monthly statements in due course of mail, and further admitted that he placed said statements, unopened, in his desk drawer, where they remained until his bookkeeper called for them in the early part of February, 1932. His testimony was to the effect that if he had examined the statements he would have discovered the forgeries.

During the months of November and December, 1931, and January, and the first ten days of February, 1932, the defendant bank accepted a number of checks drawn upon it, on which the name of plaintiff was forged as maker. These checks were all made out by William Rose, a former employee of plaintiff, to employees and former employees of plaintiff, and said William Rose forged the names of these employees on the endorsements. The defendant debited the defendant's commercial account with the amount of the forged checks in the sum of $1,345, and plaintiff seeks to recover that amount. These forged checks were forty-nine in number. Five of them totaling $130, were cashed during the month of November, 1931. Ten, amounting to $290, were cashed during the month of December, 1931. Twenty-one, amounting to $560, were cashed during the month of January, 1932. Thirteen, amounting to $365, were cashed during the month of February, 1932. On February 10, 1932, plaintiff first discovered the errors arising out of the forgeries, which appeared in these statements, and on that date he notified the bank of such discovery.

[1-3] This case, upon practically the same facts, was before this court on appeal, the decision being filed March 6, 1936, and reported in 12 Cal.App.2d 298, 55 P.2d 232. We there held that the trial court erred in directing a verdict for defendant with respect to the forged checks for the months of January and February, 1931. We expressly refrained from passing upon the legality of the contract mentioned above.

It is admitted that the evidence in this case is identical with that in the former case, with one exception, which is pointed out by respondent, who states that the record now shows that the statement of plaintiff's account for the month of January, 1932, was for the period ending January 29th, instead of January 31st—the date which we assumed to be correct on the former appeal. This statement of the evidence appears to be correct. The decision in the former case holds that there was sufficient evidence of negligence on the part of the bank in cashing the forged checks to make out a case for the jury, and that plaintiff was not, as a matter of law, himself negligent. We now take that to be the law of the case before us. In that connection, however, we deem it proper to point out a few of the facts in the record which would support a finding of negligence on the part of the bank. During the four-month period involved, the bank cashed forty-nine forged checks drawn on the account of the plaintiff. Each of these contained *two* forged signatures, the signature of plaintiff as maker, and the endorsed signature of the payee. It appears that plaintiff had maintained an account in the bank for many years prior to these transactions, and his signature card had been on file with the bank during that time. This original card is before us in the record, together with the forged checks. Having carefully examined these exhibits, we are satisfied that the jury would have been justified in finding that if the bank had compared the genuine signatures with the forged signatures of plaintiff at any time, they would have rejected the forged checks. For illustration, in making the final "s" on his given name, plaintiff used the conventional method of completing that letter with a short line to the right leading from the bottom of the letter. In none of the forty-nine forged checks do we find that line. It is entirely omitted. We do not purport to detail all the facts which would support a finding of negligence, but merely refer to this one which is so apparent and obvious. While ordinarily commercial practice may not permit a teller in a bank to constantly make such comparisons, it is certainly the duty of the employee to acquaint himself with the signature of the customer; otherwise, the latter would have no protection whatever against forgeries.

[4-8] Taking up first the appeal of plaintiff, it is contended that the court erred in directing a verdict for the defendant. Respondent seeks to uphold the directed verdict covering the checks cashed during the months of November and December, 1931, and January, 1932, upon two grounds: First: That the failure of the plaintiff to notify the bank, within a reasonable time, of any error or forgeries, gave rise to an account stated between the parties; and, second: That plaintiff was

bound by the terms of the contract to give such notice within ten days "after the expiration of the time covered by this statement", and having failed to give such notice, he had no recourse whatever against the bank. Conceding that there is sufficient evidence of negligence on the part of the bank, it is nevertheless contended by the respondent that the two defenses mentioned above are so conclusively proven that the jury had no alternative but to sustain them, and that as a matter of law, no other verdict was reasonably possible. If this contention is correct, the action of the trial court in directing a verdict should be sustained. "The question as to whether a bank is guilty of negligence in paying a forged check drawn upon the account of a depositor therein is usually one for the determination of the jury after the actual payment of a forged check has been established. So, also, the question as to whether a depositor has exercised due care in promptly examining his passbook, paid checks or a statement of his account is for the decision of the jury. Leather Mfg. Nat. Bank v. Morgan, 117 U.S. 96, 6 S.Ct. 657, 29 L.Ed. 811. It is error to withdraw the case from the jury if there is any substantial evidence to support the liability of the bank therefor. The well-established rule with respect to the liability of a bank for the payment of a forged check from the account of a depositor therein is expressed in the case of Union Tool Co. v. Farmers' & Mechanics' Nat. Bank of Los Angeles, 192 Cal. 40, at page 46, 218 P. 424, 426, 28 A.L.R. 1417, as follows: 'It is a well-settled general rule that as between a bank and its depositor the bank is only warranted in paying out the money of the depositor on his genuine order and in accordance therewith. If payments be made on a forged check, with no attendant circumstances sufficient to create an equitable estoppel as against the depositor, or there has been no prior negligence by the depositor contributory to the payment of the check, no degree of care on the part of the bank will excuse it from liability.' We may not say as a matter of law that the plaintiff was guilty of negligence which contributed to a justifiable payment of the forged checks by the bank merely because he left his blank checks, green ink and protectograph on his desk in his private office in his home. He may not be deemed to have reasonably anticipated that some thief and forger would procure a skeleton key and unlawfully enter his home in his absence to obtain these means of forging the checks. At least that question of negligence was for the determination of the jury. The authorities appear to hold that when the bank is guilty of negligence in the payment of a forged check, in the absence of an agreement to the contrary, it may be liable for the payment of a forged check even though the depositor has neglected to promptly examine his passbook or statement of account so as to discover the error. It is said in that regard in the case of Glassell Dev. Co. v. Citizens' Nat. Bank of Los Angeles, 191 Cal. 375, at page 380, 216 P. 1012, 1014, 28 A.L.R. 1427: 'The weight of authority, and perhaps of reason, supports the view that when a depositor's passbook has been written up and returned to him with canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time, and if they disclose forgeries or alterations to report them to the bank, failing in which he cannot, if his failure results in detriment to the bank, dispute the correctness of payments thereafter made by it on similar checks. * * * This rule, however, assumes that the bank itself has not been guilty of negligence in making the payment, for when by the exercise of proper care it could have discovered the alteration or forgery, it must bear the loss notwithstanding that the depositor failed in his duty to examine the accounts.'" Frankini v. Bank of America etc., 12 Cal.App.2d 298, 55 P.2d 232, 234. "If it (the bank) was negligent; if its officers are found to have failed to exercise due and reasonable care in detecting the forgery or fraud, then the subsequent negligence of the depositor, his failure to perform his duty in examining his pass-book and vouchers with reasonable care, and to report to the bank, in a reasonable time, any errors or mistakes, *would constitute no defense.*" 7 Am.Jur., p. 371, par. 516, citing numerous authorities. Summarizing briefly the rule as it pertains to the contentions here, it appears that though one is bound under the law to use diligence in examining his account after it is received from the bank, he is nevertheless excused from performing such duty if in fact the bank has failed to use ordinary care in detecting the forged signatures.

[9, 10] Taking up the defense of account stated, it appears without question that such defense is here predicated upon the silence and acquiescence of the cus-

tomer, under the rule that if the account is sent to the debtor and he does not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated. 1 Cal.Jur. p. 197. But, as we have seen, mere acquiescence is no defense where there is evidence of actual negligence on the part of the bank. This rule, if logically applied, would seem to be broad enough to cover any conduct of the customer in respect to failure to examine accounts, which conduct amounts to mere acquiescence, and hence would apply to the defense of accounts stated under the facts here. The basis of such defense is the mere passive conduct on the part of the customer, and we see no reason why the rule laid down in the Glassell Case, above stated, should not, with equal force and logic, be applied to the defense of mere acquiescence, no matter what form it may take.

It follows that a defense based upon the theory of accounts stated, where acquiescence alone is relied upon, is not in itself such an absolute defense to this action as to preclude the jury from passing upon the question of the negligence of the defendant. Furthermore, whether or not the defendant examined the account within a reasonable time, and reported any errors in the same, was a question for the jury. We cannot say as a matter of law that an account stated was proven.

[11-14] We now consider the second defense: That of the written contract quoted above, where the plaintiff agrees to make any objection to the account "within ten days after the expiration of the time covered by the statement". This is the equivalent to a ten-day limitation on the assertion of a right—the right to object to the statement. The time within which an action can be commenced is fixed by statute in this case as one year. Sec. 340, subd. 3, Code Civ.Proc. "It is a well-settled proposition of law that the parties to a contract may stipulate therein for a period of limitation, shorter than that fixed by the statute of limitations, and that such stipulation violates no principle of public policy, provided *the period fixed be not so unreasonable as to show imposition or undue advantage in some way.*" (Italics ours.) Beeson v. Schloss, 183 Cal. 618, 622, 192 P. 292, 294, citing numerous authorities. Unreasonableness depends not alone upon the words of the contract, but also upon the particular facts of the case. 37 C.J. p. 728, par. 45. In our former opinion, while not deciding this question we characterized the terms of this contract as "harsh". It is a matter of common knowledge that in this state the banking business is conducted, through branches or affiliates, by a relatively small number of corporations. It can be reasonably conceived that in certain cities and counties a single banking institution would afford the only banking facilities. In such a case the prospective customer would be compelled to sign such an agreement if he wished to open an account. It cannot be said that under such circumstances he is a free agent in making such an agreement, in the same sense that he would be if he were executing an ordinary business contract. The situation would be somewhat analogous to the execution of a policy of insurance where the rule of interpretation is thus stated: "It is to be remembered that contracts of this sort are to be interpreted in the light of the fact that they are drawn in the insurance companies, and are rarely, if ever, understood by the people who pay the premiums. Coniglio v. Connecticut Fire Ins. Co., 180 Cal. 596, 599, 182 P. 275, 5 A.L.R. 805, citing numerous authorities. For the foregoing reasons we believe it to be the duty of the court to carefully scrutinize agreements of the character here involved, particularly with reference to the matter of reasonability.

[15] At the outset we might state that in our opinion the ten-day period, in itself, is not an unreasonable limitation. The contract, here, however, involves an element which we believe renders it unreasonable. This is the period of time from which the ten-day limitation is to run. It is fixed at "the expiration of the time covered by the statement", and not from the date of mailing or the receipt of such statement. It will be noted that the bank *does not actually agree to mail or deliver the statement at all,* although such duty might possibly be inferred. The result is that if the bank mailed the statement several days after the expiration of the *time covered by it,* the ten days would be cut down accordingly,—in fact, the bank could practically eliminate the time within which the customer might object to the account, and still be within the terms of the contract. This is an entirely different matter from that presented in the case relied upon by respondent, Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, 182

P. 293, 5 A.L.R. 1193. An agreement of similar import was there before the court, but it provided that the bank account should be examined by the customer and objection made thereto *"within ten days after receipt thereof"*. Under that contract, if the customer were absent from his home, and the statement was mailed to his home, the ten days would not begin to run until he returned, and actually received it. The Supreme Court did not pass upon the reasonableness of the contract; it had no occasion to do so. It was held ineffective because it had never been signed or assented to by the customer. We do not hold, however, that the form of agreement in that case is unreasonable, as it appears to us to meet the objection we have pointed out here. The court did, however, characterize such a contract as a "trap for the unwary". This expression is particularly applicable to the instant case, because the card which contained the agreement is headed, in large type: "AUTHORIZATION TO MAIL STATEMENTS AND VOUCHERS"—a highly misleading statement which undoubtedly led to the failure of plaintiff to read the entire agreement. He testified that, prior to signing the authorization to mail, his attention was not called to the ten-day limitation language in it; that he thought that the card was but an identification of signature and a request to mail statements, and that he was never furnished a copy of it. The foregoing testimony is uncontradicted. For the reasons given, we hold that the contract in question was so unreasonable as to render it void and ineffective for any purpose.

Summarizing the entire matter with reference to the appeal of plaintiff, it appears that there is in the record sufficient evidence of negligence on the part of the bank in cashing the forged checks, to justify a finding by the jury to that effect; that neither of the two defenses, based on the accounts stated and the contract between the parties, was established to the extent that they, or either of them, absolutely precluded the jury from considering the negligence of the plaintiff, and therefore, the court was not, by reason of the proof of such defenses, justified in instructing the jury to find for the defendant.

[16] Taking up the appeal by defendant from the order granting the motion for new trial, it appears that such motion was granted upon the ground that the evidence was insufficient to sustain the verdict. "The rule is well established that the granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the *discretion of the trial court* that its action is conclusive upon this court, unless it appears that there has been an abuse of discretion. [Italics ours.]" Springer v. Pacific Fruit Exchange, 92 Cal.App. 732, 734, 268 P. 951, 952.

[17] What we have said upon the appeal by plaintiff is equally applicable on *this* appeal. There was evidence which would justify a finding by the jury to the effect that defendant was guilty of negligence. The defenses set up did not conclusively negative such negligence. It was still a question for the jury. If the trial court was not satisfied with the sufficiency of the evidence to sustain a verdict, it had the right to grant a new trial, in the exercise of a sound discretion. We cannot say that such discretion was here abused.

That portion of the judgment resulting from the directed verdict is reversed. The order granting a motion for new trial on the other issues is affirmed. Plaintiff to recover costs on appeal.

We concur: PULLEN, P. J.; THOMPSON, J.



30 Cal.App.2d 400

CARPENTER v. FROLOFF et al.
WHITE v. SAME.

Civ. 11479.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1939.

1. Vendor and purchaser ⇐351(8)

Damages for breach of agreement to convey realty could not be based upon profit which could have been made upon resale. Civ.Code, § 3306.

2. Vendor and purchaser ⇐351(1)

Measure of damages for breach of contract to convey realty is price paid and expenses incurred in examining title, etc., with interest thereon, plus, in case of bad faith,

difference between price agreed to be paid and value of realty at time of breach, and expenses incurred in preparing to enter upon land. Civ.Code, § 3306.

3. Reformation of Instruments ⇐28

Where purchaser's assignee sought reformation of contract to convey property on ground of mistake known to vendor, and it was neither alleged nor found that vendor owned property allegedly intended to have been conveyed, assignee was not entitled to reformation.

4. Appeal and error ⇐907(3)

When judgment roll alone is before appellate court, the court must assume that all facts found by trial court, even though not contained in pleadings, were by agreement of court and counsel put in issue during trial.

5. Trial ⇐395(1)

The sufficiency of findings of fact to support a judgment is tested by rules applicable to test sufficiency of pleading to state a cause of action.

6. Appeal and error ⇐907(3)

In suit by assignee of purchaser for reformation of contract of sale, in absence of an averment in pleadings or finding thereon that vendors owned or were able to sell or intended to sell the property, appellate court could not assume, where appeal was taken on judgment roll, that either by evidence or stipulation such issue was presented to the trial court.

7. Appeal and error ⇐907(3)

In suit for reformation of contract of sale where there was nothing in pleadings or findings to effect that vendors owned or were able to sell the property as described in finding, judgment for plaintiff on appeal on judgment roll could not be sustained on ground that if finding had been made it would have been against defendants, where there was nothing to show that issue was ever tendered to the trial court.

8. Reformation of Instruments ⇐19(1)

Mutuality of agreement is not always necessary to warrant reformation of instrument and mistake of one party, which other party knew at the time or suspected, is sufficient. Civ.Code, § 3399.

9. Reformation of Instruments ⇐37

Pleadings sufficiently alleged facts showing mistake of purchaser under contract to convey realty, and knowledge or suspicion of vendor of such mistake as to land to be conveyed, as respects right of purchaser's assignee to reformation on cross-complaint. Civ.Code § 3399.

10. Reformation of Instruments ⇐28

In suit to reform contract for conveyance of realty on ground of mistake of purchaser known to vendor, it was essential that vendor owned or had acquired property allegedly intended to have been conveyed. Civ.Code, § 3399.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Samuel W. Carpenter against Basil S. Froloff and Jeanette M. White for breach of agreement for sale of mining property, wherein defendant Jeanette M. White filed a cross-complaint against Basil S. Froloff and wife. Judgment for defendant Jeanette M. White on her cross-complaint, and defendants Basil S. Froloff and wife appeal.

Reversed and remanded.

For prior opinion, see 84 P.2d 188.

Thomas H. Hearn, of Los Angeles, for appellants.

Swaffield & Swaffield, of Los Angeles, Kenneth Sperry and Joseph E. Madden, both of Long Beach, and Avery M. Blount, of Los Angeles, for respondent.

WHITE, Justice.

Upon rehearing of this cause it appears that a judgment of nonsuit was entered in the action in chief herein, in which Samuel W. Carpenter, as plaintiff, sued Basil S. Froloff and Jeanette M. White, as defendants, for damages for breach of an agreement for the sale and purchase of the Rising Sun Placer Mine. The said Jeanette M. White filed her cross-complaint against the said Basil S. Froloff and Stefa Froloff, his wife, and judgment was rendered thereon in favor of said Jeanette M. White.

This is an appeal by the said Basil S. Froloff and Stefa Froloff from the said last-named judgment, and comes to this court upon the judgment roll alone. From such record it appears that on May 19, 1934, said appellants, Basil S. Froloff and Stefa Froloff, entered into an agreement (filed herein and identified as exhibit "A") by which they agreed to sell to one Charles A. Dutro the Rising Sun Placer

Mine, consisting of 190 acres of land, for the agreed purchase price of $18,000, *and to place in escrow a quitclaim deed to the property in question, which deed was to be delivered to said Dutro or his assigns upon his or their compliance with all the terms and conditions of said agreement.* On October 19, 1934, said Dutro assigned his interest in the property covered by the agreement to Jeanette M. White, respondent here, and said White in turn assigned her interest in said agreement to Samuel W. Carpenter for the agreed purchase price of $45,000.

On July 9, 1935, said Carpenter brought action against said Jeanette M. White and Basil S. Froloff and Stefa Froloff for damages for breach of contract, alleging that said Basil S. Froloff had prevented his entry upon the said mining property and the commencement of his mining operations thereon, all to his damage in the sum of $51,000. Respondent Jeanette M. White thereupon filed her cross-complaint against the Froloffs alleging that through a mistake known to the said Froloffs, the agreement of May 19, 1934, failed to express the true intention of the parties thereto, and that the quitclaim deed deposited in escrow did not accurately describe the mining property which the Froloffs had exhibited to the said Dutro and said respondent White, and of which said Froloffs represented themselves to be the owners, to-wit: 190 acres of land, known as the Rising Sun Placer Mine, lying along the contiguous channel of Rush creek for a distance of two miles; that the quitclaim deed dated June 2, 1934, did not refer to the Rising Sun Placer Mine by either name or acreage, but instead referred by legal description to two parcels of land, one comprising 90 acres and the other 100 acres, *and did not include in its provisions any description of the other lands embracing the channel of Rush creek for two continuous miles and the territory along the shores of Rush creek contiguous thereto,* which the said Froloffs had represented to said respondent White comprised the Rising Sun Placer Mine consisting of 190 acres; that in truth and in fact said mining property consisted of 90 acres only, and the Froloffs' representations that it contained 190 acres and that it included lands embracing the channel of Rush creek for two continuous miles, and the territory along the shores of Rush creek and contiguous thereto, were false and fraudulent and were made to cheat and defraud said Charles A. Dutro and his assigns; that the said Froloffs with a further intention to defraud and cheat said Dutro and his assigns and to breach their contract made with said Dutro for the sale of the lands embracing the channel of Rush creek for two continuous miles and the territory along the shores of Rush creek and contiguous thereto, said lands being represented to be gold bearing and worth over $18,000, did include in said quitclaim deed other lands which were mountainous and of practically no value and which they (the Froloffs) had not exhibited to said Dutro or to said respondent White. It was further alleged by the cross-complaint that the said lands embracing the channel of Rush creek for two continuous miles and the territory contiguous thereto and which the Froloffs represented they were selling to said Dutro, are located in sections 21, 22, 26 and 27, township 34 north, range 9 west, M. D. M., but are different lands than those described in the quitclaim deed; that the failure to include in the said quitclaim deed all of the lands which the said Froloffs exhibited to respondent White and which the said Froloffs represented they were selling to the said Dutro, was a breach of the agreement of May 19, 1934, and was done with the express purpose and intention of deceiving and cheating the said Dutro out of the most valuable portion of the lands included in the mining property, all to the damage of said Jeanette M. White, as follows:

1. $500 expended in the erection of buildings at a site and location which appellant Basil Froloff pointed out to the employees and agents of Charles A. Dutro as being part of the land and property which he was selling to the said Dutro; that after Dutro assigned his contract to respondent, said respondent attempted to occupy the said buildings constructed by said Dutro, but appellant Basil Froloff occupied the said buildings himself and refused to permit respondent as the assignee of Dutro to occupy or use the same, claiming that they were located upon property not described in the quitclaim deed hereinbefore referred to. That by reason of appellant's claiming the said buildings were located on his property, whereas in truth and in fact they were located on the property which appellant agreed to sell to Dutro; and that by reason of the deprivation of the use of said buildings, respondent has been damaged in the amount of the value of said buildings, to-wit, $500.

2. The sum of $27,000, in that respondent on the 24th of November, 1934, did assign all her right, title and interest in the contract of sale of said mining property to one Samuel W. Carpenter for an agreed consideration of $45,000; that the said Carpenter was ready, able and willing to comply with all of the terms and conditions of said contract; that one of the conditions of the assignment was that respondent should put said Carpenter in peaceable possession of all of the lands and property exhibited by appellants to respondent; that when respondent went upon the land accompanied by said Carpenter, mining engineers and surveyors for the purpose of putting said Carpenter in possession of the premises and permitting him to mine gold thereon, the appellant Basil S. Froloff forbade and prevented such entry upon the land by either Carpenter, respondent, or any one accompanying them, and by reason of appellant's threats and interference, made it impossible for respondent to fulfill the terms of her contract with Carpenter; that by such acts and by the fraudulent representations hereinbefore referred to, appellants Froloff breached their contract with respondent, causing respondent to suffer damages in the further sum of the net profits to which she would have been entitled had she been permitted to carry out her contract with the said Carpenter, to-wit, the sum of $27,000, which is the difference between the purchase price of said property, $18,000, and the price contracted to be paid to respondent by said Carpenter of $45,000.

3. The sum of $4,500 which was paid by respondent and her assignor upon the purchase price of $18,000 and which appellants converted to their own use and benefit.

4. The sum of $5,000 for money and labor expended in the development of said mining property.

Respondent White also set up in her cross-complaint a second cause of action seeking to recover $10,000 for money had and received by appellants Froloff for their use and benefit, and upon which no finding of fact was made by the trial court.

In her amendment to her first amended cross-complaint, filed by leave of the court for the purpose of conforming to the proofs and evidence adduced at the trial, respondent White in addition to the above-enumerated items of damage, prayed for "the reformation of the contract, Exhibit 'A' herein", referring to the original agreement of May 19, 1934, between appellants Froloff and Charles A. Dutro.

The trial court found in favor of respondent White on the issues presented by her cross-complaint, specifically finding that she had expended $500 in the erection of buildings on the mining property; that she sustained damage in the sum of $27,000 for loss of net profits to which she would have been entitled had she been permitted to carry out her part of the contract of assignment with her assignee, Carpenter, to-wit, the difference between the purchase price of $18,000 and the price of $45,000 which Carpenter had agreed to pay her for her interest in the agreement of sale; that she and her assignor had paid $4,500 to appellants Froloff on account of the purchase price of the said mining property, which sum appellants Froloff received and converted to their own use and benefit, notwithstanding the fact that they had by their actions, including their false and fraudulent representations, breached their said contract with respondent's assignor; that respondent White had expended money and labor in the development of the said mining property in the sum of $5,000.

The court further found that respondent White was entitled to have the contract (exhibit "A") reformed "because of mistake on the part of the cross-complainant (White) and of her assignor (Dutro), said mistake being known to the cross-defendants (Froloff), and as a result said contract failed to express the true intention and meaning of the parties, and the deed deposited in escrow did not accurately describe the lands which the Froloffs had exhibited to respondent White and to her assignor, and of which they represented they were the owners and were selling to the said Charles A. Dutro"; and that as reformed the said agreement should contain the description of certain property, particularly describing the same.

Judgment was thereupon entered in favor of respondent White for the recovery from Basil S. Froloff and Stefa Froloff of the sum of $27,000 in damages, plus interest and costs of suit, and for the reformation of the agreements of sale (exhibit "A"), said agreement as reformed to contain a description of certain property, as particularly described in said judgment.

We find ourselves in accord with the first contention of appellants, that the

findings do not sustain the conclusions of law nor the judgment as to the amount of damages awarded to respondent. In her amendment to her first amended cross-complaint, respondent alleged that "she had an opportunity to, and did, assign all of her right, title and interest in and to the contract set out and described herein as 'exhibit A' to one Samuel W. Carpenter, the plaintiff herein, for an agreed consideration of Forty-five Thousand Dollars ($45,000.00); that the said Samuel W. Carpenter was ready, willing and able to comply with all of the terms and conditions of said contract as set out in said Exhibit 'A' for the said consideration of $45,000 * * * the cross-defendants Basil S. Froloff and Stefa Froloff, his wife, have breached their contract made and entered into with Charles A. Dutro, cross-complainant's assignor, and have by their said acts and the breach of said contract *caused this cross-complainant to suffer damages in the further sum of the net profits to which she would have been entitled had she been permitted to carry out her part of her contract of assignment to said Samuel W. Carpenter, to-wit, the difference between the purchase price of said property and the price contracted to be paid to cross-complainant by said Carpenter of $45,000.00, said difference amounting to the sum of Twenty-Seven Thousand Dollars ($27,000.00).*"

[1, 2] In this connection the court found the allegations aforesaid to be true. Thus we here find a judgment awarding damages for the breach of an agreement to convey real property based upon the profit respondent alleges she could have made upon a resale. This is not an allowable measure of recovery in a case of this character. Gross v. Bank of America N. T. & S. Ass'n, 4 Cal.App.2d 353, 355, 41 P.2d 178. Under section 3306 of the Civil Code the measure of damages for the breach of a contract is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land. Consequently an award of $27,000, which sum is the difference between the purchase price of $18,000 agreed to be paid and the sum of $45,000, which latter figure represents the amount respondent claims she could have sold the property for, is erroneous, and findings predicated thereon fail to sustain the judgment therefor.

[3, 4] Appellants' contention that the findings fail to sustain that portion of the judgment which grants to respondent the remedy of reformation of the contract must be upheld. Nowhere in the pleadings is it alleged, nor is there any finding, that appellants were in fact the owners of the particular property which they exhibited to respondent and her assignor and which they agreed to buy, or that they intended to sell such property to respondent's assignor. Even though no such allegation appeared in the pleadings, the appeal being before us on the judgment roll alone, we would have to presume that appellants were the owners of the property originally exhibited to respondent and her assignor, and were capable of specifically performing the contract as reformed, had the court found such to be the fact, because when the judgment roll alone is before the appellate court, that tribunal must assume that all facts found by the court, even though not contained within the pleadings in the case, were by agreement of court and counsel put in issue during the trial of the action. McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Fighiera v. Radis, 180 Cal. 660, 182 P. 418; Bonnelfillio v. Ricks, 214 Cal. 287, 4 P.2d 929.

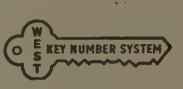
[5-7] The sufficiency of the findings of fact to support a judgment is to be tested by the same rules that are applied to test the sufficiency of a pleading to state a cause of action. Miller v. Gusta, 103 Cal. App. 32, 283 P. 946. There being nothing in either the pleadings or the findings to the effect that appellants owned or were able to sell or intended to sell the property as described in the findings, we are confronted with the omission of a finding necessary and material to sustain the judgment. In the absence of an averment in the pleadings and without a finding thereon, we cannot assume from the judgment roll alone that either by evidence or stipulation this material issue was presented to the trial court. Nor can we invoke the rule that if a finding were made the court would have found against appellants, because there is nothing to show that the issue in question was ever tendered to the trial court. Had the pleadings averred

that the lands mentioned in the findings were the lands Froloff intended to sell and respondent's assignor intended to buy, a different situation might be present, but the record before us presents pleadings, findings, conclusions of law and a judgment referring to the lands as being the property which "the cross-defendants represented to the cross-complainants that they were the owners of and that they were selling to the cross-complainant's assignor". Unless appellants owned, or had acquired the right to own, the lands they represented they were selling, how could they specifically perform the contract as reformed? And if appellants could not specifically perform the contract, reformation of necessity would be futile. The findings therefore wholly fail in material particulars to make out a case for the application of the remedy of reformation of the contract.

[8-10] Although a reversal of the judgment is required, we have for the guidance of the trial court on a retrial, given consideration to appellants' contention that the remedy of reformation of a contract is to be granted only for the purpose of making the contract conform to the mutual agreement and intention of the parties thereto; but in this state mutuality is not always necessary. It is sufficient if there was, as is alleged in the pleadings here, "a mistake of one party, which the other at the time knew or suspected" (Civ.Code, § 3399); and the pleadings herein set forth the facts showing a mistake of that character. Auerbach v. Healy, 174 Cal. 60, 161 P. 1157. The pleadings herein allege what the real agreement was, and what the agreement as reduced to writing was, and where the writing failed to embody the real agreement. The pleadings indicate a cause of action seeking the correction of the description of the land in question and describe the premises so as to render certain the location and boundaries. The facts showing how the mistake was made, whose mistake it was, and what brought it about, are clearly set forth, and the only essential averment required in an action for reformation lacking here is the allegation that the properties referred to in the corrected description were owned by cross-defendants or that the latter had acquired a right to own said properties, and that such properties were the properties they intended to sell to cross-complainant's assignor and which cross-complainant's assignor intended to buy.

The judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.



30 Cal.App.2d 609

ROSENBERG et al. v. J. C. PENNEY CO. et al.

Civ. 5792.

District Court of Appeal, Third District, California.

Jan. 18, 1939.

As Modified Jan. 31, 1939.

Rehearing Granted Feb. 28, 1939.

1. Partnership ⇐258(2)

Delay of surviving partners in accounting to personal representative of deceased partner would be a matter of which representative, alone, could complain and not a third party against whom surviving partners brought action for libel. Civ.Code, § 2435 et seq.

2. Partnership ⇐258(6)

A libel action for injury to partnership business was properly brought by surviving partners as against contention that surviving partners could not sue without joining estate of deceased partner. Civ.Code, § 2435 et seq.; § 45.

3. Partnership ⇐199

The rule that "all partners" must sue where complaint declares on an injury to partnership business means that all partners then in being must join. Civ.Code, § 2435 et seq.

[Ed. Note.—For other definitions of "Partner," see Words & Phrases.]

4. Partnership ⇐244

Surviving partners were under duty to settle partnership business and to protect its good will and turn it over unimpaired as an asset to those entitled thereto. Civ.Code, § 2435 et seq.; Probate Code, § 571.

5. Libel and slander ⇐15

A "libel per se" is a writing which, upon its face, falls within the definition of a libel. Civ.Code, § 45.

[Ed. Note.—For other definitions of "Libel," see Words & Phrases.]

6. Libel and slander ⇐89(1)

In libel action, if publication is libelous per se, averment of special damages is not necessary. Civ.Code, § 45.

7. Libel and slander ⇐100(7)

When language is used concerning a person or his affairs which necessarily or presumably will occasion him pecuniary loss, its publication prima facie constitutes a cause of action and a wrong without allegation or evidence of damage other than that which is implied from fact of publication, all of which is meant by term "actionable per se." Civ. Code, § 45.

[Ed. Note.—For other definitions of "Actionable Per Se," see Words & Phrases.]

8. Libel and slander ⇐19

In construing language charged as libelous, publication must be considered as a whole. Civ.Code, § 45.

9. Libel and slander ⇐19

In determining whether there is a libel per se, court must place itself in position of a reader under circumstances of the publication. Civ.Code, § 45.

10. Libel and slander ⇐9(7)

Placards displayed in defendant's show window making invidious comparisons of garment sold by defendant and that sold by plaintiff were "libelous per se" as accusing fraud and deception and unfair dealing with their customers and hence competitor, in libel action, was not required to show special damage. Civ.Code, § 45.

11. Libel and slander ⇐9(7)

The reputation of a tradesman in the sphere in which he earns his living is a valuable asset and is entitled to protection. Civ.Code, § 45.

12. Libel and slander ⇐9(7)

A placard in defendant's show window making invidious comparison of garment sold by defendant and that sold by plaintiff and charging plaintiff's garment to be prison made was "libelous per se." Civ.Code, § 45; Penal Code, § 679a; St.1917, p. 249; St.1929, p. 1962.

13. Libel and slander ⇐19

In libel action, it is sufficient if the gist of the libelous language contains the objectionable charge or insinuation notwithstanding some of the language may be free from any libel. Civ.Code, § 45.

14. Master and servant ⇐329

In competitor's libel action against proprietor and manager of store, based on display in show window of store, where original answer admitted proprietor and sales manager installed display, court did not abuse discretion in refusing to permit answer to be amended by alleging only that manager installed display. Civ.Code, § 45.

15. Master and servant ⇐304, 306

A master is liable if he employs an employee to speak for him and it is immaterial if, acting within authority, employee makes a mistake as to truth or acts with a bad motive. Civ.Code, § 45.

16. Master and servant ⇐308

In libel action against proprietor and manager of store, based on display placed in show window by manager, evidence that manager remained in proprietor's employ was evidence of proprietor's ratification of manager's act. Civ.Code, § 45.

17. Master and servant ⇐329

In libel action against proprietor and manager of store based on manager's window display, where amended answer contained plea of truth of statements made and original answer admitted installation of window display, such plea operated as an adoption and approval of libel by proprietor. Civ. Code, § 45.

18. Master and servant ⇐330(3)

In libel action against proprietor and manager of store, based on manager's window display, evidence sustained finding that proprietor authorized or ratified manager's act. Civ.Code, § 45.

19. Appeal and error ⇐237(2)

In libel action, defendant could not complain of admission in evidence of certain correspondence which was admitted subject to being connected by positive proof of action or lack of action of defendant and bearing on issue of malice, where no subsequent motion to strike, on ground that it had not

been connected by further evidence, was made. Civ.Code, § 45.

20. Evidence ⇐348(1)

In libel action, court did not err in admitting, without further authentication, photostatic copies of original documents showing defendant's assets, upon which were superimposed certificates of secretary of commonwealth of Massachusetts with impression of state seal, testifying to their correctness. Civ.Code, §§ 45, 372.

21. Libel and slander ⇐107(3)

In action against proprietor of store for libel based on display in show window, evidence that proprietor had stores in certain other cities could be considered by jury in computing proprietor's wealth. Civ.Code, § 45.

22. Appeal and error ⇐768

In action against proprietor of store for libel based on show window display, statement in proprietor's opening brief that proprietor maintained many stores in different states was sufficient to inform jury that proprietor was wealthy. Civ.Code, § 45.

23. Libel and slander ⇐100(2)

In libel action, where plaintiffs pleaded no special damages, defendants were not permitted to introduce evidence that there was in fact no special damage sustained. Civ.Code, § 45.

24. Libel and slander ⇐104(1)

In libel action against proprietor and manager of store based on show window display making invidious comparison of garments sold by store and by plaintiffs, evidence that some of proprietor's stores sold same garment as that sold by plaintiffs was admissible as against proprietor but not against manager.

25. Libel and slander ⇐107(1)

In libel action based on defendants' show window display making invidious comparison of garments sold by defendants and those sold by plaintiffs, testimony as to plaintiffs' good reputation was admissible. Civ.Code, § 45.

26. Damages ⇐208(1)

The jury, to a large extent, has responsibility of awarding compensation for an injury sustained.

27. Appeal and error ⇐1151(2)

When a verdict appears excessive as a matter of law, or where it is so grossly disproportionate as to raise presumption that it resulted from passion or prejudice, reviewing court is under duty to correct the fault.

28. Damages ⇐87(2)

Where no compensatory damage is assessed against a defendant, levying of exemplary damage against him is improper.

29. Libel and slander ⇐120(1)

In libel action against proprietor and manager of store, based on manager's show window display, where no compensatory damages were awarded against manager, plaintiffs were not entitled to punitive damages against manager. Civ.Code, § 45.

30. Libel and slander ⇐121(1)

$10,000 compensatory and $15,000 exemplary damages against proprietor of store in libel action based on show window display wherein invidious comparison of garment sold by store and that sold by plaintiffs was made were excessive and reduced to $5,000 each. Civ.Code, § 45.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Libel action by Ira H. Rosenberg and another, surviving partners of a partnership firm, doing business under the firm name and style of Rosenberg & Bush, against J. C. Penney Company and others. Judgment for plaintiffs against the named defendant for $25,000 and against defendant James R. Bowen for $250, and defendants appeal.

Judgment reversed as to defendant Bowen and modified and affirmed as to the first-named defendant by reducing judgment to $10,000.

Geary & Geary & C. J. Tauzer, of Santa Rosa, and Walter H. Linforth and William M. Cannon, both of San Francisco, for appellants.

Barrett & McConnell, of Santa Rosa, and A. Dal Thomson, of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In 1865 Wolf Rosenberg, the father of plaintiffs herein, established a retail store in Healdsburg. In 1890 a partnership was formed between Rosenberg and Bush and the business was carried on by them as partners until 1908, when the firm of Rosenberg & Bush was incorporated. In 1919

Bush retired from the business and the corporation was dissolved. The business was then carried on as a partnership, the members of which were Esther C. Rosenberg, the widow of Wolf Rosenberg, and their two sons, Ira H. Rosenberg and Harold B. Rosenberg, the plaintiffs herein. In 1927 Esther C. Rosenberg died, and the business has since then been conducted by the two sons, as surviving partners.

In 1924 defendant J. C. Penney Company was conducting a similar business on the opposite side of one of the main streets of Healdsburg. On September 27th of that year the manager of the J. C. Penney Company placed in his store window a sample of "gym pants" or "shorts" which were then being offered for sale to the students of the local high school by the firm of Rosenberg & Bush. This display consisted of placards, comparing the garments offered for sale by the J. C. Penney Company, and similar garments purchased from plaintiffs. Upon these placards were legends, as follows:

"These shorts
were the Official Uniform
of the Healdsburg High School
to be purchased exclusively
from Rosenberg & Bush your
Home Owned Store since 1865.

Aren't you proud of it?

Both Garments Originally Same Size. Sold as Pre-Shrunk.
The price of these
garments were originally
75¢, later reduced to 59¢
to meet our price."
(A pair of shorts was then displayed with a sign, "Size 32" upon them.)

"This garment has been laundered and Shows the Actual Shrinkage.
The Tape Line Tells the Story."

Then follows an arrow pointing to a pair of shorts, with a card "Size 32" upon them. Opposite the latter pair of shorts, fastened to the edge of the first board, was a sign reading:

"Decide for Yourself.
This Garment is either
a poorly made second
or prison-made mer-
chandise.
Seams crooked.
Slovenly made.
Long Loose Stitches.
Weight before laundrying 3¾ oz.
Weight after " 3 oz.
Leaving ¾ oz. or 25% of weight of cloth in starch and filler.
Note the shoddy appearance,
the wrinkled waist and
hems of this garment."

A board on the right displayed a garment of the defendant corporation, with the following signs:

"Draw your own conclusions.
This is Our
Own Garment.
Priced to
Sell at 59¢."

(A pair of shorts was then displayed with a sign, "Size 32", upon them.)
"Note the fine workmanship, Correct Pattern,
Fullness of cut and substantial quality of
cloth.
We think it is no more
than fair that the Shoddy
Garments of Rosenberg &
Bush be replaced
Free of Charge by them,
And that they make good
their loud and vociferous
boast of selling only first
grade merchandise."

These placards remained in the window of J. C. Penney Company during all of the day of September 27th. Mr. Bowen, one of the defendants, and the general manager of the Healdsburg branch of the J. C. Penney Company, who personally arranged the display, has been an executive of the Healdsburg branch for some nine years preceding this incident, and had been previously employed by the company for at least five years in its Santa Rosa branch.

This dispute grew out of a recommendation by the athletic director of the Healdsburg high school that the students, in the interest of uniformity, purchase the type of gym suit offered by Rosenberg & Bush. About that time the J. C. Penney Company displayed in their window a gym suit labeled "An Official California recommended gym uniform". Bowen also attempted to demonstrate to the athletic director, and to the members of the school board, that the Rosenberg & Bush garment was inferior to the Penney garment. Being unable to effect an adjustment with the director or the board, Mr. Bowen then stated to them that in the face of their refusal to correct

the matter, he would have to place the facts before the public.

Upon the day of the appearance of the garments in the window of the J. C. Penney Company, one of the plaintiffs called upon Mr. Bowen and asked the reason for the display. Mr. Bowen then stated that the goods offered by Rosenberg & Bush were prison made goods, were seconds, and made of shoddy material, and that he was going to show the public the type of merchandise offered to the students of the high school. Mr. Rosenberg then asked Bowen if he would remove the placards, which he refused to do. At the second conversation Mr. Bowen stated he had investigated the statements appearing upon the placards in the window and he was satisfied they were true, and that he was ready to prove that fact.

The following day an action for libel was filed, alleging in greater detail the foregoing facts, and charging that said statements were false, libelous and unprivileged, exposed plaintiffs to hatred, contempt, ridicule and obliquy, and injured plaintiffs in their good name and reputation in business, and asked for general and punitive damages. To this complaint the defendants answered, denying the libelous character of the display or that plaintiffs had been damaged in any sum whatever.

On the trial of the cause, substantially the foregoing facts were established, and the jury awarded plaintiffs the sum of $10,000 actual damage, and $15,000 as punitive damage against the defendant J. C. Penney Company, and the sum of $250 as punitive damage against the defendant James R. Bowen.

The principal points urged by appellants for reversal are, first, that the complaint fails to state a cause of action in that plaintiffs have no legal capacity to sue; that the window display was not libelous per se; that the evidence was insufficient to show that Bowen had authority to place the placards in the window; that the court erred in admitting and rejecting certain evidence, and in its instructions to the jury; that the evidence was insufficient to justify the verdict; that the verdict was excessive, both as to actual and exemplary damages, and was given under the influence of passion and prejudice.

The first point is that the complaint failed to state a cause of action, in that plaintiffs had no legal capacity to sue. This action was brought by the two plaintiffs as surviving partners of a firm which, some years prior to the libel, had consisted of themselves and Esther C. Rosenberg. Defendants contend that the plaintiffs did not own this joint cause of action and could not sue without joining the estate of Esther C. Rosenberg as plaintiff.

At the time in question the Probate Code, § 571, provided in part, as follows:

"* * * When, at the time of his death, a partnership existed between the decedent and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business. * * * The surviving partner must settle the affairs of the partnership without delay, and account to the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. * * *"

[1] Section 2435 et seq. of the Civil Code provided that the death of a partner brought about the dissolution of the partnership and made it the duty of the surviving partner to account to the personal representative for the assets thereof. By these sections therefore, the surviving partners were entitled to continue in control of the business for the purpose of liquidation, subject to an obligation to account to the personal representative of Esther C. Rosenberg, the deceased partner. The fact that the business had been carried on by the surviving partners for some considerable length of time is not of itself material. If such delay was a matter of loss to the personal representative that would be a matter of which such representative could complain, but none other. The only interest of defendants would be to insure their protection against future liability for the same tort.

While in Berson v. Ewing, 84 Cal. 89, 23 P. 1112, the tort affecting the partnership business was committed prior to the death of the partner, the court considered the question generally. That action was for the malicious prosecution of a civil action. It was there contended that inasmuch as a partner in liquidation was authorized to collect debts only, the surviving partner had no right to sue for damages for a tort. The court held, however, that by virtue of section 1585 of the Code of Civil Procedure (Probate Code, § 571) providing that a "surviving partner has the right to continue in possession of the partnership, and

to settle its business * * * without delay", the surviving partner had the right to maintain the action, for "the power to settle gives full authority to the surviving partner to do everything that may be necessary to wind up the affairs of the partnership * * *." [page 1114], and also construing section 2461 of the Civil Code, which provided that a surviving partner could collect debts, but could only release and compromise claims, the court holding debts and claims were there synonymous, said: "It would indeed be strange if a surviving partner could compromise any claim against the firm, but could neither compromise nor enforce one in favor of it."

This rule is also recognized generally in Corpus Juris and in Ruling Case Law, as follows:

47 C.J. 1085, Section 689: "It is a well established general rule that an action at law to enforce rights, claims or choses in action of a partnership which has been dissolved by the death of a partner is properly brought by the surviving partners, and it is neither necessary nor proper to join the representatives of the deceased partner as plaintiffs, although by virtue of statute a different rule sometimes exists."

20 Ruling Case Law, 1007: "In all matters connected with a partnership dissolved by the death of a partner the surviving partner is the proper party to bring suit."

[2] Appellants rely strongly upon the case of Lewis v. Hayes, 177 Cal. 587, 171 P. 293. There was an action for libel in which special damages were claimed for injury to plaintiff's business. The business was owned by a copartnership, and plaintiff was one of the partners. The court held that all the partners must join in an action for damages to the partnership business. Under the facts there existing, however, the partnership consisted of two individuals, one of whom alone brought the suit. We do not believe this case is in point, for there both partners were living. Here all of the surviving partners did join, which fulfills the requirements of good pleading.

Neither is Wright v. Afro-American Co., 152 Md. 587, 137 A. 273, 52 A.L.R. 908, of aid to appellants. There a libel was published with reference to a banking house in which the plaintiffs were partners. The action was brought by all of the partners, who sued not as partners but in their individual right. The court there held that for a libel affecting a partnership all of the partners must sue jointly, but for damages to the plaintiffs as individuals, separate actions must be maintained. In that case also all of the partners were surviving. In the case at bar the existing partners were suing for the damage sustained by the business, and no attempt was made to recover for damages to the plaintiffs as individuals.

[3] Appellants also cite 16 California Jurisprudence 76 and 20 Ruling Case Law, 920, holding to the general effect that all partners must sue where the complaint declares on an injury to the partnership business. It is our construction of that rule, however, that all partners, then in being, must join.

Here it clearly appeared, both by the complaint and by the instructions of the court, plaintiffs were suing not for damages for themselves, but as surviving partners of a partnership that had been dissolved by the death of a partner; they were in effect trustees protecting one of the assets of their trust, which was the good name or good will of the former partnership, which plaintiffs allege had been injured by the statements of appellants.

[4] Charged as the surviving partners were, by section 1585 of the Code of Civil Procedure, to settle the business of the partnership, it was their duty, and theirs alone, to protect such good will, and to turn it over unimpaired as an asset to those entitled thereto.

It is next contended that the window display was not libelous per se. Section 45 of the Civil Code defines a libel as follows: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obliquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

[5] A libel per se is a writing which, upon its face, falls within the definition of a libel. In Bates v. Campbell, 213 Cal. 438, 2 P.2d 383, the court, after quoting the foregoing section, stated that such definition was very broad, included almost any language which, upon its face, had a natural tendency to injure a person's reputation, either generally, or with respect to his occupation.

[6, 7] If a publication is libelous per se it is not necessary to aver special damage, Schomberg v. Walker, 132 Cal. 224, 64 P. 290. In Newell on Slander and Libel (4th Ed.), page 170, the rule is expressed as follows: "When language is used concerning a person or his affairs which from its nature necessarily must, or presumably will as its natural and proximate consequence, occasion him pecuniary loss, its publication prima facie constitutes a cause of action and prima facie constitutes a wrong without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; and this is all that is meant by the terms 'actionable per se', etc. Therefore the real practical test by which to determine whether special damage must be alleged and proven in order to make out a cause of action for defamation is whether the language is such as necessarily must or naturally and presumably will occasion pecuniary damage to the person of whom it is spoken."

[8, 9] In construing language charged as libelous it is necessary to consider the publication as a whole (Stevens v. Snow, 191 Cal. 58, 214 P. 968; Bates v. Campbell, supra; Jimeno v. Commonwealth, etc., Builders, 47 Cal.App. 660, 191 P. 64) and as pointed out in Bettner v. Holt, 70 Cal. 270, 11 P. 713, the court, in determining whether or not there is a libel per se must place itself in the position of a reader under the circumstances of the publication.

[10] In examining the placards together and separately, in the light of the foregoing authorities, the trial court was correct in its conclusion that such published matter must be accepted as libelous per se.

We are unable to reproduce in this opinion photographs in evidence, which are before us in the brief of respondents. In this exhibit, however, on one side is shown garments taken from the stock of Rosenberg & Bush. On the other side of the window is a garment on sale by the J. C. Penney Company, and affixed to these garments were descriptive legends endeavoring to make invidious comparisons with plaintiffs' goods. Appellants argued that these placards amounted to mere legitimate criticism of a competitor's stock, and did not therefore constitute libel. However, from an examination of the legends hereinbefore set forth, the public would naturally infer from such inspection that the firm of Rosenberg & Bush was selling as first grade merchandise, garments which were shoddy, poorly made seconds, and prison made merchandise, which was being offered to the public as first grade merchandise. It is also charged that these garments sold by Rosenberg & Bush as first grade merchandise were so defective and contained so much starch and filler that they lost 25 per cent of weight after laundering, and that its customers had been defrauded by purchasing as preshrunk garments, those which were not preshrunk, and that the seams were crooked; that they had long stitches and were slovenly made; and that they were offered for sale despite the loud and vociferous boast of Rosenberg & Bush that they were selling only first grade merchandise. From the foregoing it is clearly apparent that Rosenberg & Bush were accused of fraud and deception and unfair dealing with their customers. Charges of this nature are libelous per se.

[11] The reputation of a tradesman in the sphere in which he earns his living is a valuable asset and is entitled to the protection of the law. In Moore v. Francis, 121 N.Y. 199, 23 N.E. 1127, 8 L.R.A. 214, 18 Am.St.Rep. 810, it is said [page 1128]: " 'Whatever words have a tendency to hurt, or are calculated to prejudice, a man who seeks his livelihood by any trade or business, are actionable.' Where proved to have been spoken in relation thereto, the action is supported; and unless the defendant shows a lawful excuse, the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and resulting damage are presumed. * * *"

Newell on Libel and Slander, (4th Ed. 1924), p. 156, in discussing this matter places imputations against a man's business, profession or means of livelihood next to that of his life or liberty, and says that while it would be difficult to reconcile all of the various decisions upon this subject, the general rule is apparent that words are actionable which directly tend to the prejudice of one in his office, profession, trade or business, and an action will lie for any words which prejudice him in such trade or employment, and although the statements may seemingly concern the goods only they may so reflect upon the merchant himself as to amount to a libel per se. Many cases could be cited to support this rule, for it is one of long lineage as is evidenced by Linotype Co. v. British Empire Type-

setting Machine Co., 1899, 81 L.T.,N.S., 331, 15 Times L.R. 524; Burnet v. Wells, 12 Mod. 420, 88 Eng.Reprint 1423; 36 Corpus Juris 1188, section 88 et seq.; Annotation, 48 L.R.A.,N.S., 1214.

[12] The placard charging the garments were prison made merchandise was particularly objectionable inasmuch as the Penal Code section 679a declares it to be a crime to sell or offer for sale any article manufactured wholly or in part by prison labor, except articles which are specifically sanctioned in law to be so sold.

Statutes of 1917, page 249, Deering's General Laws, Act 4636, also make it an offense to sell or offer for sale, articles for personal wear manufactured in penal institutions outside of California unless there is a designated label upon the goods, and a sign in a conspicuous place upon the premises that such goods are on sale; and the Statutes of 1929, page 1962, Deering's General Laws, Act 8062a, provide for the labeling of convict made goods. Mr. Bowen also admitted on the witness stand that he knew of the public prejudice against prison made merchandise in his community.

There are two classes of statements concerning the goods of a competitor, first, where the statement is made with reference to goods or products, but there is also included libelous words concerning the seller, which impute to him, in connection with the sale of such goods, fraud, dishonesty or questionable business methods; and, secondly, statements that go no further than to criticise the goods of a competitor, which criticism is based upon or appeals to a personal taste or preference of the buyer, but contains no imputation against the honesty or integrity of the merchant in the sale of the goods.

It is the claim of appellant that the window display in question falls under the second class and was merely legitimate competition. They argue that plaintiffs and J. C. Penney Company were striving for business along similar lines in the same community, and that they both wanted to sell athletic garments to the students of the local high school. The J. C. Penney Company had garments which it deemed superior to those of plaintiffs, and to demonstrate that fact they obtained a sample of the merchandise of plaintiffs, and demonstrated to the general public the result of laundrying, and merely placed the two competitive garments side by side for the general public to choose which of the two articles they would prefer. It needs but a reading of the placards to show that appellants went far beyond this legitimate comparison.

From the construction of the language placed by defendants upon the placards they next claim that the language was sufficiently ambiguous and susceptible to two meanings, one of them harmless and the other injurious, that it was necessary for the plaintiffs to plead by innuendo the facts upon which it relied to point out the injurious meaning of the writing. Bates v. Campbell, supra.

[13] Appellants also point to the principle that where a publication is ambiguous, one harmless and the other injurious, the language complained of may not be extended or enlarged by the innuendo. Regardless of the fact, however, that plaintiffs in their complaint did plead the innuendo, the language and meaning of the placards are so plain that it was not necessary to resort to the innuendo; and while some of the language may have been free from any libel, it is sufficient to support an action where the gist of the language contains the objectionable charge or insinuation, and here the charges upon the placards lead to the conclusion that plaintiffs were accused of dishonesty in dealing with their customers, thereby injuring the business and its good reputation.

It is next contended that the evidence is insufficient to show that Bowen had authority to place the placards in the window display, or that his action was ratified by the J. C. Penney Company.

[14] The original answer admitted the defendants installed the window display, and at the opening of the trial they sought to amend by alleging only that Bowen installed the display, thereby raising the question of the scope of Bowen's authority. This amendment was refused by the court. In ruling upon this question the trial court pointed out that the original answer admitted that the display in the show window was participated in by both defendants, which was a matter peculiarly within their knowledge, and that to require the plaintiffs at that stage of the proceedings to show the scope of authority of the local manager, would be placing upon plaintiffs a heavy burden and one that they should not be called upon to meet, particularly at that point of the proceedings. In thus ruling the court did not abuse its discretion.

The facts in evidence showed that Bowen was the general manager of the J. C. Penney Company at Healdsburg, and that as such manager he had charge of the window displays and also as to what goods were to be displayed and their manner of arrangement. No objection was made to this line of testimony at the time of its introduction.

[15, 16] Appellants introduced a "policy book" of the J. C. Penney Company, admonishing their managers to maintain a spirit of friendliness and courtesy toward their competitors. Clearly, however, the master is liable if he employs an employee to speak for him, and it is immaterial if, acting in the scope of his authority, he makes a mistake as to the truth or acts with a bad motive. Restatement of the Law, Agency, p. 555, sec. 247. Furthermore, it appears that at the time of the trial Bowen was still in the employ of the J. C. Penney Company, acting as manager, which of itself is some evidence of ratification to be considered with the other facts in the case. Sullivan v. People's Ice Corporation, 92 Cal.App. 740, 268 P. 934; Edmunds v. Atchison, T. & S. F. Ry. Co., 174 Cal. 246, 162 P. 1038.

[17, 18] Furthermore, in the amended answer of defendant corporation and Bowen was a plea of the truth of the statements made which operate as an adoption and approval of the libel. Tribune Ass'n v. Follwell, 2 Cir., 107 F. 646. It would therefore appear that respondents were justified in contending that defendant corporation was liable in compensatory damage, first, because the pleadings admitted Bowen's authority; secondly, the evidence showed his authority; thirdly, the secret instruction set forth in the policy book could not be utilized to deny liability; fourthly, the acts of Bowen were ratified by his retention in the employ of the company, and by an amended answer filed by the defendant corporation.

In order to properly understand the claim of appellants that the court erred in admitting certain evidence, it is necessary to briefly recite certain facts not heretofore alluded to.

In September, 1934, Bowen inserted an advertisement in the local Healdsburg paper, reading in part as follows:

"Penney's have
Official California
Gym Togs at lower prices * * *."

[19] Complaint was made to the Better Business Bureau of San Francisco by a man named Walters, who received his information from Ira Rosenberg, who was then president of the Home Owned Merchants Association. Letters from the Better Business Bureau were addressed to the J. C. Penney Company in San Francisco. What action, if any, was taken does not appear nor does it appear that Bowen had any knowledge of this complaint. At the trial the correspondence between the Better Business Bureau and the J. C. Penney Company was offered and received in evidence. Appellants claim that this evidence was improperly admitted, contending that if this evidence was admitted for the purpose of showing malice in fact, that it would be necessary for Bowen to have been acquainted with this matter and had been actuated thereby by ill will, and with intent to injure them. We believe, however, that appellants misconstrue the purpose of the evidence. The court, in passing upon its admissibility, stated it would be admitted subject to being connected by positive proof of action or lack of action of the J. C. Penney Company, and bearing on the issue of malice. We find no subsequent motion to strike out this evidence on the ground that it had not been properly connected by further evidence. This point, however, becomes immaterial as far as Bowen is concerned by reason of our subsequent holding as to him.

[20] Another citation of error by appellants was the admission in evidence of records relative to the financial standing of the J. C. Penney Company. On this issue plaintiffs introduced photostatic copies of original documents, purporting to show assets of the J. C. Penney Company as of December 31, 1935, of over $74,000,000. This exhibit had superimposed upon the pages thereof a certificate from the secretary of the commonwealth of Massachusetts, and bearing the impression of the seal of that state, testifying to its correctness. Inasmuch as on this document appeared what purported to be the great seal of the commonwealth of Massachusetts, under section 372 of the Civil Code, the court took judicial notice of the seal, and in the absence of evidence to the contrary, accepted it as such, and it was properly admitted in evidence without further evidence of authentication.

[21, 22] Many exceptions are pointed out as to the form of certificate attached,

and to the nature of the document itself, but such respectable authority as Wigmore on Evidence (2d Ed.), volume 2, page 618, and in volume 3, at page 563, justifies the admission of evidence in such form. This document was admitted undoubtedly to show the wealth of the defendant corporation. Regardless of that evidence, however, it appeared in the record that the J. C. Penney Company had stores in Healdsburg, Santa Rosa, Fairfield, Chico, New York and San Francisco, which could be considered by the jury in computing the wealth of defendant corporation. Further it appears in appellants' opening brief that J. C. Penney Company "maintains many stores in different states and in the different towns of each state"; that of itself undoubtedly is sufficient to bring before the jury the fact that the J. C. Penney Company was at least a business of wide interest and financial ability.

[23] It was next urged that the trial court erred in rejecting evidence which was offered to prove that the business of plaintiffs had suffered no loss or detriment as a result of the display. The answer to this objection is that plaintiffs pleaded no special damages and therefore defendants should not be permitted to introduce evidence that there was in fact no special damage sustained. A similar situation existed in Scott v. Times-Mirror Company, 181 Cal. 345, 184 P. 672, 12 A.L.R. 1007, where an attorney sued a newspaper company for injuries to reputation by a published libel. The court there said: "The respondent is not required to prove, and in the nature of things cannot prove, the extent to which he has been damaged by this libel, or of what legal fees he has been deprived through its circulation, or what clients he has lost because of it. It is well settled that in such cases as this a jury may consider as a basis for its award of actual damages all of such matters as those set out above, including the wide publicity given to the libel, plaintiff's prominence in the community in which he lives, his professional standing, his good name and reputation * * *."

We can see no distinction between the injury to the attorney there involved and the damage here asserted. See, also, Bennett v. Salisbury, 2 Cir., 78 F. 769; Fish v. St. Louis County Printing & Publishing Co., 102 Mo.App. 6, 74 S.W. 641.

[24] It is also claimed that the court erred in admitting evidence as to sales of garments similar to plaintiffs' gym suits in certain J. C. Penney Company stores. Here, over the objection of defendants, the witness was permitted to testify that his company sold the same kind of gym pants to the J. C. Penney Company stores at Fairfield during the summer of 1934, and no complaints in respect thereto were received by the J. C. Penney Company. To this evidence Bowen objected, claiming that the quality of goods sold in the J. C. Penney Company stores, with which he had nothing to do, could not be admissible against him. As to the J. C. Penney Company it was claimed they were not the manufacturer of the merchandise, and that the local managers, subject to certain limitations, had authority to stock their stores in accordance with their best judgment. This evidence was received for the purpose of proving that the corporate defendant was not indulging in legitimate criticism of competitors' goods, and its motive was not that of protecting the community when they were selling the same goods in other localities.

Appellants' point is well taken as to the admissibility of this evidence against Bowen. Undoubtedly the court should have instructed the jury, in view of the objections of counsel, that this evidence was not received and should not be considered relative to Mr. Bowen. We can see no valid objection to the ruling of the court as to the J. C. Penney Company.

[25] A witness was permitted to testify as to the good reputation of plaintiffs. Objection was interposed to this line of evidence, and is now cited as error. We again find no error in this ruling. The witness was testifying as to no particular time but as to his familiarity generally with the reputation of the company over a period of some thirty-nine years. It was the business integrity of the company that was at stake, and although it changed its business structure from time to time it was practically a family business during its entire existence, and no time was specified by the witness.

Turning now to the instructions given by the court to the jury, which are criticised by appellants, we believe that what we have heretofore said as being our view of the law is sufficient answer to the various citations of error in the instructions. The errors urged are directed almost entirely to construction of law and therefore if the principles that we have

heretofore announced are correct, the instructions based thereon must also be correct.

Some twenty citations of error are pointed out, but it will serve no useful purpose to discuss them in detail in view of the fact they are not sufficiently vital to affect the outcome of this action.

It is claimed next that the evidence is insufficient to justify the verdict for more than normal damages.

We approach now the question of damages. It will be recalled that the jury found for the plaintiffs, and assessed their damages in the sum of $10,000 actual damages, and the sum of $15,000 as punitive damages against the defendant J. C. Penney Company, a corporation, and the sum of $250 as punitive damages against the defendant Bowen. Appellants argue with considerable force that inasmuch as we are here dealing with a dissolved partnership that there is no entity with a reputation to destroy. The fact is that plaintiffs were suing as surviving partners of a partnership that had been dissolved by the death of Esther C. Rosenberg in 1927.

We have heretofore considered section 1585 of the Code of Civil Procedure which provides that a "surviving partner has the right to continue in possession of the partnership, and to settle its business * * *." From that language it is apparent that something remains after the death of a partner—good will, perhaps—and it is the duty of a surviving partner to protect such assets and distribute the residue to those entitled thereto.

[26-29] In considering whether or not the awards were excessive, we realize the very familiar rule that to the jury, to a very large extent, is committed the responsibility of awarding compensation for an injury sustained. When the award, as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice, the duty is then imposed upon the reviewing court to act. Examining first the award as against Bowen, it would appear to fall under the rule that where no compensatory damage is assessed against a defendant it is improper to levy exemplary damage. In Haydel v. Morton, 8 Cal.App.2d 730, 48 P.2d 709, the verdict read compensatory damages in the sum of $00, exemplary damages $10,000. The court there held that in such cases the award of punitive or exemplary damage could not be upheld. In Clark v. McClurg, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908, the court held that exemplary damages were not recoverable in the absence of a showing of actual damage. The judgment against Bowen in the sum of $250 as punitive damages must therefore be set aside.

Referring briefly to the facts with reference to the actual damage sustained by plaintiffs, for which the sum of $10,000 was awarded against the J. C. Penney Company, we find two rival firms competing for the business of the local high school. The libel was by a display in the window of the J. C. Penney Company store, where it remained for only one day. The display was made on a Thursday in the town of Healdsburg, having a population of some 2,500. At the end of the day the objectionable display was removed, and no further reference made thereto.

Inasmuch as no special damages were alleged or proven, the award in the sum of $10,000 for such a libel impresses this court that there existed a feeling of prejudice against the chain store operated by the J. C. Penney Company.

As to the exemplary damage of $15,000 against the J. C. Penney Company, it must be remembered that it did not appear that the J. C. Penney Company directly authorized or knew of the display but are liable merely as employers of their local manager. It does not appear in what way the J. C. Penney Company could have protected themselves against this act, as Bowen had been in their employ a number of years as manager, and it did not appear that he had at any previous time indicated an intention of exceeding the rules of good business ethics. It would appear that the award of $15,000 was actuated by some motive other than that required by legal standards.

[30] The judgment against Bowen is reversed. If the respondents within seven (7) days from the date hereof, file herein a remittitur reducing the judgment of $10,000 compensatory damages to $5,000, and exemplary damages of $15,000 to $5,000, the judgment will stand affirmed. Otherwise the judgment is reversed, and the cause remanded for a new trial.

I concur: THOMPSON, J.

BROCK, Director of Agriculture, v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 16635.

Supreme Court of California.

Jan. 24, 1939.

Rehearing Denied Feb. 23, 1939.

1. Injunction ⇐85(2)

Statute prohibiting issuance of injunction to prevent execution of public statute by officers prohibits restraining public officers from enforcing valid law, but does not prevent issuance at instance of one specially interested to enjoin attempted execution of an unconstitutional statute. Civ.Code, § 3423.

2. Injunction ⇐136(2)

Where complaint shows threats by public officers to enforce unconstitutional law or attempted application of valid law in a manner violating constitutional rights, injunction may issue pending hearing and decision on issues presented. Civ.Code, § 3423.

3. Agriculture ⇐2

A statute authorizing director of agriculture, when one person is licensed to engage in intrastate marketing transactions, to subject all persons engaged in same business to identical license provisions, does not authorize director to regulate marketing of all agricultural products by one general license fixing a total quota for them divisible ratably between shippers without regard to difference in nature of crop and other factors. St.1935, p. 1036, § 6a(b).

4. Injunction ⇐85(2)

Growers who sought to enjoin enforcement of plan for regulation of intrastate marketing of grapefruit were entitled to findings of trial court on issues of fact raised by their complaint respecting whether marketing of desert grapefruit was different from marketing of other products, whether growers were discriminated against to advantage of orange growers, and whether grower's property was taken without due process of law, as against contention that court was without power to enjoin enforcement of statute. St.1935, p. 1036, § 6a(b); Civ.Code, § 3423.

5. Courts ⇐489(1)

A superior court had jurisdiction to determine whether at time director of agriculture issued license for marketing citrous fruits a valid federal license regulating same industry existed as required by statute. St. 1935, p. 1036, § 6a(b); Federal Agricultural Adjustment Act 1933, 48 Stat. 31, 7 U.S.C.A. § 601 et seq.

6. Constitutional law ⇐42

One who challenges a statute on ground that it deprives him of constitutional rights must show that his rights have been invaded by actual or threatened application of challenged law to him.

7. Constitutional law ⇐46(3)

Where growers sought to enjoin enforcement of plan for citrous fruit production control on ground that constitutional rights were violated, issues raised would not be determined by Supreme Court on application for prohibition to compel dissolution of temporary injunction, but application would be denied in order that trial on the issues might be had. St.1935, p. 1036, § 6a(b).

8. Statutes ⇐82

A "special law," within meaning of constitutional prohibition against passage of "special law" giving effect to invalid deeds, wills, or other instruments, is one which confers particular privileges or imposes peculiar disabilities or burdensome conditions in exercise of a common right on class of persons arbitrarily selected from general body of those who stand in same relation to subject of law. Const. art. 4, § 25.

[Ed. Note.—For other definitions of "Special Law," see Words & Phrases.]

9. Statutes ⇐82

Where amendment to Agricultural Adjustment Act changed procedure to be followed by director of agriculture in issuing licenses thereunder, in such fashion that licenses issued under original act would not conform to requirements of amendment, provision in amendment purporting to validate licenses previously issued was invalid as a "special law" attempting to validate invalid instruments. St.1937, pp. 2505, 2508, 2515, § 5, subd. 6, and §§ 7, 18; Const. art. 4, § 25.

In Bank.

Proceeding in prohibition by A. A. Brock, as Director of Agriculture of the State of California, and others, against the Superior Court of the State of California in and for the County of Los Angeles, and Ruben S. Schmidt, Judge thereof, to compel the court to dissolve a temporary injunction previously issued by it. An al-

ternative writ of mandate was issued to which respondents filed a general demurrer.

Demurrer sustained; alternative writ discharged; petition for peremptory writ denied.

U. S. Webb, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., and Ivan G. McDaniel and Farrand & Slosson, all of Los Angeles, for applicants.

J. H. O'Connor, Co. Counsel, A. Curtis Smith, Deputy Co. Counsel, Stewart, Shaw & Murphey, Arvin B. Shaw, Jr., and William L. Murphey, all of Los Angeles, for respondents.

EDMONDS, Justice.

By this proceeding in prohibition, the Director of Agriculture, certain officers of that department, and a number of growers of citrus fruits who are members of committees appointed for the administration of the Agriculture Adjustment Act of this state (Stats.1935, p. 1032; Deering's Gen. Laws, Supp.1935, Act 146), seek to compel the respondent Superior Court to dissolve a temporary injunction which was issued in an action brought against them by Harry W. Forbes and others to enjoin the enforcement of a plan for the regulation of intrastate marketing of grapefruit. They contend that the validity of the statute has been upheld by this court in the case of Brock v. Superior Court, 9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127, and that the complaint upon which the injunction was issued presents no questions of fact such as those which required the denial of a similar petition in the case of Agricultural Prorate Commission v. Superior Court, 5 Cal.2d 550, 55 P.2d 495.

Upon this petition an alternative writ of mandate issued to which the respondents have filed a general demurrer. In support of the demurrer they contend that prohibition is not a proper remedy because the superior court has jurisdiction of the cause of action and that the constitutionality of a statute should be determined only in relation to the facts of a particular case as found by a trial court. By answer they allege facts which they contend show that the statute, as the Director of Agriculture is attempting to enforce it under a license issued by him for the purpose of regulating the marketing of citrus fruits, unlawfully interferes with the property rights of those persons who were granted an injunction. The respondents also attack on many different grounds the entire plan of agricultural regulation set up by this marketing license. According to them, the plan was devised for the purpose of putting into effect an economic theory known as "the philosophy of scarcity", which is based upon the assumption that the agricultural depression may be cured by restricting the production of food. By allowing only a portion of the grapefruit produced in this state to be marketed here, many growers will be unable to make a profit and will fail, with the result that a large number of acres will go out of production and with less fruit available, the consumer will be forced to pay higher prices. They allege that this amounts to the confiscation of property in violation of constitutional guarantees. More specifically, they charge that both the license issued to regulate intrastate marketing and that which was adopted by federal authorities are invalid.

The record presented by the petitioners shows that the injunction which they are seeking to dissolve by this proceeding prevents them from enforcing or attempting to enforce the terms and provisions of a marketing license promulgated by the Director of Agriculture, and all rules and regulations made under the Agricultural Adjustment Act of this state. It was issued upon a complaint which alleges not only that the statute as written is unconstitutional, but also that as the defendants are attempting to apply it to the plaintiffs' property rights, it is discriminatory and confiscatory. The court is asked to (1) determine and declare the right of the Director of Agriculture to promulgate the license issued by him in 1936; (2) enjoin the defendants from prescribing any allotment, quota or prorate of grapefruit allowable to be packed, shipped or marketed by them; and (3) prohibit the enforcement as against them of any of the provisions of the act.

Another action brought by a group of orange growers to prohibit the enforcement of the Agricultural Adjustment Act in this state was commenced at the same time as the Forbes case. Pico Citrus Ass'n v. Brock. In that case the act was attacked upon grounds similar to those advanced in the Forbes case, and the superior court issued a preliminary injunction.

Thereafter, the Director of Agriculture and others enjoined upon the complaint of the Pico Citrus Association secured from

this court a peremptory writ of prohibition restraining the superior court from enforcing its injunction. Brock v. Superior Court, 9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127. After the determination of that proceeding the defendants in the Forbes case moved the superior court to dissolve the preliminary injunction against them, which motion was denied.

[1, 2] The petitioners place their principal reliance upon section 3423 of the Civil Code which provides that "an injunction cannot be granted * * * to prevent the execution of a public statute, by officers of the law, for the public benefit". This section has been construed as a limitation upon the power of a court to restrain public officers from enforcing a valid law (Reclamation District v. Superior Court, 171 Cal. 672, 154 P. 845), but it has uniformly been held that one specially interested may enjoin the attempted execution of an unconstitutional statute. Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 407, 65 P. 2d 884, 109 A.L.R. 895; Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; Wheeler v. Herbert, 152 Cal. 224, 92 P. 353; Schofield v. City of Los Angeles, 120 Cal.App. 240, 7 P.2d 1076. And although certain provisions of the law under which the petitioners in the present proceeding assumed to act have been upheld (Brock v. Superior Court, supra), a statute valid upon its face may be unconstitutionally applied. Yick Wo v. Hopkins, 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220. Therefore, if the complaint in the action brought by Forbes and his coplaintiffs shows that the petitioners threatened to enforce an unconstitutional law against them, or that their acts in the attempted application of a valid law violated rights guaranteed to all citizens by either the federal or state Constitution, the superior court had jurisdiction to issue an injunction pending a hearing and decision upon the issues presented, and the petition for a writ of prohibition must be denied.

The allegations of the complaint cover a wide range. They present facts which the plaintiffs assert compel a conclusion that the license issued by the Director of Agriculture allowing each marketer of citrus fruits to "ship", in intrastate commerce only the amounts of grapefruit to be fixed by that official from time to time, is invalid. Specifically, it is alleged that the license regulates the transportation of all oranges and grapefruit grown in the state of California and that the marketing of desert grapefruit is a specific and naturally inherently and intrinsically distinctive agricultural trade or industry which cannot be regulated under the provisions of the act in combination with other citrus fruits. In support of this contention the complaint states that the citrus business of California comprises at least three different agricultural industries, namely, the growing and marketing of oranges, coastal grapefruit and desert grapefruit. It is also alleged that 93 per cent of all oranges grown in California are shipped outside of the state but that more than 60 per cent of the crop of desert grapefruit and 40 per cent of all coastal grapefruit produced is consumed here.

According to the plaintiffs' allegations the desert grapefruit of California differs materially from the coastal variety and is grown under conditions which insure production at much less cost. The plaintiffs set forth at great length the climatic characteristics of the counties in which each variety is raised and the culture which must be used under the various conditions. Because of the rainfall, soil and climate in the desert counties, say the plaintiffs, the grapefruit grown there has a sugar and juice content different from that grown in a colder temperature, and the crop must be picked and marketed during the period from November 1st of each year to March 15th of the succeeding year and consumed before the following May 1st. The coastal grapefruit is picked, sold and consumed from April to November of each year.

By their amended complaint the plaintiffs also assert that the purpose of the regulation placed upon the citrus industry by the defendants is to limit and reduce shipments of grapefruit grown in California and Arizona to such an extent as to cause an artificial scarcity in the market and thereby bring the price received by the grower to $2.57 per box; that the product cannot be sold at that price in competition with California and Arizona oranges and that by the device of fixing weekly allotments allowable for shipment in intrastate commerce the defendants will compel growers, including the plaintiffs, to allow one-third or more of their crop to spoil and be destroyed. That by reason of the temporary restraining order issued upon the original complaint, from November 1, 1935, to March 31, 1936, the producers and shippers of desert grapefruit were able to sell and

deliver the fruit grown by them with an average price return within a few cents per box of that received during the prior four-year period; "that the amount of money returned in said five-months' period of the crop year 1935–36 to the growers of said grapefruit, with which to operate their said grapefruit groves, was approximately four times the amount of money returned to said growers in the same five-months' period of the crop year 1934–35 and approximately twice the amount of money returned to the said growers of said grapefruit in the same five-months' period of the crop year 1933–34".

[3, 4] Under the California Agricultural Adjustment Act of 1935, the Director of Agriculture has power to license persons engaged in intrastate marketing transactions, provided that "whenever one such person is licensed the director at the same time shall subject all persons engaged in the same specific and naturally, inherently and intrinsically distinctive agricultural business, trade or industry to the same identical license provisions". Sec. 6a(b). This language, as a matter of law, does not authorize the Director of Agriculture to regulate the marketing of all agricultural products by one general license fixing a total quota for them divisible ratably between shippers without regard to the difference in the nature of the crop, cost of production, time of harvest, facilities for shipment, amount of demand, price obtainable or other factors which make the conditions under which one agricultural product is marketed distinctly different from those which are applicable to another. The allegations of the plaintiffs' complaint tender as an issue of fact the question whether the marketing of desert grapefruit is an agricultural trade or industry distinctly different from that of marketing other products, and, also, whether the producers of grapefruit are being discriminated against to the profit and advantage of the orange growers and their property taken without due process of law. The plaintiffs are entitled to the findings of a trial court upon those issues.

The validity of the license issued by the Director of Agriculture is also attacked by the plaintiffs. They allege facts tending to show that the Director of Agriculture had no authority to issue the license for marketing citrus fruits which is complained of because at the date it was promulgated, there was no valid "corresponding Federal marketing agreement or license regulating such business, trade or industry under the National Agricultural Adjustment Act" as required by the California law. (Sec. 6a). Admittedly, however, the Secretary of Agriculture had issued a license under the federal statute, but the respondents contend that this license is invalid.

The facts relied upon by the plaintiffs in this connection are pleaded at length. They assert that some time before the Director of Agriculture issued the license in question the California Fruit Growers Exchange and others filed with the Secretary of Agriculture a petition for the purpose of invoking the provisions of the federal Agricultural Adjustment Act of 1933, 48 Stats. 31, 7 U.S.C.A. § 601 et seq. Thereafter the Secretary of Agriculture, claiming to act under that law, entered into an agreement with certain shippers of oranges and grapefruit in California and Arizona, not including the plaintiffs, and issued a license regulating the amount of such fruit which each one could market in interstate commerce. Later and in 1935, the Secretary of Agriculture issued a marketing order purporting to regulate the handling of oranges and grapefruit in these states. Pursuant to that order, the Secretary of Agriculture appointed certain persons as members of a "Growers Advisory Committee" and other persons as members of a "Distribution Committee". All of these persons, or their successors, are defendants in the action brought by Forbes and are petitioners in the present proceedings.

The complaint charges that upon the hearing which preceded the issuance of this license, no evidence was taken respecting the purchasing power of grapefruit grown in California during the base period from November, 1924, to October, 1928, inclusive; that the license "has never been approved or favored by a vote of producers who during any representative period determined by the Secretary of Agriculture have produced for market two-thirds of the volume of oranges and grapefruit, or either thereof, produced for market within California or Arizona or by either of said states, nor by any other group or number of producers required by said Agricultural Adjustment Act of 1933, as amended, to approve such order before it shall be effective"; that no desert grapefruit was grown or produced for market within the state of California in the base period established by the act;

and that the order has never been approved by the President of the United States.

[5] These allegations present the factual basis for the plaintiffs' contention that when the California license for intrastate marketing was issued, there was no valid federal agreement or license regulating the same agricultural trade or industry under the national Agricultural Adjustment Act. The issue thus tendered does not involve the right of federal officers to enforce the license issued by the Secretary of Agriculture under the law of this state, and the superior court has jurisdiction to determine whether these conditions fixed by the legislature as a prerequisite for regulation of intrastate marketing existed at the time the Director of Agriculture assumed to act. State v. American Express Co., 38 S.D. 227, 161 N.W. 132; Stephenson v. New Orleans & N. E. R. R. Co., 180 Miss. 147, 177 So. 509.

[6, 7] Also a broad principal underlying the construction of statutes which, it is charged, deprive one of constitutional rights compels a trial of the issues presented by the plaintiffs' complaint. One who attacks a statute upon that ground has the burden of showing that his rights have been invaded by the actual or threatened application of the challenged law to him. "But where the legislative action is suitably challenged," said the Supreme Court of the United States in a recent case, "and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support." Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 55 S.Ct. 187, 192, 79 L.Ed. 281. This rule has been applied in many cases (Chastleton Corp. v. Sinclair, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841; Hammond v. Schappi Bus Line, 275 U.S. 164, 48 S.Ct. 66, 72 L.Ed. 218; Liverpool, N. Y. & P. Steamship Co. v. Emigration Commissioners, 113 U.S. 33, 5 S.Ct. 352, 28 L.Ed. 899; Chicago, M., etc., Ry. v. Tompkins, 176 U.S. 167, 20 S.Ct. 336, 44 L.Ed. 417; Lincoln Gas & Electric Light Co. v. Lincoln, 223 U.S. 349, 32 S.Ct. 271, 56 L.Ed. 466) and was followed by this court in the case of Agricultural Prorate Commission v. Superior Court, supra. Very recently the Supreme Court of the United States again restated the principle which it held controls a court's decision when a defendant urges that constitutional questions presented by the allegations of a complaint should be determined upon demurrer. In the case of Polk Company v. Glover, 59 S.Ct. 15, 83 L.Ed. —, plaintiffs engaged in the business of canning citrus products grown in the state of Florida challenged the validity of a statute of that state requiring that every label upon any container of canned citrus fruit, or juice shall show accurately the name of the state or country in which the fruit or juice was produced and also that every container used for such fruit or juice produced in Florida "shall have stamped into or embossed upon the tin, glass or other substance or which such container is made, the word 'Florida' ". Acts Fla.1937, c. 17783, § 2. The bill of complaint set forth facts relating to the character of the trade, the process of canning and the trade practices as to labeling and the effect of a compliance with the statute upon plaintiffs' trade was described in support of the claim that the enforcement of its provisions would inflict immediate and irreparable injury. The defendant officials filed answers putting in issue the allegations as to the injurious effect of the statute upon the plaintiffs' operations and also moved to dismiss the bill upon the ground that it failed to state a cause of action. Injunction was denied, the motions to dismiss were granted and a final decree was entered accordingly.

In reversing the decree and remanding the cause for further proceedings the court said [page 17]: "We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity. The allegations of the bill as to trade conditions and practices, and as to the effect of the required embossing of cans, raise particular questions which can hardly be said to lie within the range of judicial notice. The salutary principle that the essential facts should be determined before passing upon grave constitutional ques-

tions is applicable. See Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 211-213, 55 S.Ct. 187, 192, 193, 79 L.Ed. 281, and cases cited. And that determination requires a hearing in due course upon the issues raised by the pleadings."

This principle is particularly applicable to the facts alleged by the complaint of the respondents which show that the Director of Agriculture asserts the right to say that only such amount of oranges and grapefruit may be shipped within the state as can be sold for a certain price, although the balance of the crop must spoil on the trees or be destroyed, no matter how great the need for food may be. Certainly such a novel exercise of power should be sustained only after a full showing of facts upon which such a decision may be based.

The decision of this court in the case of Brock v. Superior Court, supra, is not inconsistent with these conclusions. That case was decided upon a complaint attacking the statute upon grounds different from those presented by the pleadings of Forbes and after the parties had entered into a stipulation eliminating issues of fact. The decision upon the particular questions presented to the court in that proceeding is not necessarily determinative of the rights of the plaintiffs in the Forbes case.

[8, 9] As another ground for the issuance of the writ demanded by the petitioners they assert that any defects in the license issued by the Director of Agriculture have been cured and validated by the amendments to the Agricultural Adjustment Act which were made in 1937. Section 18, which was added at that time, provides: "Any marketing agreement or license, or both, and each and every provision thereof heretofore executed or issued by the Director of Agriculture are hereby continued in effect and deemed to be within the standards and provisions of these amendments, subject however to the provisions hereof for amendment and termination. * * *" Stats. 1937, p. 2501; Deering's Gen.Laws, 1937 ed., Act 146. However, the 1937 enactment changes the procedure which must be followed by the Director of Agriculture in issuing a license. For example, under the present law, shipments are to be regulated under a "marketing order" instead of a "license" and no such order "shall become effective (a) unless and until handlers, who, during a representative period determined by the director, handled not less than sixty-five per cent (65%) of the volume of the commodity regulated by such marketing order, or not less than 65 per cent of the number of handlers, who, during a representative period determined by the director, were engaged in handling such commodity, have assented thereto in writing, and (b) unless and until the director determines that the issuance of such marketing order is approved or favored, (1) by at least 65 per cent of the producers who, during a representative period determined by the director, have been engaged in the production for market of the commodity regulated by such marketing order, or, (2) by producers who, during such representative period, have produced for market at least 65 per cent of the volume of such commodity produced for market and regulated by such marketing order". Section 7. No such approval was required under the 1935 act. By another provision the Director of Agriculture is required to limit shipments so as to establish a price which will "provide an adequate standard of living to the farm operator and his family" (sec. 5, subd. 6), rather than on such basis as will reestablish prices to farmers and growers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to their purchasing power during the period of 1909 to 1914, or such other base period as may be selected under certain circumstances.

It seems apparent that any license issued under the 1935 act would not conform to the requirements and measure up to the standards fixed by the 1937 act and the attempted validation of licenses previously issued is, therefore, special legislation forbidden by article 4, section 25, of the California Constitution, which provides that no special law shall be passed "giving effect to invalid deeds, wills, or other instruments", or "legalizing, except as against the State, the unauthorized or invalid act of any officer. * * *" A special law has been defined as one which "confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law". City of Pasadena v. Stimson, 91 Cal. 238, 251, 27 P. 604, 607. The provision enacted in 1937 purporting to validate licenses previously issued clearly falls within that definition. See, also, Miller & Lux v. Board of Super-

visors, 189 Cal. 254, 208 P. 304; Mordecai v. Board of Supervisors, 183 Cal. 434, 192 P. 40.

The demurrer of the respondents is sustained, the alternative writ of prohibition is discharged and the petition for a peremptory writ is denied.

We concur: WASTE, C. J.; SHENK, J.; HOUSER, J.; SEAWELL, J.



12 Cal.2d 639

PEOPLE v. DAVID.

Cr. 4193.

Supreme Court of California.

Jan. 26, 1939.

1. Homicide ⇐311

Where jury found accused sane on sole plea of not guilty by reason of insanity, evidence that accused confronted murder victim with pistol, bound his hands together with wire, and smashed victim's skull with stock of rifle, leaving him dead beside road, warranted trial judge in imposing death sentence.

2. Criminal law ⇐637

In murder trial on plea of insanity, alleged misconduct of deputy sheriff in taking seat immediately behind accused in courtroom, and trial court's refusal to thereupon discharge jury panel, did not deprive accused of fair trial in absence of showing of prejudice.

3. Witnesses ⇐269(3)

In murder trial on plea of insanity, cross-examination of accused's mother respecting period of accused's life which had not been referred to on direct examination was properly refused.

4. Homicide ⇐179

In murder trial on plea of insanity, accused as witness in his own behalf was properly asked about prior convictions.

5. Witnesses ⇐380(2)

In murder trial on plea of insanity, testimony of accused respecting his criminal record was admissible to impeach him.

6. Criminal law ⇐1186(4)

In murder trial on plea of insanity, where criminal record of accused was shown, by his own testimony, reference by district attorney during cross-examination of accused's mother to prior penal confinements which court cautioned jury to disregard was not reversible error. Const. art. 6, § 4½.

7. Witnesses ⇐345(1)

Testimony of a witness may be impeached by proof of prior conviction of felony. Code Civ.Proc. § 2051.

8. Witnesses ⇐337(5)

The testimony of an accused who testifies in his own behalf may be impeached by proof of prior conviction of felony, notwithstanding that such proof tends to prejudice him in eyes of jury. Code Civ.Proc. § 2051.

9. Witnesses ⇐337(5)

The nature of crimes of which an accused has been previously convicted is proper subject of inquiry in establishing fact of such conviction, but details and circumstances comprising prior offenses are not admissible. Code Civ.Proc. § 2051.

10. Witnesses ⇐337(5)

In murder trial on plea of insanity, cross-examination of accused who had taken stand in his own behalf with respect to prior convictions was properly confined to fact of such convictions and nature of crimes committed. Code Civ.Proc. § 2051.

11. Criminal law ⇐706

In murder trial on plea of insanity, where defense advanced theory that accused was suffering from amnesia, cross-examination of accused as to his conduct and state of mind during robbery which occurred 10 days prior to alleged murder in contradiction of accused's testimony as to motive and mental lapse was not prejudicial misconduct.

12. Criminal law ⇐380

Evidence of particular wrongful acts are not generally admissible in prosecution of accused who has not put his character in issue.

13. Homicide ⇐166(1)

Prosecution was entitled to show not only motive for alleged murder but also deliberately conceived plan to carry it out, in refuting theory of insanity.

14. Homicide ⇐179

In murder trial on plea of insanity, testimony of robbery victim who a few days

prior to murder had been compelled by accused in same manner as murder victim to ride in his own automobile at point of gun with hands tied with wire was not improperly admitted.

15. Criminal law ⇐354

Evidence tending to prove sane motive for crime and ability of accused to devise and execute deliberate plan is material to issue raised by plea of not guilty by reason of insanity.

16. Criminal law ⇐354

Where defense of insanity is interposed and evidence of previous conduct of accused is offered by him, prosecution is not limited to explanation or denial of particular conduct of accused but may offer evidence of other acts committed by him within reasonable time before or after crime tending to show sanity at time act was committed.

17. Criminal law ⇐354

Period of time over which inquiry may be extended respecting other acts committed by accused who has interposed defense of insanity tending to show sanity at time act was committed rests largely in trial court's discretion.

18. Criminal law ⇐478(1)

In murder trial on plea of insanity, testimony of psychiatrist from state prison who had observed accused in routine examinations and also in county jail just before testifying was not erroneously admitted, notwithstanding psychiatrist was not present in court during introduction of most of accused's testimony.

19. Homicide ⇐179

In murder trial on plea of insanity, letters written by accused while on parol from prison clearly reflecting his mental condition during several months leading up to murder were competent.

20. Criminal law ⇐444

In murder trial on plea of insanity, where letters written by accused reflecting mental condition during months prior to murder were shown to be in his handwriting, letters were not inadmissible because prosecution failed to show that they were products of accused's mind and not dictated by someone else.

21. Criminal law ⇐444

In murder trial on plea of insanity, sufficient foundation for introduction of letters by accused showing mental condition during months prior to murder was laid by proof of his handwriting and defense then had right to explain them.

22. Criminal law ⇐354

Conduct and declarations of accused occurring within reasonable time before or after commission of alleged crime are admissible in proof of mental condition at time of offense, particularly where insanity sought to be proved by defense is of temporary character.

23. Criminal law ⇐519(3)

Extrajudicial declarations of accused to peace officers after having been taken into custody were not inadmissible because amounting to confessions of crime charged or of other crimes.

24. Homicide ⇐179

In murder trial on plea of insanity, transcripts of conversations between peace officers and accused presenting complete record of accused's conversations for several weeks after commission of offense indicating logical and rational process of mind inconsistent with defense of insanity were competent.

25. Criminal law ⇐703

In murder trial on plea of insanity, opening statement of district attorney who told jury that statement was not intended as evidence or argument was not ground for reversal, though relating to guilt of accused rather than his mental balance.

26. Criminal law ⇐1144(15)

Supreme Court is required to presume that jury followed instructions and arrived at conclusion on fair consideration of evidence.

In Bank.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Claud David was convicted of murder and he appeals.

Affirmed.

Edmund M. Moor, of Corning, for appellant.

U. S. Webb, Atty. Gen., Ralph H. Cowing and J. Q. Brown, Deputy Attys. Gen., and Clair Engle, Dist. Atty., of Red Bluff, for the People.

EDMONDS, Justice.

By indictment, the defendant was charged with the crime of murder and with a violation of section 2 of the Concealed

Weapons Act. Stats.1923, p. 695, as amended by St.1931, p. 2316. Upon his sole plea of not guilty by reason of insanity, he was tried by a jury and found sane. After hearing additional evidence, the trial judge determined the degree of the crime to be that of murder of the first degree without mitigating or extenuating circumstances, and rendered a judgment imposing the death penalty. Under the provisions of section 1239 of the Penal Code, an appeal from that judgment was automatically taken to this court.

[1] From the facts shown by the defendant's admissions and by numerous connecting circumstances, the crime appears to have been committed deliberately and in cold blood. For several weeks before the crime, the defendant had been dickering with Earl Cofer for the purchase of some field glasses and other articles. On the fatal day, at the defendant's request, Cofer came to the ranch where the defendant worked as a farm hand. Shortly after his arrival, the defendant suddenly confronted him with a pistol and bound his hands together with wire. The defendant then went into the house, changed his clothes, returned and drove Cofer along a lonely road. There he took him out of the automobile and smashed his skull with the stock of a rifle, leaving him dead beside the road. There was evidence tending to show that he robbed the deceased of a watch and some $30 in cash. Under these circumstances the trial judge was warranted in imposing a death sentence, the jury having found the defendant sane at the time the crime was committed.

As grounds for reversing the judgment the defendant contends that persons on the panel from which the jury was drawn were prejudiced against him by reason of the fact that at the trial a deputy sheriff was seated immediately behind him; that the district attorney was guilty of prejudicial misconduct in his questioning of witnesses and in his argument to the jury; and that certain testimony was erroneously admitted into evidence. No claim is made that the evidence was insufficient to support the jury's finding of sanity.

[2] At the outset of the trial the defendant was brought into the courtroom by the sheriff and his deputies. The panel from which the jury was to be selected was present, and as the defendant took his seat inside the rail one of the deputy sheriffs drew up a chair immediately behind him. Counsel for the defendant moved to discharge the panel upon the ground that the conduct of the deputy sheriff had created prejudice in the minds of the prospective jurors. The court requested the deputy to move back to the rail and denied the defendant's motion. The defendant contends that because of the misconduct of the deputy sheriff and the refusal of the trial court to discharge the jury panel, he was deprived of a fair trial. In this connection he relies upon People v. Harrington, 42 Cal. 165, 10 Am.Rep. 296. But the facts in that case which, it was held, tended to bias the jury were vastly different from those shown in the present one. There several defendants, who were on trial for robbery, were brought into the courtroom with their legs in irons. The trial court denied a request that they be unshackled during the trial. This ruling was held to constitute reversible error in the absence of a showing of necessity for such precautions. In the case now before the court it does not appear that in the position he took in the courtroom, the deputy was even touching the defendant, and there is nothing to show that his conduct prejudiced the defendant in any way.

[3-6] During the trial the defendant's mother took the witness stand in his behalf and testified concerning various portions of his life, omitting only two periods. In each of these he was serving a sentence imposed upon him after he was convicted of a felony. During the cross-examination of this witness, after the district attorney had questioned her further concerning her son's life, the following occurred:

"Q. I am talking about sixteen. A. After seventeen I didn't see him very often.

"Q. Where was he after seventeen years of age?

"Mr. Moor: I will object to that question * * * for the reason that it is an attempt to prejudice and bias the defendant. Counsel well knows the answer, for the reason that certain of the pleas were not read in court this morning.

"Mr. Engle: If counsel thinks he is going to be able to keep out of this record the fact that this defendant was in the State Prison at San Quentin and in a Federal Government jail, he is all wrong, and if that is prejudicial error to have it in, we will have to commit it, because this woman has testified —

"Mr. Moor (interrupting): I cite the statement of the District Attorney as misconduct and prejudicial error, an attempt to prejudice the defendant."

The court sustained the objection to the question and, at the request of the defendant, cautioned the jury to disregard the district attorney's remark. On several later occasions the district attorney adverted to the same line of inquiry but was stopped by timely objections interposed by counsel for the defendant.

The prosecution's claim that these questions were within the proper scope of cross-examination cannot be sustained. No part of the direct examination had referred to this portion of the defendant's life, and the trial court's rulings were entirely correct. But it does not follow that the defendant is entitled to a reversal of the judgment. The jury was admonished to disregard the district attorney's direct allusions to the defendant's prior convictions. Furthermore, the defendant was being tried solely upon the question of his sanity at the time the offense with which he was charged was committed, and a reference to those matters was less calculated to bias the jury than if his guilt or innocence had been in issue. Moreover, at a later time when the defendant was a witness in his own behalf, he was properly asked about the prior convictions. His criminal record was shown by his own testimony which was admissible to impeach him; therefore, the examination of the mother, which brought out only the same facts, does not constitute reversible error. Const., art. 6, § 4½.

[7-10] When the defendant took the witness stand in his own behalf, upon cross-examination, reference was made to his previous convictions, but the prosecution was not allowed to go beyond the fact of such convictions and the nature of the crimes committed. In this state the testimony of a witness may be impeached by proof that he has suffered the prior conviction of a felony. Code Civ.Proc., § 2051. This rule applies to a defendant who testifies in his own behalf in a criminal trial notwithstanding the fact that such evidence tends to prejudice him in the eyes of the jury. People v. Romer, 218 Cal. 449, 23 P.2d 749; People v. La Verne, 212 Cal. 29, 297 P. 561. The nature of the crime or crimes of which he was convicted is a proper subject of inquiry in establishing the fact of his conviction. People v. Higbee, 78 Cal.App. 455, 248 P. 927; People v. Craig, 196 Cal. 19, 235 P. 721. But details and circumstances comprising the prior offenses are not admissible. People v. Eldridge, 147 Cal. 782, 82 P. 442; People v. Muchupoff, 79 Cal.App. 306, 249 P. 240. The record in this case shows that the cross-examination with respect to the defendant's prior convictions was properly curtailed in compliance with these rules.

[11] At the time of the trial an indictment for robbery was pending against the defendant growing out of a separate incident which occurred ten days prior to the alleged murder. One Ballarena, the complaining witness, charged that the defendant came to his cabin late at night, confronted him with a gun; bound his hands behind him with wire; forced him to ride around the countryside; finally robbed him of about $15 and threatened to kill him if he reported the matter to the authorities. During the cross-examination of the defendant the district attorney, over the defendant's objection, questioned him concerning this incident, and the defendant replied: "I was supposed to have held the man up but I don't remember" and "They said that I went over there but I don't remember". Upon advice of counsel the defendant then refused to answer any more questions pertaining to this affair, but the district attorney persisted in alluding to the same subject-matter in several subsequent lines of inquiry. The defendant's claim that this constituted prejudicial misconduct cannot be sustained, for the attempted inquiry appears to have been within the proper scope of cross-examination. It was the theory of the defense that the defendant was suffering from amnesia at the time he killed Carl Cofer. Upon direct examination he testified that on different occasions throughout his life he had suffered from mental lapses, that he had no recollection of the killing but realized that he must have done it when he found himself standing over the body of the deceased at the scene of the crime. He also denied having robbed Cofer and was unable to assign any motive for his conduct. The Ballarena robbery was so close to the murder in point of time and was so similar in its modus operandi that proof of his conduct and state of mind during that incident tended to contradict the defendant's testimony both as to motive and mental lapse.

[12-14] A cognate question is raised by the defendant's contention that the testi-

mony of Ballarena concerning the details of the robbery was improperly admitted into evidence. While it is true that evidence of particular wrongful acts are not generally admissible where the defendant has not put his character in issue, it seems clear that under the circumstances of this case the evidence was properly admitted. The prosecution was entitled to show not only a motive for the crime but a deliberately conceived plan to carry it out. As shown by the evidence the acts of the defendant were substantially the same on both occasions. In each case a gun was held on the victim, his hands were tied behind him with wire and he was forced to ride in his own car over various roads in Tehama county. In each case the defendant made the claim that he was unable to remember the details, although he later confessed to a knowledge of the details of the robbery. By producing Ballarena the prosecution presented evidence concerning the defendant's conduct and conversation in a similar transaction which had occurred only a few days prior to the death of Cofer.

[15-17] Evidence which tends to prove a sane motive for the crime and an ability on the part of the accused to devise and execute a deliberate plan is material to the issue raised by a plea of not guilty by reason of insanity. People v. Sloper, 198 Cal. 238, 244 P. 362; People v. Donlan, 135 Cal. 489, 67 P. 761. Furthermore, it is the rule that where a defense of insanity is interposed and evidence of the previous conduct of the defendant is offered by him, the prosecution is not limited to an explanation or denial of the particular conduct of the defendant, but may offer evidence of other acts committed by him within a reasonable time before or after the crime which tend to show that he was sane at the time the act was committed. People v. Willard, 150 Cal. 543, 550, 89 P. 124; State v. Spangler, 92 Wash. 636, 159 P. 810; Wigmore on Evidence, 2nd ed., vol. 1, p. 473. The period of time over which an inquiry of this character should be extended is a matter which rests largely within the discretion of the trial court. People v. Kimball, 5 Cal.2d 608, 611, 55 P.2d 483; People v. Aranda, Cal.Sup., 83 P.2d 928.

[18] As further grounds for reversal of the judgment the defendant contends that various other portions of the evidence introduced by the prosecution were erroneously admitted over his objections. A psychiatrist from the state prison at San Quentin was permitted to give an opinion concerning the defendant's mental condition at the time of the offense, although the witness had not been present in court during the introduction of most of the defendant's testimony. But this fact went only to the weight of the witness' testimony. He had observed the defendant in routine examinations at San Quentin and, also, just before testifying, he examined the defendant in the county jail, where he was able to observe and talk to him at some length. In People v. Delhantie, 163 Cal. 461, 125 P. 1066, the evidence showed that six days prior to the trial one of the physicians who testified had observed the defendant for an hour. It was held that this was sufficient to warrant the court in allowing his opinion to go to the jury.

[19-21] Certain letters written by the defendant while he was out of San Quentin on parole were admitted over objection. These letters were clear and rational and were shown to have been in the defendant's handwriting. Inasmuch as they clearly reflected his mental condition during the several months leading up to the crime, they were competent evidence. The claim that they were inadmissible because the prosecution failed to show that they were "the products of the defendant's mind" and not dictated by someone else, has no merit. One witness testified that he had helped the defendant write letters, but it did not appear that these were the letters referred to. A sufficient foundation for the introduction of the letters was laid by proof of his handwriting, and the defense then had the right and was given the opportunity to explain them.

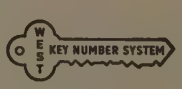
[22-24] Also introduced by the prosecution were several transcribed statements of conversations between peace officers and the defendant which occurred after the latter had been taken into custody. When first questioned concerning the Ballarena robbery he doggedly denied knowledge of it. Later he confessed to the commission of the crime in a statement showing a knowledge of all its details. He also confessed to the murder, but in this confession, as in his testimony at the trial, he maintained an inability to remember the events surrounding the actual killing of the deceased. Each confession clearly shows attempts to cover up the crimes after their commission. It is contended that this evidence was competent only to show that the defendant

was aware that his conduct was wrongful, and since he had taken the witness stand and testified to such subsequent awareness, it is argued that the evidence should not have been admitted. But the transcripts of these interviews tended to prove more than a consciousness of guilt. They present a complete record of the defendant's conversations made several weeks after the commission of the offense, and indicate a logical and rational process of mind which was inconsistent with the defense of insanity. As previously stated, the conduct and declarations of the defendant occurring within a reasonable time before or after the commission of the alleged act are admissible in proof of his mental condition at the time of the offense. Particularly is this so where the insanity sought to be proved is of a temporary character, for this is often the only factual evidence which the prosecution can bring to bear on the question. People v. Willard, supra; 8 Cal.Jur. 51. Because the extrajudicial declarations amount to confessions of the crime with which he is charged or of other crimes does not render them inadmissible. U. S. v. Chisholm, C.C., 153 F. 808; People v. Sloper, 198 Cal. 238, 244, 244 P. 362. Undoubtedly certain portions of this evidence, such as the defendant's first statement concerning the robbery which was a persistent denial of all guilt, or the portion containing an extra-judicial identification of the defendant by a person who was not a witness at the trial, would not have been admissible had the defendant's guilt or innocence been in issue before the jury. But it was not offered in proof of the facts stated, but to show the defendant's reactions at a time shortly after the commission of the crime. The complete statements were competent evidence of his mental condition.

[25, 26] The defendant's final contention relates to the conduct of the district attorney in his opening statement and argument to the jury. Objection is made to portions of the opening statement reciting evidence which the defendant claims was inadmissible. Instead of being a recitation of the facts which the prosecution expected to prove, many parts of the statement were more in the nature of an argument. But in opening his remarks the district attorney told the jury that his statement was not intended to be either evidence or argument and should not be taken by them as such. Under these circumstances, the remarks which he made were not so improper as to require a reversal, although, unquestionably, he overstepped the bounds of propriety. He dwelt at length upon the facts bearing upon the defendant's guilt, speculating in detail upon the manner in which the crime might have been committed, and indulged in rhetorical invective against the accused as though his guilt, rather than his mental balance, were in issue. Such conduct cannot well be justified in a proceeding to determine sanity, but it must be presumed that the jury followed the instructions which fully and fairly covered the real issues of the case and arrived at its conclusion upon a fair consideration of the evidence. There was ample testimony, both medical and lay, to support the verdict. The weight of this evidence tends strongly toward a conclusion that the defendant was sane at the time of the commission of the crime. The defendant was ably represented by counsel, and an examination of the whole record discloses that he was given a fair trial.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.



12 Cal.2d 629

VIERRA et al. v. PEREIRA et ux.

Sac. 5218.

Supreme Court of California.

Jan. 25, 1939.

1. Evidence ⇐589

Where a cause was heard without a jury, court was authorized to credit plaintiffs' statements and to discredit defendants' which were contradictory.

2. Frauds, statute of ⇐144
Husband and wife ⇐267(9)

Where husband and wife owned land as community property and wife authorized husband to make an oral three-year lease of land upon which lessees entered, prepared land for cultivation, and farmed land for one year, husband and wife were estopped from asserting that the lease violated the statute

of frauds, and wife, under statute, was estopped from avoiding the lease. Civ.Code, §§ 172a, 1624; Code Civ.Proc. § 1973.

In Bank.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Theodore Vierra and another against A. T. Pereira and his wife to quiet title to plaintiffs' leasehold interest in defendants' land, wherein defendants cross-complained for restitution of the land, damages, and other equitable relief. From a judgment for plaintiffs, defendants appeal.

Judgment affirmed.

Wilcox & Rodin, of Turlock, and E. H. Zion and Dennett & Zion, all of Modesto, for appellants.

Harold L. Hjelm and Hjelm & Hjelm, all of Turlock, for respondents.

EDMONDS, Justice.

During the cropping season of 1937 a controversy arose over the plaintiffs' interest in thirteen acres of alfalfa land owned by the defendants husband and wife as community property. The plaintiffs claimed that they were entitled to possession of the property pursuant to the terms of an oral lease thereof made to them by the defendants for the period of three years from December 1, 1935. In April, 1937, they commenced this action to quiet title to their leasehold interest and to restrain any interference by defendants with it. The trial court upheld their contentions and the defendants appealed from the judgment.

The complaint alleged the making of the oral agreement of lease, a promise to reduce it to writing, and failure on the part of the defendants to keep the promise. The defendants, by way of answer, denied the existence of the lease for the term stated and pleaded the statute of frauds. They also cross-complained for restitution of the premises, damages, and other equitable relief. The problem on appeal is to determine whether the trial court correctly concluded that the case is a proper one in which to apply the doctrine of equitable estoppel. Were the defendants estopped to rely upon the statute of frauds (sec. 1624, Civ.Code; sec. 1973, Code Civ. Proc.) as a bar to any recovery by the plaintiffs? And was the defendant wife further estopped to avoid the oral agreement upon the ground that it was made without her written consent or authorization (sec. 172a, Civ.Code)?

The trial court found that on December 1, 1935, the defendants orally agreed to lease the thirteen acres to plaintiffs for a period of three years. The transaction, so the findings recite was handled entirely by defendant husband, who acted with the authority, knowledge and consent of his wife, and as her agent. Although the wife denied that she authorized or agreed to a lease to plaintiffs for more than one year, she admitted having seen plaintiffs at work on the land, and she also testified that her husband was renting, managing and caring for the property with her consent. At no time did she repudiate any of his acts or take any steps to disaffirm his agreement with plaintiffs. According to the testimony, a request was made by plaintiffs that the lease be put in writing, but the defendant husband stated that it was not necessary; his word was good. It appears that he had known plaintiffs since their childhood, for the families were neighbors; the plaintiffs relied upon his assurance, and were led to believe that a written lease was not necessary.

Under the terms of the oral agreement plaintiffs, at their own expense, were required to level, prepare for irrigation, and plant the entire thirteen acres. In return for this work they were to have the use and occupation of the premises as tenants for the years 1936, 1937, and 1938, together with the exclusive ownership of all crops produced thereon during 1936, and an equal share, with defendants, of all crops produced during 1937 and 1938. They agreed to plant and produce all of these crops at their own expense and to deliver defendants' share to them on the premises.

This agreement was fully performed throughout the year 1936. Plaintiffs entered upon the raw, rolling land. They cut down the high places and put in fills. After the ground was scraped and leveled they disked it twice. They put up levees. They plowed and chiseled the field and strip-checked ten checks. They then harrowed, seeded with seed supplied by the defendants, and harrowed again. Practically the entire first growth of alfalfa was cut, hauled, and burned. All this required an estimated 200 hours of labor and an expenditure of over $688, which was the rea-

sonable value of the work performed. With care and irrigation of the land, several additional cuttings were obtained during the 1936 season and the plaintiffs' right to these crops was not questioned.

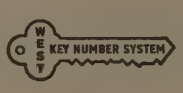
During the early months of 1937, plaintiffs again entered upon the property and performed preliminary work for that cropping season. In April, while they were engaged in cutting hay, the defendant husband came to them and told them that he claimed the entire crop. He informed them that their lease had terminated; that it had only been for one year; and that they should have asked for a renewal. Upon their refusal to surrender possession, he caused a written notice to be served upon them stating that their right of occupancy had expired, and ordering them to quit the premises within three days. The filing of this action followed. The cause was tried in June, 1937; findings and judgment in favor of plaintiffs were entered in October, but it was agreed that plaintiffs would continue in possession of the land during 1937, and that defendants would accept, without prejudice to their rights herein, one-half of the crops produced for that year.

The court, having heard the cause without a jury, reached the conclusion that plaintiffs had a binding enforceable lease upon the property for the three years, with the right to the 1936 crops, and an equal share of the 1937 and 1938 crops. It concluded that in negotiating for and completing the lease, defendant husband was the agent and servant of his wife and acted with her knowledge, consent, and approval, and that defendants were estopped to deny the execution and existence of the lease, or to raise the bar of the statute of frauds.

[1, 2] Appellants challenge the correctness of these conclusions and they further assert that testimony is lacking to support particular findings. Neither contention can be sustained. Upon the controverted issues of fact the testimony of plaintiffs is a flat contradiction of that of defendants. The court was privileged to credit the statements of plaintiffs and to discredit those of defendants, and each of its findings is supported by substantial competent evidence. Clearly these facts warrant the application of the doctrine of equitable estoppel. The rules governing that doctrine are well established. The conduct of defendants was such as to estop them to make the defense of the statute of frauds (Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Needham v. Abbot Kinney Co., 217 Cal. 72, 17 P.2d 109; Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198; Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770), and, in particular, under the provisions of section 172a of the Civil Code, the defendant wife was estopped by her conduct from avoiding the agreement (Mark v. Title Guarantee & Trust Co., 122 Cal.App. 301, 9 P.2d 839; Schelling v. Thomas, 96 Cal.App. 682, 274 P. 755; Rice v. McCarthy, 73 Cal.App. 655, 239 P. 56).

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; HOUSER, J.; SHENK, J.; SEAWELL, J.



12 Cal.2d 651

In re LOPUS' ESTATE.

Sac. 5203.

Supreme Court of California.

Jan. 30, 1939.

1. Appeal and error ⇐337(1), 792

A prematurely noticed appeal fails to confer jurisdiction and an appellate court of its own motion may dismiss such an appeal.

2. Appeal and error ⇐337(2)

The phrase "rendition of judgment," within statute prohibiting dismissal of appeal taken after rendition of judgment and before formal entry, meant the signing and filing of findings of fact and conclusions of law. Code Civ.Proc. § 939; Probate Code, § 1233.

[Ed. Note.—For other definitions of "Rendition of Judgment," see Words & Phrases.]

3. Appeal and error ⇐337(2)

An appeal was filed prior to "rendition of judgment" and would be dismissed, where findings and judgment were signed and filed several days after filing of notice of appeal. Code Civ.Proc. § 939; Probate Code, § 1233.

4. Appeal and error ⇐533(1)

An opinion of the trial court is no part of the record on appeal.

5. Appeal and error ⇐717

An appellant could not rely on "opinion" of trial court in support of the appeal where the "opinion" was improperly included in the record and in the proposed substituted record.

In Bank.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceeding in the matter of the estate of Joseph Lopus, deceased. From an order or decree of the probate court denying the application of the former administratrix of the estate for settlement of her first and final account, the former administratrix appeals. On motion to substitute or supplement record and appeal.

Motion denied and appeal dismissed.

Lelia R. Leep, of San Francisco, for appellant.

W. H. Early and Clarendon W. Anderson, both of Santa Rosa, for respondent.

WASTE, Chief Justice.

[1] The former administratrix of the above-entitled estate noticed this appeal from an order or decree of the probate court denying her application "for settlement of her amended first and final account and specifically from that portion * * * decreeing and adjudging that the item of two thousand five hundred dollars * * * was not her separate property * * * but that the same was and is property of the estate * * * and ordering [her] to account to said Court for the same". Subsequently, there was filed with this court a typewritten transcript of the judgment roll duly certified by the clerk of the court below. In some manner this transcript was inadvertently forwarded to this court for, at a later date, the appellant tendered a duly certified printed record containing a transcript of the judgment roll and a bill of exceptions. Appellant thereupon moved this court for an order substituting the printed record for the previously filed typewritten record or declaring it to be supplemental thereto. That motion is now before us for determination. Whether we grant or deny it will be of little moment to the appellant-movant for an examination of either or both of said records discloses that the appeal was prematurely filed and must therefore be dismissed. Under settled principles, a prematurely noticed appeal fails to confer jurisdiction and an appellate court of its own motion may dismiss the same.

It appears that on May 25, 1937, the probate judge rendered what is expressly captioned in the record an "Opinion" which concluded with the words "Let a formal order be presented." On June 17, 1937, the appellant filed her notice of appeal. But, it was not until June 24, 1937, that the court signed and filed its findings of fact and judgment. It is immediately apparent that the notice of appeal antedated the judgment by several days.

[2, 3] Appellant urges that contrary to the early rule, it is now provided by statute that "No appeal * * * shall be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry." Sec. 939, Code Civ.Proc.; sec. 1233, Pro.Code. However, it is definitely settled that the "rendition" of a judgment, within the meaning of the quoted language, occurs upon the signing and filing of the findings of fact and conclusions of law. Aspegren & Co. v. Sherwood, Swan & Co., 199 Cal. 532, 250 P. 400; 2 Cal.Jur. 398, sec. 167. Here, as stated, the findings and judgment were signed and filed several days after the filing of the notice of appeal. There had been no "rendition" of judgment at the time of the noticing of the appeal.

[4, 5] In conclusion, it should be mentioned that the "Opinion" of the court below which appears in both transcripts here involved, has no place therein. It has been held in many cases that an "opinion" of the trial court is no part of the record on appeal. Estate of Finkler, 7 Cal. 2d 97, 103, 59 P.2d 801; Fechtner v. Costa, 16 Cal.App.2d 691, 61 P.2d 473; 2 Cal.Jur. 488, sec. 235. This being so, appellant in support of her appeal may not rely on the "Opinion" of the trial court which is improperly included in the record and in the proposed substituted record.

The motion is denied and the appeal is dismissed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; SEAWELL, J.

12 Cal.2d 618

JOHNS v. SCOBIE.

L. A. 16335.
Supreme Court of California.
Jan. 24, 1939.

1. Pleading ⇐381(1)

That merely probative facts are not pleaded is no obstacle to proving them if they are relevant to the issues that are pleaded.

2. Trial ⇐105(2)

In grantee's action against deceased grantor's administratrix to reform deed, where administratrix testified without objection that grantor's only heirs were nieces and nephews and no evidence was introduced to the contrary, testimony was required to be taken as true, as respects whether grantee's possession of land had been adverse.

3. Deeds ⇐56(3)

There was no legal delivery of deed placed by grantee in trunk in which both grantor and grantee kept their papers, where grantor had not intended to relinquish all control over property prior to his death.

4. Reformation of Instruments ⇐6

A grantee who had obtained no title under deed not legally delivered was not entitled to reformation thereof to include additional land.

5. Descent and distribution ⇐74

The title to property of deceased grantor who died intestate became vested in his heirs, whether known or unknown. Probate Code, § 300.

6. Descent and distribution ⇐74
Tenancy in common ⇐3

The intestate's heirs who were all nephews and nieces were entitled to equal shares, and took title to his realty as tenants in common. Probate Code, § 300.

7. Tenancy in common ⇐15(10), 21

A tenant in common has a right to occupy the whole of property, the possession of one tenant being deemed the possession of all, and each may assume that another in exclusive possession is possessing for all and not adversely to others.

8. Tenancy in common ⇐15(10)

One tenant in common does not, by exclusive possession, gain title by adverse possession against others, but such possession will be presumed to be by permission and rightful, in absence of notice to others that it has become hostile.

9. Tenancy in common ⇐15(2)

Where notice of hostile claim of one tenant in common, either actual or constructive, is brought home to other cotenants, adverse possession may be gained.

10. Tenancy in common ⇐15(7)

The recordation of invalid deed by grantee who was deceased grantor's nephew, and who was unaware of existence of other nephews and nieces, was notice to them that his possession of land, of which all were cotenants, was hostile, as respects running of statute of limitations.

11. Tenancy in common ⇐15(7)

Where tenant in common enters into possession without knowledge of existence of other cotenants and claims under invalid deed purporting to convey property to him, recordation of deed constitutes notice to cotenants of its existence and of adverse character of his claim so as to start statute of limitations running.

12. Adverse possession ⇐71(2)

Generally, any instrument, however defective or imperfect, and regardless of cause of invalidity, purporting to convey land and showing extent of tenant's claim, may be color of title upon which adverse claim may be based.

13. Tenancy in common ⇐15(5, 7)

That recorded deed good on its face had not been legally delivered did not preclude deed from constituting color of title, or from giving notice to grantee's cotenants of his hostile claim to land involved.

14. Adverse possession ⇐4

Where grantee went into possession and recorded invalid deed 12 years before issuance of letters of administration on grantor's estate, the possibility of future proceedings in administration did not preclude him from acquiring an adverse title against estate.

15. Adverse possession ⇐100(4)

A grantee whose adverse claim to land rested upon deed which had never been validly delivered could claim only the land described by deed, in absence of evidence of other acts indicating claim to additional land.

In Bank.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by James T. Johns against Lena A. Scobie, as administratrix of the estate of Isaac Johns, deceased, to obtain the reformation of a deed, wherein the defendant filed a cross-complaint seeking to quiet title to the land claimed by the plaintiff under the deed. From a judgment on the cross-complaint in favor of the plaintiff quieting plaintiff's title to the entire property without passing on the question of reformation of the deed, defendant appeals.

Judgment reversed and cause remanded.

For prior opinion, see 79 P.2d 191.

Harvey, Johnston & Baker, T. H. Werdel, and Claude Baker, all of Bakersfield, for appellant.

Samuel Taylor, of Bakersfield, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Fourth Appellate District, in order to give further consideration to the problem of adverse possession by one cotenant against others. On the other issues we are satisfied with the conclusions reached by said court, and accordingly adopt the following portion of the opinion of Mr. Justice pro tempore Haines, 79 P.2d 191, as part of the opinion of this court:

"This action was commenced by respondent James T. Johns, as plaintiff, against appellant Lena A. Scobie, as administratrix of the estate of Isaac Johns, deceased, to obtain the reformation of a deed dated March 8, 1920, alleged to have been executed and delivered by the decedent in his lifetime to respondent and to be defective in describing less land than that intended to be conveyed. Appellant filed an answer denying everything alleged in the complaint, which answer she subsequently amended by pleading additional defenses which need not for our present purposes be recited in detail. She also filed a cross-complaint seeking, in behalf of the decedent's estate, to quiet title, both to the property described in the complaint, as actually mentioned in the deed, and also to the additional property claimed by respondent as constituting the rest of that intended to be included in the conveyance. Respondent answered this cross-complaint claiming, as against the decedent's estate, and appellant as administratrix thereof, title by adverse possession to the whole of the property mentioned, asserting that such adverse possession had been maintained for more than five years before the commencement of the action, and that it was under a claim of title on respondent's part, exclusive of other right and hostile to any claim or title on the part of the decedent's estate, asserting that respondent had, during such five years paid all taxes levied and assessed on the land and further invoking the bar of sections 318, 319 and 322 of the Code of Civil Procedure. The trial court found in respondent's favor on the issues tendered by the cross-complaint and his answer thereto and on that basis rendered judgment quieting his title to the entire property without passing on any question of reformation of the deed. The present appeal is from this judgment.

"The evidence disclosed that respondent was a nephew of the deceased and that both were bachelors; that for many years prior to the decedent's death the two lived together in a two-room adobe cabin on part of the land here in dispute, had their beds in the same room, and both kept their papers in the same trunk which was at some times locked and at other times unlocked. Uncle and nephew were jointly engaged in the cattle business on the property. The land embraced 157.55 acres, for which the uncle held a government patent, also kept in the trunk referred to. On March 8, 1920, the deceased caused to be prepared by one Allen, signed and acknowledged, a grant deed in respondent's favor for about 45 acres of land, the rest of the 157.55 acres having, according to respondent's claim, been omitted by reason of a mistake in the description. This deed, according to respondent, was brought into the house by decedent, who said to respondent, 'Here is the deed', whereupon respondent looked at it and put it in the trunk. Something like a year later respondent had Allen prepare another deed in decedent's favor, said to have described all of respondent's property so far as patented. This deed, respondent testified that he gave to decedent to read, after which decedent placed it also in the trunk 'with the rest of the papers'. According to respondent, however, it did not include the property embraced in the deed from his uncle to him but only affected property other and different from said 157.55 acres, which other property was owned by the respondent and over which he and his uncle were accustomed to run their stock.

"Respondent testified that he did not intend to pass title by this last-mentioned deed to his uncle, the decedent, but as to its purpose that:

"'If anything happened to me so I would have it, if I happened to die or get killed I had no certainty of life. I was trying to protect him.'

"Thereupon the following colloquy ensued:

"'Q. And the same thing applied with the deed made out by your uncle to you, made out to protect you in the event he died? A. That was the understanding, he was trying to protect me and the interest I had there.

"Q. If he died then you would have the deed? A. Yes.

"Q. If you died he was to have the other deed, that was it, wasn't it? A. I deeded mine to him in case anything happened to him before I passed away, I was protecting him as our partnership.

"Q. And if he passed away first he was to protect you? A. Certainly.

"Q. And in the event both lived both kept your own properties? A. Yes sir.'

"Isaac Johns, the uncle, died on December 26, 1924, whereupon respondent promptly recorded the deed from the decedent to himself and later burned the deed from himself to the decedent. Respondent has ever since occupied the whole 157.55 acres in controversy, all of which has been and is under fence, and has erected an 8-room dwelling upon it. No question about the ownership of the property appears to have been raised by anybody until 1936, in February of which year respondent says that he was told through an abstract company that his title was defective, and on April 8 of which year appellant Lena A. Scobie secured letters of administration on the decedent's estate, whereupon the present litigation ensued.

[1, 2] "In our opinion it sufficiently appears from the record that Isaac Johns died intestate and that his heirs at law are five nephews and nieces, to-wit, W. E. Johns, Elizabeth A. Wood, respondent James T. Johns, appellant Lena A. Scobie (administratrix) and Johnathan Johns. At the trial Mrs. Scobie was asked directly what heirs decedent left and answered giving this list. No objection was made to this testimony at the time it was given, though counsel for respondent now claims that it ought to be disregarded, both because the subject is not involved in the pleadings and for the further reason that the testimony is a conclusion of law since, although the evidence itself disclosed that the decedent died a bachelor, there is nothing in it specifically to negative the possibility of his having left parents, brothers or sisters surviving him. The inquiry as to who are the decedent's heirs is not an inquiry as to an ultimate fact in the present case, but only as to probative facts involved in the effort to determine whether respondent's possession of the land involved has been adverse to the estate as claimed. The circumstance that merely probative facts are not pleaded is no obstacle to proving them if relevant to the issues that are pleaded. Counsel for respondent had full opportunity to cross-examine Mrs. Scobie and inquire whether or not decedent left any nearer relatives than the nieces and nephews named and omitted either to do so or to move to strike out as a conclusion her statement that they were decedent's heirs. Neither did he introduce any evidence to the contrary or make any statement at the trial of any claim to the contrary. In these circumstances we think Mrs. Scobie's undisputed statement on the subject must be taken to be true."

[3, 4] The trial court did not expressly find on the issue of delivery of the deed, but it is clear from the testimony quoted above that the grantor did not intend to relinquish all control over the property prior to his death, and therefore there was no legal delivery. Hence plaintiff obtained no title by the deed itself, and his demand for reformation must fail. It remains to be determined whether he acquired title to the property in whole or in part by adverse possession, bearing in mind that the trial court found that such a title was acquired to the entire property.

[5–8] All of the elements of adverse possession are clearly established save one, the element of hostile or adverse claim. The decedent died intestate, and upon his death title to the property became vested in his heirs (Probate Code, § 300) whether such heirs were known or unknown. State v. Miller, 149 Cal. 208, 85 P. 609. In the present case the heirs, all nephews and nieces, were entitled to equal shares under the laws of succession, and therefore took title as tenants in common. It is a funda-

mental rule that each tenant in common has a right to occupy the whole of the property. The possession of one is deemed the possession of all; each may assume that another in exclusive possession is possessing for all and not adversely to the others; and consequently one tenant in common does not, merely by exclusive possession, gain title by adverse possession against the others. Such possession will be presumed to be by permission and rightful, unless notice is brought home to the others that it has become hostile. Wood v. Henley, 88 Cal.App. 441, 263 P. 870; Nelson v. Sweitzer, 22 Cal.App.2d 382, 71 P.2d 85.

[9, 10] But it is equally well settled that where notice of the hostile claim, either actual or constructive, is brought home to the other cotenants, adverse possession may be gained. See Akley v. Bassett, 189 Cal. 625, 209 P. 576; Unger v. Mooney, 63 Cal. 586, 49 Am.Rep. 100; Winterburn v. Chambers, 91 Cal. 170, 27 P. 658; Smith v. Barrick, 41 Cal.App. 28, 182 P. 56; Beitz v. Buendiger, 144 Minn. 52, 174 N.W. 440; May v. Chesapeake, etc., Ry. Co., 184 Ky. 493, 212 S.W. 131; Tiffany, Real Property, 2d, p. 2017; Thompson, Real Property, pp. 995, 996, 1005; note, 4 So.Cal.L.Rev. 325. The erection of the house by plaintiff might perhaps offer a basis for the claim here if the evidence were more satisfactory as to the time it was built or the other facts that might tend to establish notice reasonably to be derived from it. But in any event the recordation of the deed from decedent to plaintiff does, in our opinion, establish the necessary notice.

[11] Although there are some decisions to the contrary, the weight of authority seems to support the doctrine that where a tenant in common enters into possession and claims under an invalid deed purporting to convey the property to him, the recordation of the deed is notice to his cotenants of its existence and therefore of the adverse character of his claim, so as to start the statute of limitations running, at least where, as here, he knew nothing of the existence of the other cotenants. See Tiffany, Real Property, p. 2018; Thompson, Real Property, p. 1008, sec. 1838, 1929 Supp., p. 630; Elder v. McClaskey, 6 Cir., 70 F. 529; Akley v. Bassett, 189 Cal. 625, 642, 209 P. 576; McCann v. Welch, 106 Wis. 142, 81 N.W. 996; Bourne v. Wiele, 159 Wis. 340, 150 N.W. 420; Puckett v. McDaniel, 8 Tex.Civ.App. 630, 28 S.W. 360, followed in Morgan v. White, 50 Tex. Civ.App. 318, 110 S.W. 491, and Ames v. Howes, 13 Idaho 756, 93 P. 35; Keyser v. Brown, 80 Ind.App. 504, 138 N.E. 514; Quarels v. Bradshaw, 200 Ky. 475, 255 S.W. 124; Peeples v. Boykin, 132 Miss. 359, 96 So. 177; Craven v. Craven, 68 Neb. 459, 94 N.W. 604.

In Elder v. McClaskey, supra, the court declares that the presumption of a tenant in common holding by permission of other cotenants only applies where the possession was avowedly begun as a tenant in common, and not where it commenced under a deed purporting to give the fee, which is the exact situation before us here. And in emphasizing the proposition that constructive notice is sufficient, and actual notice not essential, the court says (page 545): "If a tenant in common, in order to make his possession adverse to a cotenant, is obliged to seek the latter out and actually inform him of his intention, then it would become impossible to set the statute running against absent heirs, whose existence and whereabouts were unknown to the tenant, and whose heirship and interest in the property were unknown to themselves. * * * Cases can be stated, doubtless, where the fiduciary relation between the possessor and the owner is actual, and not created alone by the legal character of their respective titles, in which the dependence of the one upon the loyalty of the other is so complete that nothing but actual notice of the change from a subordinate to an adverse possession would suffice to set the statute running. In such cases it would seem that the relation must be of such a nature as affirmatively to discourage the owner from giving attention to conduct of the tenant. But the authorities cited show conclusively that no such rule obtains where the fiduciary relation, if such it can be properly called, is created merely by the character of the respective titles, and not by an actual personal dependence of the owner upon the possessor, and that in such cases the owner is bound at his peril to take notice of acts of the possessor of such open and notorious character, and so unmistakably indicative of an intention to exclude others from any interest in the land, that the world about, including the real owner, must be presumed to know and act upon them."

The above decision and the statement that the ordinary presumption does not apply where the possession was not avowedly begun as a tenant in common, were approved and followed by this court in Akley v. Bassett, supra.

Similarly in Bourne v. Wiele, supra, the court said (page 421 of 150 N.W.): "If it appeared that either the widow or the defendants [the adverse claimants] had ever recognized or acknowledged that the plaintiffs had title as cotenants to any part of the premises, it would probably be necessary that actual knowledge of the changed and hostile character of the defendants' possession be brought home to the plaintiffs before such possession could be held adverse. * * * No such acknowledgement appears, however. On the contrary, all the evidence on the subject indicates that neither the widow nor the present defendants ever knew of the existence of the plaintiffs, and hence never acknowledged that the plaintiffs had any interest in the premises."

There are a few contrary decisions, based on facts substantially different from those presented by the record herein. They are cases, e. g., in which a person knowingly begins his possession as a tenant in common, and attempts to secure full ownership against the other tenants by taking a deed from a third party, or purchasing at a tax sale. In the latter situation it is properly held that his acts amount to nothing more than payment of the tax, and entitles him only to contribution from the others. See Cocks v. Simmons, 55 Ark. 104, 17 S.W. 594, 29 Am.St.Rep. 28.

[12] The argument is also made that an undelivered deed cannot constitute color of title. A few cases contain expressions to this effect. See Casady v. Casady, 184 Iowa 1241, 169 N.W. 683; Stearns Coal & Lumber Co. v. Boyatt, 168 Ky. 111, 181 S.W. 962; 2 C.J.S., Adverse Possession, § 72, p. 595. On its facts, the Casady Case is not in conflict with our present decision, for there the making of the purported deed was never disclosed to the grantee, and the instrument remained in the grantor's personal possession until he died. The contention that adverse possession begun during the grantor's lifetime with the deed still in his possession and the grantee unaware of it, could be deemed under color of title, was properly rejected by the court. The Stearns Case states the above-mentioned rule in a brief dictum, but the case was chiefly concerned with the extent of the land alleged to be adversely possessed. On the other hand, numerous authorities have stressed the point that color of title is merely a means of showing hostility of possession; that it is never a good title but merely an appearance of title. Almost every kind of void or voidable deed has been held to be color of title, including those where the defect appeared on the face of the instrument. "Generally speaking, any instrument, however defective or imperfect, and no matter from what cause invalid, purporting to convey the land, and showing the extent of the tenant's claim, may be color of title * * *" 1 Am. Jur. 901; see authorities collected in 1 Am. Jur. 894, 902-905, 907; Thompson, Real Property, 1929 Supp., p. 844; McCann v. Welch, supra. The California decisions are to the same effect. Wilson v. Atkinson, 77 Cal. 485, 20 P. 66, 11 Am.St.Rep. 299; Packard v. Moss, 68 Cal. 123, 8 P. 818.

[13] If a deed wholly void by reason of lack of title in the grantor or because of defects in its execution or the proceedings upon which it is based may constitute color of title (see cases cited, supra), we think a deed believed valid by grantor and grantee, but failing to measure up to the legal requirements of delivery, may likewise be sufficient for this purpose. The fact that lack of delivery makes it void is utterly immaterial; the question is not whether the title is good, but whether it appears to be good, so as to be notice to others of the claim of the adverse possessor. In the instant case the technical defect in delivery did not detract in the slightest degree from the notice conveyed by the recordation of a deed good on its face, and it must therefore be held that the requirement of notice of the hostile claim was fulfilled.

[14] It is further objected that even if plaintiff could and did hold adversely to his coheirs, the other tenants in common, he did not establish adverse possession against the estate. The cases relied on in this connection, however, are clearly distinguishable. They involve situations where administration was commenced, and thereafter an heir or devisee made his entry and set up his hostile claim. In such cases it is properly held that the heir or devisee cannot acquire title by adverse possession against the executor or ad-

ministrator, any more than can a tenant against his landlord, while holding under the tenancy. See Blair v. Hazzard, 158 Cal. 721, 112 P. 298; Phelps v. Grady, 168 Cal. 73, 141 P. 926; Smith v. Barrick, 41 Cal.App. 28, 182 P. 56.

The instant case presents an entirely different situation. Plaintiff went into possession and recorded his deed twelve years before the issuance of letters of administration. He did not take the property during administration, or from the estate. His title by adverse possession, if it could be acquired, was complete before administration began. The mere possibility of some future proceedings in administration could not completely bar the acquisition of an adverse title. It would seem clear that if adverse possession can be gained against the other heirs, who have the legal title, it certainly can be gained against such claims as the executor or administrator may have for purposes of administration. The case of Mawson v. Gray, 78 Utah 542, 6 P.2d 157, is closely in point, and the opinion therein distinguishes our decision in Blair v. Hazzard, supra.

[15] We conclude, therefore, that the elements of adverse possession have been established, and that plaintiff has acquired title against his coheirs and against the estate. The remaining question is as to the extent of the land thus acquired. If, as we hold, the hostile claim rests upon the deed, it only extended to the 45 acres described by it, and that is all that plaintiff may claim. If evidence is presented to establish notice from the structure erected or other acts of possession indicating a claim to the entire parcel, it might be possible to sustain the claim as to the whole. It would not, of course, be possible to establish constructive adverse possession to the whole from possession of a part, since the color of title relied on here (the deed) does not describe the whole property. See Johnson v. Buck, 7 Cal.App. 2d 197, 202, 46 P.2d 771; In re Wasson, 54 Cal.App. 269, 273, 201 P. 793. On this issue the record is too unsatisfactory to sustain the judgment for plaintiff. As we have already pointed out, the deed itself is the only clear basis for the adverse possession, and that only serves to make out the claim for the 45 acres described. Unless other evidence is forthcoming to justify a greater claim, the court cannot give judgment for more than that.

The judgment is reversed and the cause remanded for new trial or other proceedings in conformity with the above opinion.

12 Cal.2d 633

RIDEAUX v. TORGRIMSON.

L. A. 16786.

Supreme Court of California.

Jan. 26, 1939.

Rehearing Denied Feb. 23, 1939.

1. Statutes ⇐179

When a legislative body enacts a statute which prescribes the meaning to be given to particular terms used by it, such meaning is binding upon the courts.

2. Workmen's compensation ⇐2084

The statutory cause of action for damages may be maintained by an employee for whom no compensation has been secured, regardless of the general provisions of the statute for compensation in lieu of damages. Gen.Laws 1931, Act 4749, § 29(b); St.1933, p. 975.

3. Workmen's compensation ⇐2122

An employee's cause of action for damages for personal injuries against an employer who has failed to secure to an employee the payment of compensation as required by law survives the death of the employer. Gen.Laws 1931, Act 4749, §§ 1, 7, 29(b), 69; St.1933, p. 975.

4. Workmen's compensation ⇐52

If any ambiguity exists in the statute concerning proceedings by an employee where payment of compensation is unsecured, the doubt must be resolved in favor of the employee in view of required liberal construction. Gen.Laws 1931, Act 4749, §§ 1, 7, 29(b), 69; St.1933, p. 975.

5. Workmen's compensation ⇐2133

A complaint alleging that plaintiff received injuries due to negligent operation of automobile by employer while acting in scope of employment was sufficient as against general demurrer, to admit evidence showing plaintiff was an employee within the Compensation Act at time of injuries. Gen.Laws 1931, Act 4749, § 29(b); St.1933, p. 975.

6. Workmen's compensation ⇐1789

That the Industrial Accident Commission denied employee's claim for compensation was not conclusive as res judicata upon employee's appeal in action for damages for failure to secure payment of compensation where such former adjudication had not been pleaded or proved. Gen.Laws 1931, Act 4749, § 29(b); St.1933, p. 975.

7. Judgment ⇐948(1)

A defense founded upon the conclusiveness of a former adjudication must be either pleaded or proved and is waived if not so raised.

8. Judgment ⇐958(1)

A plea of res judicata does not oust the court of jurisdiction, since the scope and validity of a prior judgment may require scrutiny.

9. Workmen's compensation ⇐2141

On appeal by employee in action for damages for failure to secure payment of compensation, Supreme Court would not consider effect of an adjudication of Industrial Commission denying compensation when such adjudication was not pleaded or proved. Gen.Laws 1931, Act 4749, § 29(b); St. 1933, p. 975.

In Bank.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Maxine D. Rideaux against John Torgrimson, Jr., as administrator of the estates of John Torgrimson, deceased, and Anna Torgrimson, deceased, for damages for personal injuries. From a judgment sustaining a demurrer to the complaint without leave to amend, plaintiff appeals.

Reversed.

Prior opinion, 78 P.2d 205.

Aaron Sapiro, Samuel De Groot, Samuel A. Rosenthal, and Burton Briggs Crane, all of Los Angeles (Burton Briggs Crane, of Los Angeles, of counsel), for appellant.

W. M. Greathouse, of Los Angeles, for respondent.

EDMONDS, Justice.

The question presented for decision by this case is whether an action for damages sustained by an employee because of personal injuries survives the death of his employer under the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917, as they existed in 1936. Stats. 1917, p. 831, as amended; Deering's General Laws, 1931 ed., Act 4749. By the plaintiff's complaint she alleged that while employed by John and Anna Torgrimson and acting in the course and scope of her employment, she suffered personal injuries as a result of the negligent operation of an automobile by John Torgrimson; that John and Anna Torgrimson died as a result of injuries received in the same accident; and that they had failed to secure

to her the payment of compensation as required by law. To this complaint a demurrer was sustained without leave to amend and the appeal is from the judgment subsequently entered.

The compensation act defines the term employer as used in sections 6 to 31, inclusive, of it, to mean "* * * every person * * * who has any person in service under any appointment or contract of hire, * * * and the legal representative of any deceased employer". (Sec. 7.) It also provides: "If any employer shall fail so to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition thereto, such injured employee or his dependents may bring an action at law against such employer for damages, the same as if this act did not apply, and shall be entitled in such action to the right to attach the property of the employer, at any time upon or after the institution of such action, in an amount to be fixed by the court, to secure the payment of any judgment which may ultimately be obtained. Such judgment shall include a reasonable attorney's fee to be fixed by the court. The provisions of the Code of Civil Procedure, except in so far as they may be inconsistent with this act, shall govern the issuance of and proceedings upon such attachment; provided, that if as a result of such action for damages a judgment is obtained against such employer in excess of the compensation awarded under this act, the compensation awarded by the commission, if paid, or if security approved by the court be given for its payment, shall be credited upon such judgment; provided further, that in such action it shall be presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof shall rest upon the employer, to rebut the presumption of negligence. In such proceeding it shall not be a defense to the employer that the employee may have been guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow-servant. No contract, rule or regulation shall be allowed to restore to the employer any of the foregoing defenses." Sec. 29(b.) The appellant contends that the legislature by defining the term "employer" as including "the legal representative of any deceased employer", has given injured employees a cause of action for damages which survives, notwithstanding the rule of the common law.

By section 29(b) the legislature has provided a statutory cause of action for personal injuries quite different from that of the common law. If an employer fails to secure the payment of compensation, either an injured employee or his dependents may sue the employer, or "the legal representative of any deceased employer", for damages. In such an action the plaintiff may attach the property of the employer and is given the benefit of a presumption that the employer was negligent. The employer may not defend upon the ground that the employee was contributorily negligent, or assumed the risk of the hazards attending his employment, or that he was injured through the negligence of a fellow servant.

[1, 2] When a legislative body enacts a statute which prescribes the meaning to be given to particular terms used by it, that meaning is binding upon the courts. In re Monrovia Evening Post, 199 Cal. 263, 270, 248 P. 1017; 23 Cal.Jur. 751. Giving effect to the definition stated by the legislature, it has provided that under particular circumstances an injured employee or his dependents may sue the employer, or the legal representatives of any deceased employer, independently of the right to claim compensation in a proceeding before the industrial accident commission. The words "the same as if this act did not apply" make certain that the statutory cause of action may be maintained when an employee has failed to secure compensation, regardless of the general provisions of the statute for compensation in lieu of damages (Marshall v. Foote, 81 Cal.App. 98, 252 P. 1075; Rosslow v. Janssen, 139 Cal.App. 81, 33 P.2d 705); they do not refer to the common law action for personal injuries.

The social public policy of the state is declared in the statute, which, it is said, is intended to make effective a complete system of workmen's compensation irrespective of the fault of any party, and also to require full provision for adequate insurance coverage against the liability to pay or furnish compensation. Sec. 1. For those injured employees who find themselves without the protection of the insurance required by the compensation law, the legislature has provided a remedy

having somewhat the nature of a penalty. In such a case the burden of proof is largely upon the employer. To escape liability he must prove that he was not guilty of negligence, notwithstanding the presumption to the contrary provided by the statute.

[3] There is sound reason for making such a cause of action survive the death of the employer. By provisions of the statute which cover the subject in detail, an employee's right to compensation continues notwithstanding the death of his employer, and it is clear that the legislature, by its definition of the term "employer", intended to place an injured employee for whom no compensation has been secured upon the same basis, so far as his right to recover after the death of his employer is concerned, as one who is protected by insurance.

[4] This construction is compelled by the plain language of the statute. Unless the words "and the legal representative of any deceased employer" were intended to give this right they have no purpose. If any ambiguity may be said to exist, the doubt must be resolved in favor of the appellant. The statute by its terms requires that it shall be liberally construed "with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment". Sec. 69.

[5] The respondent asserts that even if the cause of action survived, the allegations of appellant's amended complaint are insufficient to establish an employer-employee relationship between the decedents and the appellant because it was not alleged that they agreed to pay her any consideration for her services. The contention has no merit. The complaint alleges that the appellant "was employed by and was in the employ of said John Torgrimson and said Anna Torgrimson, to assist them in driving their automobile while traveling from their home in the County of Los Angeles to, in and about the State of Oregon * * * and during said trip * * * to render her services as a companion in caring for and attending John Torgrimson and Anna Torgrimson, and at all times herein mentioned, plaintiff was engaged and was acting within the course and scope of her said employment". These allegations, at least against a general demurrer, were clearly sufficient to entitle the plaintiff to present evidence tending to show that, at the time of the injury, she was an employee within the meaning of the Compensation Act.

Since this case was argued the respondent has called the attention of the court to proceedings instituted by the petitioner before the Industrial Accident Commission to obtain compensation for the injuries for which damages are sought in the present action. The commission denied her an award upon the ground that she was not an employee of the class entitled to protection under the Workmen's Compensation Act. A petition to review that decision was denied by this court and it has since become final. Rideaux v. I. A. C., L. A. No. 16954. Assuming that this court can take judicial notice of the finality of the decision in that proceeding, the question arises whether the conclusion reached therein to the effect that the appellant was not an employee within the meaning of the compensation statute can be considered as res judicata upon this appeal.

[6-9] A consideration of the nature of a plea of res judicata indicates that this question must be answered in the negative. A defense founded upon the conclusiveness of a former adjudication must be either pleaded or proved. Brown v. Superior Court, 13 Cal.App.2d 693, 57 P.2d 965; Spitzer v. Superior Court, 74 Cal.App. 494, 241 P. 270. Such defense is waived if not raised either by the pleadings or the evidence. Domestic and Foreign Petroleum Co. v. Long, 4 Cal.2d 547, 51 P.2d 73; 15 Cal.Jur., p. 210. Since the scope and validity of the prior judgment may require scrutiny, a plea of res judicata does not oust the court of jurisdiction. Reidy v. Superior Court, 220 Cal. 111, 29 P.2d 780; United Security Bank & Trust Co. v. Superior Court, 205 Cal. 167, 270 P. 184; Baird v. Superior Court, 204 Cal. 408, 268 P. 640. In view of these principles, this court cannot now consider the effect of an adjudication which may never be relied upon as a bar to the action for damages, or which the appellant may be able to show does not estop her from prosecuting this suit.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; HOUSER, J.

HAMILTON v. PACIFIC ELECTRIC RY. CO.

L. A. 16885.

Supreme Court of California.

Jan. 24, 1939.

Rehearing Denied Feb. 23, 1939.

1. Carriers ⇐280(1)

Carrier owed to passenger waiting in station at least a reasonable inspection of its waiting room as a matter of protection of safety of passenger.

2. Evidence ⇐54

One inference cannot be made to depend on a precedent inference. Code Civ.Proc. §§ 1958, 1960.

3. Evidence ⇐595

The jury is authorized to make any logical and reasonable deduction from evidence.

4. Trial ⇐139(1), 142

The jury is the exclusive judge of the weight and value of inference that may be drawn from evidence.

5. Appeal and error ⇐996

Any attempt on part of appellate court to draw an inference of fact from evidence constitutes a usurpation of the province of trial court.

6. Appeal and error ⇐996

The fact that some inference other than that which has been drawn by a jury may appear to an appellate tribunal to be the more probable affords no sufficient reason for disturbing the jury's inference.

7. Appeal and error ⇐996

An appellate court does not have power to draw an inference different from that which jury has deduced, notwithstanding evidence upon which inference is founded is undisputed or without conflict.

8. Carriers ⇐316(1)

In action against carrier for injury sustained when passenger stepped in small pool of oil on floor of station in which passenger was waiting, duty of establishing facts sufficient to create liability of carrier rested on passenger.

9. Carriers ⇐318(2)

Evidence that passenger spent between 20 and 30 minutes in carrier's station, that passenger did not observe any person either enter into or depart from waiting room, and that when passenger attempted to leave waiting room she slipped on small pool of oil on floor, sustained judgment for passenger on theory that carrier had not performed its duty in giving reasonable inspection to premises.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Personal injury action by Jennie E. Hamilton against the Pacific Electric Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 80 P.2d 515.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for appellant.

Leo V. Youngworth and J. Harold Decker, both of Los Angeles, for respondent.

HOUSER, Justice.

The undisputed facts herein appear to be that on a specified date, at about 8:30 o'clock p. m., thereof, on the arrival within its station at the city of Los Angeles of an interurban car that was operated by the defendant, plaintiff alighted therefrom and thereupon, pending the departure from such station of another car which plaintiff intended to use for the purpose of being thereon carried to her proposed destination, went into a waiting room which was located within such station and which was provided by the defendant for the use of its patrons. Plaintiff remained in the waiting room for a space of between 20 and 30 minutes and, although during such time there were "10 or 12 or 15" other persons therein, she "did not observe" any person either enter into or depart from the said waiting room. However, when the car arrived upon which plaintiff had intended to be transported, at the moment when she attempted to leave the waiting room, she slipped upon some oil that lay on the floor immediately in front of the exit door thereof, and thereby was caused to be thrown to the floor; from which fall she sustained the injuries that were the basis of her claim of damages against the defendant, and which form the subject-matter of the instant action. At the conclusion of plaintiff's testimony, both parties rested. From a judgment which was rendered in favor of plaintiff, the defendant has appealed.

On the part of plaintiff no claim is made that preceding the instant when the accident occurred, the defendant had actual notice of the fact that oil lay or ever had lain upon the floor of its waiting room. In such circumstances, the negligence, if any, of the defendant must rest upon the assumed fact that preceding that moment, the oil had lain upon the floor of the waiting room for such a length of time that the defendant was charged with notice of the fact of its said existence and location.

[1, 2] It is not denied that as a matter of protection of the safety of plaintiff the defendant owed to plaintiff at least a reasonable inspection of its waiting room. As to the question of whether the defendant had given a reasonable inspection of such premises preceding the moment when the accident occurred, it is obvious that, prima facie, the length of time that the oil had been upon the floor thereof before that instant would be practically determinative. For example, if no inspection of the waiting room by the defendant had occurred within 24 hours preceding the accident, in the absence of defensive evidence, it fairly might be concluded by a jury that the defendant had failed in its duty to plaintiff in that regard. On the other hand, had inspection been made within one minute before the occurrence of the accident, it might very reasonably be held that the defendant had not so failed. But approximately what space of time had elapsed between the hour and minute when the oil was deposited upon the floor of the waiting room and the moment when plaintiff slipped on such oil and sustained the injuries of which she complained, does not appear from any direct evidence that was received in that behalf. In that regard, as hereinbefore has been stated, the only direct evidence consisted of testimony that was given by the plaintiff to the effect that during the 20 or 30 minutes that she had occupied the waiting room, she observed no one who either entered it or left it,—notwithstanding the additional fact that there were "10 or 12 or 15" other persons in the waiting room during that time. Of course, it is possible that the oil was upon the floor at the time when plaintiff entered the waiting room and that it so remained until she attempted to leave it,—in which case the question of whether the defendant had performed its legal duty to plaintiff would be a question of fact for determination either by a jury or by the trial court. On the other hand, the bare fact that plaintiff "did not observe" any person either enter or leave the waiting room at any time during the 20 or 30 minutes of her stay therein would not constitute very strong or persuasive evidence that neither an inspector of the premises, in the performance of his duties as such, had not visited the waiting room at any given moment during such 20 or 30 minutes, nor that within that period no other person had either entered or departed from the waiting room. Indeed, considering the fact that at 8:30 o'clock p. m. many persons were making use of the waiting room, it is not improbable that during the time that plaintiff was an occupant thereof, several persons either did enter or leave it,—in which event it would have been possible that at any given moment of such time any one of them might have caused the oil to be deposited upon the floor of the waiting room. However, in order to arrive at the indicated conclusion it would be necessary that one inference be made to depend upon a precedent inference; and, as has been repeatedly ruled, such a course of reasoning is not permitted in the law.

By statutory provision, an inference is defined as "a deduction which [without an express direction of law to that effect] the reason of the jury makes from the facts proved". Sec. 1958, Code Civ.Proc. But it is essential that an inference be founded either upon a fact that has been "legally proved", or upon "a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature". Sec. 1960, Code Civ. Proc.

In the case of Thomas v. Visalia Electric R. Co., 169 Cal. 658, 661, 147 P. 972, 973, it is declared that "where mandatory presumptions are not exacted, it is the right and duty of the jury to draw such reasonable inferences from the evidence *as may appeal to and satisfy their minds*". (Italics added.)

Again, in Rovegno v. San Jose K. of C. Hall Ass'n, 108 Cal.App. 591, 596, 291 P. 848, 850, it was said: "In California, inferences in themselves constitute a recognized class of indirect evidence which a court or jury may not disregard. Code Civ.Proc., §§ 1957, 1958. Furthermore,

'upon a trial of a case the jury is to find not only the facts but also the inferences from them, if any may properly be drawn. * * * When an inference is supported by the evidence, and is not opposed to human experience and reason, it cannot be disturbed by an appellate court.' 10 Cal. Jur. 738." See, also, In re Estate of Moore, 65 Cal.App. 29, 223 P. 73.

[3-7] It may be confidently declared that, founded upon the evidence, the jury not only is authorized to make any logical and reasonable deduction, but also that the jury is the exclusive judge of the weight and value of the inference that may be drawn by it; furthermore, as corollary thereto, that any attempt on the part of an appellate court to draw an inference of fact constitutes "a usurpation of the province of the trial court". The fact that some inference other than that which has been drawn by a jury may appear to an appellate tribunal to be the more reasonable, affords no sufficient reason for disturbing the inference in question. (10 Cal.Jur. 735 et seq.) It also appears to be well-established law that notwithstanding the fact that the evidence upon which the inference is founded is undisputed or without conflict, an appellate court has not the power to draw an inference different from that which the jury has deduced.

In the case of Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 67, 148 P. 212, the following language occurs: "The question of negligence is one of fact for the jury, and the finding of the jury cannot be overturned by the court where the evidence is conflicting, or where, although the evidence is without conflict, different inferences may reasonably be drawn from it."

Likewise, in Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 44, 26 A.L.R. 123, it was said: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. * * *"

[8] It is clear that the duty of establishing the existence of facts sufficient to create a liability in the defendant rested on plaintiff. Accordingly, she was obligated to prove a negative, to-wit, that the defendant had given no reasonable inspection to the waiting room.

[9] Such being the law, it remains to be considered whether the implied inference which was drawn by the trial court to the effect that prior to the happening of the accident the defendant had made no reasonable inspection of its said premises is sufficiently supported by the unquestioned fact that, during a space of time which was between 20 and 30 minutes, plaintiff "did not observe" that any person either entered into or departed from the waiting room.

In the case of Russell v. McDowell, 83 Cal. 70, 81, 23 P. 183, 187, it is said that: "Moreover, it is to be considered that the contestant was assuming the difficult task of proving a negative, i. e., the want of qualification of a large number of voters; and the doctrine is well established that slight proofs make out a prima facie case where a negative is to be proved. In all such cases, rebuttal is comparatively easy, and is consequently of imperative obligation. Here no proof in rebuttal was offered, and the evidence for contestant stands absolutely uncontradicted." See, also, Parsons v. Weis, 144 Cal. 410, 420, 77 P. 1007; Owens v. Carmichael's U-Drive Autos, Inc., 116 Cal.App. 348, 2 P.2d 580; People v. Macbeth, 104 Cal. App. 690, 286 P. 448.

In the face of positive evidence to the effect that a signal of warning was given of the approach of a car with which an automobile collided, it has been held that negative evidence by passengers in the automobile to the effect that they heard no such signal was sufficient to sustain a finding of fact by the jury that no warning was given. Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709.

To like effect see: Hunt v. Los Angeles Ry. Corp., 110 Cal.App. 456, 294 P. 745; Takahashi v. White Truck, etc., Co., 15 Cal.App.2d 107, 59 P.2d 161. In the case of Lahey v. Southern Pacific Co., 16 Cal.App.2d 652, 661, 61 P.2d 461, 465, it was said: "The negative testimony or testimony of witnesses that they did not hear the ringing of a bell or the sounding of a whistle is admissible and sufficient to support a verdict of the jury as to the

nongiving of signals, we need only to cite the following cases without quoting therefrom: Jones v. Southern Pacific Ry. Co., 74 Cal.App. 10, 239 P. 429; Switzler v. Atchison, T. & S. F. Ry. Co., 104 Cal.App. 138, 285 P. 918."

Analogously, where the issue of the reputation of a party litigant is involved, it has been ruled that testimony by a witness to the effect that, although favorably situated with reference thereto, he has never heard the reputation of the person in question discussed, affords cogent evidence that his reputation is good. People v. Pauli, 58 Cal.App. 594, 209 P. 88; People v. Adams, 137 Cal. 580, 70 P. 662; People v. Stennett, 51 Cal.App. 370, 197 P. 372.

From a consideration of the foregoing, it would seem well established not only that plaintiff had offered sufficient evidence to sustain a judgment in her favor, but also that it was within the province and the power of the trial court to draw therefrom the inference that the defendant had not performed its duty in giving a reasonable inspection to the premises in question.

It follows that the judgment should be, and it is, affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; EDMONDS, J.



12 Cal.2d 653

FARNEY v. STOCKTON PORT DIST. et al.

Sac. 5265; S. F. 16132.

Supreme Court of California.

Jan. 30, 1939.

Rehearing Denied Feb. 27, 1939.

1. Appeal and error ⇐781(1)

An appellate court will not review or determine questions which have become moot.

2. Pilots ⇐5

The statute providing for issuance of annual pilot licenses, renewal thereof, and notice and hearing in event of nonrenewal is inapplicable to licenses issued by the Stockton Port District. St.1937, pp. 815, 818, 821–823, 825, 826, 960, 962, 963, §§ 1101, 1154, 1160, 1190–1193, 1270, 1290–1292, 1371, 6249, 6290, 6299.

3. Pilots ⇐1, 5

The members of Stockton Port District's Board of Port Commissioners have exclusive power to appoint, regulate and refuse to reappoint pilots for such district, and such pilots serve at pleasure of such board, which is not required to renew their licenses, whether expired, suspended or revoked. St. 1937, p. 792 et seq.; pp. 960, 963, §§ 6249, 6299.

4. Mandamus ⇐187(9)

Whether port district and its Board of Port Commissioners may suspend or revoke pilot's license, issued for term fixed by them at one year, without notice or hearing, need not be decided by Supreme Court on appeal in mandate proceedings to compel them to reinstate revoked license or issue renewal license, as their liability to licensee for loss of pilot fees may best be determined elsewhere in action for damages. St.1937, p. 792.

5. Pilots ⇐5

The suspension or revocation of pilot's license by port district's Board of Port Commissioners does not deprive him of means of livelihood as pilot, as he may pursue such calling under license procured from appropriate federal authorities or any local board or commission authorized to issue such licenses. St.1937, p. 792.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Proceeding by Edgar D. Farney for a writ of mandate to compel the Stockton Port District and its Board of Port Commissioners to reinstate petitioner's revoked pilot commission or license, and original proceeding by petitioner for a writ of mandate directing respondents to issue to him another or renewal commission or license. From a judgment for respondents in the reinstatement proceeding, petitioner appeals.

Affirmed, and alternative writ in original proceeding discharged and peremptory writ denied.

Prior opinions, 81 P.2d 996; 82 P.2d 609.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for petitioner.

Louttit, Marceau & Louttit, of Stockton, for respondent.

WASTE, Chief Justice.

The above-entitled proceedings were separately commenced by the petitioner seeking writs of mandate to compel the respondent Port District and its Board of Port Commissioners to take certain action, hereinafter to be specified, in connection with licensing him as a pilot in and for the respondent district. Inasmuch as the two proceedings more or less complement each other, we shall consider and determine the issues involved in one opinion.

[1] It appears that the proceeding first above entitled (Sac. No. 5265) originated in the superior court in and for the county of San Joaquin by the filing of a petition wherein the petitioner alleged that the respondents had theretofore issued to him a pilot commission for the term of one year and that prior to the expiration thereof and without cause or notice to him had suspended and revoked the same. It was prayed that a peremptory writ issue compelling the respondent board to reinstate the pilot commission or license theretofore issued to him and which had not then expired. Following several amendments of the petition, respondents' demurrer thereto was sustained without leave to amend. Petitioner appealed from the judgment thereafter entered to the District Court of Appeal of the Third Appellate District, 81 P.2d 996. That court affirmed the judgment for reasons not necessary to here mention and in denying a rehearing, 82 P.2d 609, declared that "the issue which was involved on the appeal in this proceeding became moot before the appellant's [petitioner's] brief was filed therein, and that the granting of a peremptory writ of mandamus as prayed for would serve no useful or beneficial purpose". In other words, the term of the one-year commission or license issued to petitioner, which had been revoked and which by said proceeding he sought to have reinstated, had in the interim completely expired and the issuance of a writ could not possibly serve the only purpose for which it was sought. An appellate court will not review or determine questions which have become moot, since the decision will serve no useful or beneficial purpose. O'Neal v. Seabury, 24 Cal.App.2d 308, 311, 74 P.2d 1082. As to the determination of a mandamus proceeding, it is stated in 38 C.J. 949, section 750, that "Ordinarily moot questions will not be considered; and, where pending the review events have occurred rendering a decision of the legal questions involved unnecessary or useless, the court will not pass upon them."

[2] Though we were, and still are, of the view that the proceeding first above entitled was moot, we nevertheless granted the petition for hearing therein because of the almost simultaneous filing with this court of a separate and distinct petition (S. F. No. 16132, second above-entitled matter) wherein petitioner sought a writ of mandate directing the respondents to issue to him another or renewal commission or license as pilot for one year commencing with the expiration of the old or former license. In support of this application the petitioner refers us to section 1101 of the Harbors and Navigation Code of this state, St.1937, p. 815. That section provides that "Pilots licensed by commissioners shall be carefully examined as to their qualifications, and, if found to be qualified and worthy, they shall receive licenses as pilots for a term of twelve months. Licenses shall be renewed annually unless the commissioners have good cause to withhold renewal. Whenever the commissioners deem they have cause, or intend for any reason to withhold renewal of a pilot's license, the secretary of the board of commissioners shall serve notice, in writing, on the pilot, specifying the causes, at least ten days before the expiration of his license. The pilot is thereupon entitled to a full hearing before the board."

Petitioner alleges, among other things, that respondents, without cause or notice to him, have refused to renew his license in asserted violation of the quoted code section. He also urges that the language of this section is such as to require a determination herein as to the propriety of the revocation of his prior license in order to give effect to the remaining provisions of the cited section calling for notice and hearing when a renewal of license is to be refused. As we shall presently show, section 1101, supra, is inapplicable here and without effect upon licenses or commissions issued by the respondent district. This, in effect, is the theory of the respondents in support of their demurrer to the petition filed in the second above-entitled proceeding, now under consideration. They urge that the provisions of section 1101 of the Harbors and Navigation Code, relied on by the petitioner, as indicative of his right to a one-year license together with a renewal thereof for a similar period, in the

absence of notice, hearing and the showing of cause for any other or different action, appear in a portion of the code which is herein applicable because of the specific provisions of another portion thereof governing port districts having the status of the respondent district.

We have examined the Harbors and Navigation Code (Stats.1937, chap. 368, p. 792), which is the counterpart of many former scattered sections of the Civil and Political Codes. In our investigation thereof we have directed attention to the sections of said code having to do particularly with the licensing and regulating of pilots. In this connection we have found that section 1101, relied on by petitioner and quoted above, appears in chapter 1 of division 5 of the code. Our examination satisfies us that said section, providing as it does for the issuance of pilot licenses for terms of one year with provision for renewal thereof and notice and hearing in the event of nonrenewal, is not to be applied to all pilot licenses issued under state authority. This conclusion is suggested by the provisions of the many other specific and frequently conflicting sections controlling the licensing and regulating of pilots by the governing boards of the several bay, harbor, port and other districts provided for and mentioned in the code. Among such other provisions governing the licensing and regulating of pilots we find the following:

Chapter 2 of division 5 of said code (containing sections 1150 to 1193) specifically provides for the licensing, regulation, suspension, etc., of pilots by the appropriate board of pilot commissioners for San Francisco, San Pablo and Suisun bays. Section 1154, p. 818, of the chapter grants the board power to make by-laws and rules for the government of pilots appointed by it. Section 1160, p. 818, provides that the board shall renew the licenses of, or examine and license, not less than fifteen nor more than twenty bar pilots and not more than five bay pilots. Under the provisions of section 1190, p. 821, of said chapter, the board of pilot commissioners for the three named bays may summarily suspend pilots appointed by it for designated causes and may then investigate and decide the complaint. Sections 1191 and 1192, p. 821, provide for the suspension and revocation of licenses of pilots for other specified causes following a ten-day notice to the pilot and hearing thereon. In the event the license of a pilot for one of these bays is not to be renewed, he is entitled (under section 1193, p. 822) to a trial and hearing (no definite period of notice being prescribed) and the decision of the board is open to review, by trial de novo, in the superior court. Thus it would appear that the legislature by specific enactments has cared for the licensing and regulating of pilots for San Francisco, San Pablo and Suisun bays.

Chapter 3 of the code, section 1250 et seq., p. 822 et seq., supra, indicates that they have similarly specifically legislated as to Humboldt bay for therein it is provided that the board of pilot commissioners for said bay "may appoint * * * such number of pilots as are necessary, who shall be subject to removal by the board at any time". Sec. 1270, p. 823. In sections 1290 and 1291, pp. 824, 825, provision is made for the forfeiture and revocation of such pilot licenses following notice and hearing. As regards the renewal of licenses issued to pilots of Humboldt bay, section 1292, p. 825, expressly places the burden, contrary to the provisions of section 1101, supra, and the earlier chapter covering San Francisco, San Pablo and Suisun bays, on the pilot to "apply for a renewal of his license ten days before its expiration, otherwise it need not necessarily be renewed".

Again, in chapter 4, section 1350 et seq., p. 825 et seq., we find specific provisions covering a designated harbor, viz., San Diego harbor. Herein we find express legislation for the licensing of pilots by the board of harbor commissioners of that harbor for a term of twelve months, which licenses "shall be annually renewed unless the board has good cause to withhold renewal". In the event a pilot's license is not to be renewed he is entitled to ten days' notice thereof and a full hearing before the board (sec. 1371, p. 826). Therefore, as regards the renewal (which is the immediate problem to which we are now directing our attention) of the licenses of pilots for San Diego harbor, we find specific provision therefor consistent with the language of section 1101, supra, but contrary to appropriate provisions governing other bays and harbors, the legislature thus again evincing its intention to legislate specifically in certain instances.

Division 6 of the Harbors and Navigation Code, section 1690 et seq., p. 828 et seq., is divided into three parts and contains many provisions pertinent to the operation and regulation of San Francisco, San Diego and Eureka harbors, exclusive

of the licensing of pilots therefor. Division 7 of said code, section 4000 et seq., p. 883 et seq., likewise is without pertinency to our present inquiry.

Division 8 of the code, section 5000 et seq., p. 893 et seq., provides for the formation, government and regulation of several types of harbor and port districts. In part 1 provision is made for the creation and operation of "Municipal Port Districts" with an express and specific grant of powers to the governing board thereof. The same is generally true of part 2 having to do with "Harbor Improvement Districts", of part 3 dealing with "Harbor Districts", of part 4 covering "Port Districts", of part 5 dealing with "Recreational Harbor Districts" and of part 6 having to do with "River Port Districts". We shall direct our consideration exclusively to the specific provisions of part 4, section 6200 et seq., p. 957 et seq., concerning "Port Districts" for it is conceded that the respondent district comes within the purview of the districts contemplated and legislated for therein. The formation of such a "port district" is provided for in chapter 1, section 6210 et seq., p. 957 et seq., and in chapter 2, section 6240 et seq., p. 959 et seq., it is declared, among other things, that the district "shall be governed by a board of port commissioners" consisting of five members appointed in a designated manner. In section 6249, p. 960, power is conferred on the board to "prescribe rules and regulations pertaining to the selection of officers and employees of the district", with the added proviso that "the term of each officer appointed by the board shall be during the pleasure of the board". In People v. Woodbury, 14 Cal. 43, it was held that a pilot appointed by a local authority to pilot boats over a bar or in designated waters, or to a particular port, is a public officer. This decision was referred to with approval in People v. Abbott, 16 Cal. 358, 359, and Spreckels v. Graham, 194 Cal. 516, 528, 228 P. 1040.

A district created under this part of the code is by section 6290, p. 962, declared to be "a public corporation created for municipal purposes" and by section 6299, p. 963, "it has exclusive jurisdiction over, and it may provide for and supervise pilots and the pilotage of sea-going vessels from the end of jurisdiction of existing pilot authorities to points lying upon any navigable waterway project of the United States, entering the district".

[3] We are satisfied from our review of the entire Harbors and Navigation Code, with particular emphasis on sections 6249 and 6299 thereof, which appear in that part of the code governing the formation and regulation of port districts of the character and status of the respondent district, that the legislature by express and specific enactment has definitely conferred upon the respondent members of the board of port commissioners of the respondent port district exclusive power to appoint, regulate and to refuse to reappoint pilots for the respondent port district. The definite omission by the legislature of any provision for licensing of pilots for such a district for a designated period or to provide for notice and hearing in the event of a contemplated refusal to renew a pilot's license, contrary to its express mandate in these particulars as regards other districts, ports and harbors, leads to the inevitable conclusion that pilots in and for the respondent district, and districts similarly situated, serve at the pleasure of the appointing power, viz., the board of port commissioners of said district. It is declared in Matter of Carter, 141 Cal. 316, 320, 74 P. 997, 998, that "in creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and that in such a case the incumbent takes the office subject to the conditions which accompany it. It may always be terminated in such manner and by such means as are prescribed by the law which created it". In other words, the absence of a fixed statutory term of license and provision for notice in the event of nonrenewal thereof (as is elsewhere provided in the code as to other districts), together with the grant to the respondent board of "exclusive" jurisdiction and supervision over pilots in and for the respondent district, are indicative of a legislative intention that the petitioner, and others similarly situated, are licensed as pilots for such district at the pleasure of the district and its governing board and that respondents in their conduct and operation of the port of Stockton, and in their discretion, are not required to renew such licenses, whether prior licenses have been permitted to run for the entire period for which they may have been issued by the board or have been suspended or revoked in advance thereof. In either event, the respondent district and board are not required, in our opinion, to renew the same and such con-

clusion adequately determines the proceeding second above-entitled wherein, as already stated, petitioner seeks to compel a renewal of a prior license.

There are other cogent reasons that appear from an examination of the Harbors and Navigation Code, some of which are mentioned in respondents' briefs, but which need not be here set forth in detail, definitely indicating that section 1101, supra, is inapplicable and that respondents need not renew petitioner's license and that mandamus should not, therefore, issue herein. Briefly these reasons are that section 1101 applies to licenses issued by "pilot commissions". San Francisco, San Pablo and Suisun bays, and perhaps others, have "pilot commissions". The respondent district is governed by a "port commission". The legislature may have used these varying terms advisedly. Secondly, chapter 1 of division 5, wherein appears section 1101, contains other sections and provisions apparently inapplicable to districts of respondent's status. Thirdly, sections 1100 to 1116 of the code, pp. 815–817, were formerly in existence as sections of the Political Code and antedate by many years the legislature's enactment in 1931 of a policy governing port districts, such as the respondent district.

[4] Whether the respondents after issuing a (prior but now expired) license to petitioner for a term fixed by them at one year may, without notice or hearing, suspend or revoke the same need not here be decided. Determination of this point is not indispensable to the disposition of these mandate proceedings, the principal purpose of which is to compel reinstatement of such prior license now expired and the issue therefore moot (Sac. 5265) and to compel issuance of a renewal license for an additional period (S.F. 16132), which issuance, as we have shown, is a matter within the exclusive jurisdiction of the governing board of the respondent district. If, as petitioner urges, the respondents acted improperly in suspending or revoking, without notice and hearing, his prior but now expired one-year license theretofore issued by them, and are therefore answerable to him for the loss of pilot fees from the date of such revocation to the expiration date of such prior license, a point upon which we express no opinion, it would seem that that issue, involving as it will controverted questions of fact as to the cause or causes for such revocation and as to the damages, if any, caused thereby, together with a question as to the legal liability of the respondents, may best be determined in an action, if deemed advisable, based on such alleged wrongful revocation and asserted resulting damages, triable before a court charged with and equipped for the preliminary finding of the pertinent facts. It is not our purpose to indicate that such an action will lie under the assumed circumstances, but taking petitioner's contention at its face value, and without expressing an opinion thereon, the matter may best be determined elsewhere.

[5] In conclusion, we desire to state that the effect of respondents' action, whether proper or improper, is not, as urged, to deprive petitioner of all means of livelihood as a pilot. He is free to pursue such calling under any license that he may procure from the appropriate federal authorities or any of the several local boards or commissions vested with power to issue such licenses.

The judgment in the proceeding numbered Sac. 5265 is affirmed. The alternative writ issued in the proceeding numbered S. F. 16132 is discharged and a peremptory writ denied.

We concur: CURTIS, J.; LANGDON, J.; EDMONDS, J.; SHENK, J.; SEAWELL, J.

BRYANT v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 12107.

District Court of Appeal, Second District, Division 2, California.

Jan. 25, 1939.

Divorce ⇐269(8)

Where a party is not in court when order for payment of alimony by him is made and is not served with copy thereof, court is without jurisdiction to punish him for contempt in failing to comply with such order.

Original proceeding by Sumner C. Bryant for a writ of prohibition, restraining the Superior Court in and for Los Angeles County from enforcing an order adjudging petitioner guilty of contempt for failure to comply with an order requiring him to pay alimony and a sum for the support of his minor child.

Writ granted.

Lauren M. Handley, of Los Angeles, for petitioner.

No appearance for respondent.

McCOMB, Justice.

This is an original application for a writ of prohibition to restrain respondent court from enforcing an order adjudging petitioner guilty of contempt of court for failure to comply with an order requiring him to pay (a) alimony and (b) a sum for the support of his minor child.

The undisputed facts are:

February 11, 1938, respondent court made an order requiring petitioner to pay $50 per month by way of alimony, and on August 26, 1938, made an order requiring him to pay $25 per month for the support of his minor child. Petitioner was not in court when the order of February 11, 1938, was made, nor was he ever served with a copy thereof. Petitioner is not delinquent upon the order for the support of his minor child.

It is the established law of California that where a party is not in court at the time an order for the payment of alimony is made and is not served with a copy thereof, the court is without jurisdiction to punish him for contempt. In re Meyer, 131 Cal.App. 41, 44, 20 P.2d 732; Wallis v. Superior Court, 72 Cal.App. 90, 93, 236 P. 927.

Applying the foregoing rule to the facts in the instant case, since petitioner was neither present in court nor served with a copy of the order directing him to pay alimony, the respondent court was without jurisdiction to punish him for contempt and its order is void.

For the foregoing reasons let the writ issue as prayed.

We concur: CRAIL, P. J.; WOOD, J.



30 Cal.App.2d 507

EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES v. MILSTEIN et al.

Civ. 12120.

District Court of Appeal, Second District, Division 1, California.

Jan. 25, 1939.

As Modified Feb. 1, 1939.

Appeal and error ⇐624

On motion to dismiss appeal from order denying motion to set aside default judgment, appellant claiming want of transcript was due to lack of finances and asserting that transcript would be filed if given reasonable time was given additional time.

Action to foreclose a mortgage by the Equitable Life Assurance Society of the United States against Grace Milstein and others. From an adverse judgment, the named defendant appeals. On motion to dismiss appeal.

Order in accordance with opinion.

Grace Milstein, in pro. per.

Newlin & Ashburn and George W. Tackabury, all of Los Angeles, for respondent.

PER CURIAM.

Motion to dismiss an appeal for failure to file transcript within time. The clerk's certificate offered in support thereof in-

dicates that the action is one involving foreclosure of a mortgage upon property owned by appellant, Grace Milstein; that as to said appellant a default judgment was entered on June 3, 1938, whereupon appellant made a motion to set aside the default judgment, which relief was denied on June 14, 1938. On June 22, 1938, appellant herein appealed from the last-named order. Sale of the property was had pursuant to the judgment on July 12, 1938. A bill of exceptions prepared by appellant, after hearing on objections thereto, was finally engrossed and filed in the superior court on August 4, 1938. No record on appeal has been filed in this court to date.

In opposition to the motion, appellant, appearing in propria persona, makes affidavit in part as follows:

"That this Defendant and Appellant is without funds to employ an Attorney and has been throughout all the proceedings; that all of the proceedings in this action which have been filed on behalf of defendant and appellant have been only such pleadings as she was able to gather by help and assistance; that not knowing the law this defendant did not know how to perfect her appeal according to the law and therefore had to use whatever information she could gather; that after filing her appeal by a Bill of Exceptions she was informed that it would be necessary for her to have the record printed and transmitted to the District Court of Appeal; that in pursuance of this information she went to the printing firm of Baird and Parker, Law printers, in the City of Los Angeles, and was informed that it would cost approximately $60.00 to print the record on appeal; that this affiant did not have the money and does not now have the money to print the record on appeal; * * *."

At the oral argument upon the aforesaid motion to dismiss the appeal, appellant advised that if reasonable time were given her she could arrange to have the bill of exceptions printed and filed in this court.

In view of the fact that this matter has not been heard upon its merits; that the judgment was entered, so far as appellant was concerned, upon the taking of her default, which default judgment she sought without delay to have set aside, as indicated by the fact that the same was denied within eleven days after the entry of the default judgment against her; and her appeal being from the order denying her motion to set aside the default judgment, —we are of the opinion that the ends of justice herein would be served by ordering this matter on the calendar for further hearing February 27, 1939, at 10 o'clock a. m.; that should appellant on or before the date of such calendar hearing cause to be printed and filed in this court the transcript on appeal, that the motion to dismiss such appeal shall be denied; but in the event such transcript on appeal is not lodged in this court as aforesaid, the motion to dismiss the appeal shall be granted. It is so ordered.



30 Cal.App.2d 532

PEOPLE v. MATTMUELLER.

Cr. 440.

District Court of Appeal, Fourth District, California.

Jan. 25, 1939.

1. Burglary ⇐41(6)

Circumstantial evidence including fact that accused was found in possession of tools which fit marks in burglarized places and was in vicinity of burglarized places on night of burglary and owned shoes which made tracks corresponding with tracks found near burglarized places sustained conviction for second-degree burglary.

2. Criminal law ⇐1168(2)

Where accused's counsel called attention to improper question which court immediately ordered stricken and admonished jury to disregard, propounding of objectionable question was not reversible error.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Waldemar Mattmueller was convicted of burglary in the second degree, and he appeals.

Affirmed.

Theodore G. Krumm of San Bernardino, and E. L. Johnson, of San Diego, for appellant.

Earl Warren, Atty. Gen. and Warner I. Praul, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

The appellant was charged with the offense of burglary in an information containing two separate counts. The first count alleged generally that on or about the 1st day of October, 1937, he burglarized a certain office and warehouse of the Carlsbad Feed & Fuel Company. In the second count he was similarly charged with burglarizing, on the same date, the office building of the Carlsbad Mutual Water Company. Both buildings were located in Carlsbad, a few blocks distant from each other. To this information and each of the respective counts thereof, the appellant entered a plea of not guilty. Upon the conclusion of the trial by a jury, the appellant suffered a conviction on both counts of the information. The degree of the offense as stated in each count was fixed as burglary of the second degree. Judgment was thereafter pronounced and a motion for a new trial was denied. The appeal here perfected is taken not only from the judgment but also from the order denying a motion for a new trial.

This case was previously presented to this court for decision on an appeal from an order granting a motion for a new trial after conviction by a jury. 25 Cal. App.2d 418, 77 P.2d 504.

A goodly portion of the evidence produced against the appellant may be tersely classified as circumstantial evidence. The attorney-general has not favored us with a brief in this case although the time for filing one has long since passed. However, the factual background, taken from the record, may be thus related.

On the evening of October 1, 1937, some time between the hours of 5:30 p. m. and 6:30 a. m. of the following day, the feed and fuel supply warehouse referred to in the information was entered and burglarized. The entry was made through the rear of the warehouse by using an ordinary wood-bit and drill. By the use of the bit a series of holes were drilled through the wooden walls until finally a section of board was removed (later received in evidence), sufficient in size to permit the entry of an individual. There was a tar composition roof on the lean-to at the back of the warehouse over which the burglar passed in making his entrance into the warehouse. There was left in the tar on the roof a heel print, of which photographs were taken and at the trial they were received in evidence. After entry was made into that particular warehouse, a safe of venerable vintage was broken. A series of three nuts were removed from the safe but these efforts were apparently in vain, for the operator was unable to open that particular safe.

The evidence further discloses that some instrument, such as a tire iron or a leaf of a spring sharpened on one edge, had been used in part, in cutting through a partition leading to another room in that same establishment. There is no evidence that would indicate that anything was taken from this building.

On the same night between the same hours, the office building of the Carlsbad Mutual Water Company and the Carlsbad Irrigation District was entered through the rear window by the use of a tire iron or jimmy, and the closed door between the two rooms, which were separately occupied by the above-mentioned companies, was also pried open by the use of the same instrument. There was one ordinary safe located in one of the rooms and a vault recess in the wall in the other room. Those safes were broken into in the same manner by striking off the knob or turning surface of the dial and then striking it with a drill or a punch, removing the center core running to the knob and thence to a series of cylinders in the safe. In this manner entry was effected into the two safes. From one of the safes the sum of $39 was taken.

The appellant lived in San Bernardino with his parents. About dusk on the evening of October 1st, the night those burglaries took place, appellant drove to Oceanside in a car registered in his mother's name and he registered at an auto court there, a distance of less than two miles from the location of these two buildings in which the burglaries took place. One of the back apartments or cabins of the court was selected by appellant, which he testified was for the purpose of removing himself from the noise of the street. This rear apartment or cabin was so situated that entrance might be gained to a rear street without driving out the main entrance to the court.

On the 13th day of October, 1937, the law-enforcement officers arrested appellant as he drove up to his home in San Bernardino in his mother's car. A series of about 30 different items of tools were found in the car. Among them were a brace, screw-drivers, hammers, pliers, and a spring leaf jimmy or tire iron, sharpened on one edge, which fitted quite exactly into the several pieces of studding and door jams which were removed from the building and introduced in evidence at the trial. There was a pair of shoes taken from the trunk of the car of appellant at the time of his apprehension, the soles of which had two identifying worn spots on them. The heels were of the same type, bearing the Florsheim emblem, and coincided exactly with the imprint left on the tar paper roof of the lean-to. Similar imprints were found near the office of the water company and in and about the various pathways leading from these buildings to the paved highway. No finger prints of appellant were located. Among the articles found in appellant's possession in the glove compartment of the automobile were three cotton gloves, a flash light, ice pick, a bit which precisely fit the series of holes that were cut in the boarding in the rear of the described building. There were two punches also found there which were of such size that they fitted with a like similarity the holes punched in the safe. The hammer found in the trunk of the car bore worn surfaces on the sides of its head. Two of the wrenches found in the car were such in size as would fit the nuts removed from the safe. Many articles, such as clothing, a hand bag and automobile tools were also found in the automobile.

When appellant was apprehended and questioned, he wanted to know "what good would it do him to talk". Later, he stated that he had not been in San Diego county for a period of about two months prior to the time of his arrest and that he was the owner of the shoes which were found in the car and later received in evidence.

Appellant then took the witness stand in his own defense and gave a general account of the possession of the various tools and the uses to which he placed them in his mining operations, and several defense witnesses attempted to corroborate his statements. Appellant then admitted that he left San Bernardino on October 1st and went through Oceanside and Carlsbad to La Jolla in search of a man by the name of Luther Campbell, whom he had not seen for several years, and after looking at the listings in a telephone book in La Jolla, being unable to find him, he returned to Oceanside that evening, stopping at the court heretofore described and remaining there all night. He then claimed that he returned to his home.

Appellant strenuously contends that the evidence is insufficient to sustain the verdict of the jury. He argues that the evidence is entirely circumstantial; that it does not prove him guilty beyond a reasonable doubt; that the circumstances relied upon by the prosecution are just as consistent with his innocence as with his guilt.

[1] We have enumerated the salient circumstances as they presented themselves to us and as a result thereof we are of the opinion that the circumstances reasonably justify the conclusion of the jury as expressed in their verdict. Therefore, we cannot reverse the judgment. People v. Martinez, 20 Cal.App. 343, 128 P. 952; People v. Strauss, 75 Cal.App. 447, 243 P. 67; People v. Martin, 16 Cal.App.2d 515, 60 P.2d 1014; People v. Garcia, 83 Cal. App. 463, 256 P. 876.

[2] The only other question presented is claimed prejudicial misconduct on the part of the district attorney in cross-examining the appellant's mother in reference to the occupation of her son. The portion complained of reads as follows:

"Q. [By Mr. Wurfel]: Shortly before October 1st, he had been working in a cigar store there? A. He had, the Magazine Mart.

"Q. Acting as bookmaker, making books on the races?"

At this point the following objection was made (by Mr. Johnson): "Just a moment, Your Honor, I take exception to the asking of that question and assign it at this time as prejudicial misconduct on the part of counsel." The court then ruled: "It may be stricken and the jury are instructed to disregard it." The propounding of such questions, under the circumstances, is not to be encouraged. People v. Podwys, 6 Cal.App.2d 71, 74, 44 P.2d 377. However, counsel properly called the improper question to the attention of the court and it was immediately ordered stricken and the jury admonished to disregard it. The propounding of the

objectionable question, under the circumstances, was not reversible error. People v. Chilcott, 18 Cal.App.2d 583, 64 P.2d 450; People v. Bragdon, 103 Cal.App. 20, 283 P. 881; People v. Mareck, 17 Cal.App.2d 278, 61 P.2d 972.

The judgment and order from which this appeal is perfected must be and are affirmed.

We concur: BARNARD, P. J.; MARKS, J.



HEROUX v. ATCHISON, T. & S. F. RY. CO. et al.*

Civ. 11815.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1939.

Rehearing Denied Feb. 14, 1939.

Hearing Granted by Supreme Court March 23, 1939.

1. Appeal and error ⇐1218

Where aggrieved party is cognizant of fraud or mistake upon which appellate court has based its decision unless such party acts promptly, order will not be made recalling remittitur.

2. Appeal and error ⇐1218

Where plaintiff was familiar with alleged fraud and mistakes upon which motion to recall remittitur was based, but filed petition for rehearing with Supreme Court instead of filing petition for rehearing with appellate court, plaintiff moving for recall of remittitur after Supreme Court had denied rehearing petition was guilty of laches requiring denial of motion.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

On motion to recall remittitur.

Motion denied.

For original opinion, see 82 P.2d 620.

Robert Brennan, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellants.

Russell H. Pray and Mason & Windham, all of Long Beach (Henry F. Walker, of Los Angeles, and Roy J. Brown, of Long Beach, of counsel), for respondent.

McCOMB, Justice.

This is a motion by respondent for an order recalling the remittitur heretofore issued herein on the grounds (1) that the judgment of this court was improvidently granted upon false suggestions and under a mistake as to the facts of the case, and (2) that fraud and imposition have been practiced upon this court in procuring its judgment and upon counsel representing respondent.

The undisputed facts are:

Respondent obtained a judgment against defendants after trial before a jury in an action to recover damages for personal injuries. From this judgment defendants appealed to this court, and, after a hearing upon the merits, we reversed the judgment of the lower court on September 8, 1938. Heroux v. Atchison, Topeka & Santa Fe Railway Company, Cal.App., 82 P.2d 620. No application for a rehearing was filed by respondent with us. However, on October 10, 1938, she filed a petition with the Supreme Court for a hearing, which petition was denied November 7, 1938. November 9, 1938, remittitur issued from this court to the superior court.

This is the sole question necessary for us to determine:

Will this court issue an order recalling its remittitur when the moving party, fully cognizant thereof from the time of the filing of the opinion of this court, has failed to call the alleged fraud and imposition upon which the motion is based to our attention by way of a petition for rehearing?

[1] This question must be answered in the negative. The law is established that, where an aggrieved party is cognizant of fraud or mistake upon which an appellate court has based its decision, unless such party acts promptly and at the first opportunity to call the court's attention thereto, an order will not be made recalling the remittitur after the same has been issued. Haydel v. Morton, Cal.App., 82 P.2d 623.

[2] Applying this rule to the facts of the instant case, it appears that on September 8, 1938, respondent was familiar with the alleged fraud and mistakes upon which the present motion is based; that a petition for rehearing was not filed in this court; and that thereafter a petition for hearing was filed with the Supreme Court

*The denial of rehearing is on a motion to recall remittitur

setting forth substantially the same grounds for a hearing by that court as are now urged for an order of this court recalling the remittitur. It is therefore evident that respondent is guilty of laches in making the present motion, and under the law above stated the order prayed for should be denied.

The motion is denied.

We concur: CRAIL, P. J.; WOOD, J.



30 Cal.App.2d 445

PEOPLE v. BRANNON.

Cr. 3165.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1939.

1. Burglary ⇐41(1)

Proof that property was in possession and under control of person from whom taken is sufficient proof of his ownership thereof to sustain conviction of burglary.

2. Burglary ⇐41(1)

Undisputed testimony, in burglary trial, that money admittedly taken from slot machines by defendant was in possession and under control of owner of cafe entered by defendant, was sufficient to sustain trial court's implied finding that defendant broke into cafe with intent to take and did take property of another.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Claude E. Brannon was convicted of second-degree burglary, and he appeals.

Affirmed.

Anna Zacsek, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

McCOMB, Justice.

From a judgment of conviction of burglary of the second degree after trial before the court without a jury, defendant appeals.

Viewing the evidence most favorable to the People (respondent), the facts are:

June 16, 1938 at about 3 a. m., defendant broke into and entered a cafe owned and operated by Ira S. Fierce. He then broke the glass coverings on two slot machines (stipulated to be gambling devices) and removed therefrom ninety-seven dimes and twenty-three nickels. As he left the cafe he was apprehended. Defendant had for several months prior thereto frequented the cafe, and on various occasions had deposited coins in the slot machines.

Defendant relies for reversal of the judgment upon this proposition:

There is no substantial evidence to sustain the implied finding of the trial court that the money taken by him was property of another person.

[1] This proposition is untenable. It is the established law of this jurisdiction that proof that property was in the possession and under the control of the person from whom it is claimed to have been taken is sufficient proof of ownership to sustain a conviction of burglary. People v. Kirsch, 204 Cal. 599, 602, 269 P. 447; People v. Hayes, 72 Cal.App. 292, 299, 237 P. 390.

[2] This rule is not in conflict with the law as announced by our Supreme Court in People v. Rosen, 11 Cal.2d 147, 152, 78 P.2d 727, 116 A.L.R. 991, which holds that it is a question of fact for the determination of the jury whether or not the defendant in committing the robbery intended to recover money which he had lost in a gambling device or to take the property of another. In the instant case the undisputed testimony shows that the money which defendant admittedly took was in the possession and under the control of Mr. Fierce, the owner of the cafe which defendant entered.

Therefore, applying the rules of law above stated, there was evidence in the instant case to sustain the trial court's finding of fact that defendant broke into the cafe with intent to take property of another and that the property in fact taken by him belonged to another.

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J., WOOD, J.

30 Cal.App.2d 437

BEHNE v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 11640.

District Court of Appeal, Second District, Division 1, California.

Jan. 24, 1939.

1. Negligence ⇐83

Whether last clear chance doctrine applies depends on particular facts.

2. Negligence ⇐83

Doctrine of last clear chance is applicable when all its elements are present and plaintiff's negligence is remote in causation, but, when any of the elements of the doctrine are lacking and plaintiff's negligence is continuing and contributory with that of defendant, recovery cannot be had.

3. Negligence ⇐83

A defendant is never relieved of liability if he has it in his power to prevent injuring another, notwithstanding that injured person was imperiled by reason of his own negligence.

4. Street railroads ⇐93(4)

Motorman of interurban car had right to assume that pedestrian approaching crossing on boulevard was in full possession of her faculties of sight and hearing, and that she would look and see the car, hear the whistle, or observe the swinging wigwag and stop to let the car go by.

5. Negligence ⇐83

The doctrine of "last clear chance" is founded upon principle that no one can willfully and wantonly run down and injure another simply because the latter through his own negligence places himself in a position of danger.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words & Phrases.]

6. Negligence ⇐22

Where person is approaching a place of danger and all the warnings of such danger have been given that reasonable care requires, those in charge of the dangerous instrumentality seeing such person thus acting are not obliged to presume that person will continue his approach until he gets in place of danger when it is obvious that he could with least care avoid it.

7. Negligence ⇐1

As respects negligence, the law presumes that a person possesses and will exercise normal faculties.

8. Street railroads ⇐103(2)

Where motorman of interurban car, on realizing that pedestrian on boulevard might be inattentive to peril, sounded whistle and did everything possible to prevent injury to the pedestrian, who walked upon the track in spite of warning from swinging wigwag and noise of approaching trolley car, recovery could not be had for pedestrian's death under doctrine of "last clear chance."

9. Street railroads ⇐102(2)

Where pedestrian on boulevard, without paying attention to wigwag whistle, noise and whistle of approaching trolley, stepped upon streetcar tracks and motorman used ordinary care to avoid injuring pedestrian, pedestrian's original negligence, continuing to be the proximate cause of the injury, precluded recovery for her death.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Fred Behne, as heir at law of Dora Behne, deceased, against Pacific Electric Railway Company and others for death of plaintiff's intestate resulting when struck by an interurban car. From an adverse judgment, plaintiff appeals.

Affirmed.

Edwin C. Boehler and Ezra Neff, both of Los Angeles, for appellant.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

WHITE, Justice.

Action for damages prosecuted by plaintiff as the surviving husband of Dora Behne, who lost her life when she was struck by one of defendant railway company's interurban trolley cars. At the conclusion of plaintiff's case the court granted a nonsuit. This is an appeal from the judgment.

Such of the facts as are necessary for a proper discussion of the case show that the decedent was struck down and fatally injured by a trolley car owned by defendant Pacific Electric Railway Company and operated by defendant Chaffin as motor-

man. The accident occurred where Washington boulevard, running north and south, crosses the defendant railway company's track. The double tracks of the railway company run east and west on its private right-of-way on Venice boulevard in Los Angeles county. Venice boulevard is paved on both sides of the tracks, and crosses Washington boulevard at right angles, while curbs separate the private right-of-way from the street. At the time of her death, August 16, 1934, the deceased was fifty-one years of age and enjoyed excellent health, except that she was so deaf that she could not have heard the train whistle; but her eyesight was good. At about 2:50 o'clock on the afternoon of a clear day, the deceased was walking north, while the interurban car was proceeding west on the north track, upon which track deceased was struck. At the time of the accident the overhead wigwag signal was in operation. The motorman testified that the interurban car was approximately 140 to 150 feet from the east edge of Washington boulevard when he first saw the deceased. The distance from the south rail of the eastbound track to the first or southern rail of the westbound track on which she was struck, is fourteen feet. When first noticed by the motorman, the deceased was "looking straight ahead". When he originally saw the deceased, according to the motorman's testimony, she was just stepping on to the south rail of the southern or inbound track. The car was "coasting" when he first saw the deceased. According to the motorman, he was "blowing his whistle and watching". When the car reached a point about eighty feet from where the deceased was leaving the inbound or southern track and was about nine feet from the outbound track upon which the car was traveling, the motorman, according to his testimony, concluded that the deceased had not heard the whistle or seen the car, whereupon he applied his emergency brakes in an effort to stop, and at the time of which brake application the car was traveling about twenty miles per hour. There was some testimony to the effect that it takes from one to two seconds for the brakes to take hold after the air is applied, during which interval in the instant case the car had traveled about forty feet, when the brakes took hold and the car commenced to stop. According to the motorman, the car came to a stop about 120 to 150 feet from the point at which he first started to apply the brake handle.

Throughout the trial, as well as at the time the motion for a nonsuit was made, and now upon this appeal, appellant's counsel conceded the negligence of the deceased and relied exclusively upon the doctrine of the last clear chance. Therefore it becomes unnecessary to discuss the question of the sufficiency of the evidence to support a verdict in his favor upon the theory of negligence and the absence of contributory negligence; and the only question of concern here is the sufficiency of the evidence under the doctrine of the last clear chance. The trial judge held, and the respondents here contend, that the evidence shows that the deceased's negligence continued up to the moment of the collision and proximately contributed thereto, by reason of which, argue respondents, the last clear chance rule does not apply and appellant cannot prevail.

[1-3] It was held in Center v. Yellow Cab Co., 216 Cal. 205, 207, 13 P.2d 918, 920, that "the real issue in cases of this character is not whose negligence came first or last, but rather whose negligence, however it came, was the proximate cause of the injury. Whether or not, therefore, negligence is the proximate or remote cause depends upon the facts of the particular case. The doctrine of continuing negligence has no application unless the negligence is the proximate cause of the injury. If all the elements of the doctrine of the last clear chance are present and plaintiff's negligence becomes remote in causation, then the doctrine applies." See, also, Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915. Whenever any of the elements of the doctrine are lacking, plaintiff's negligence being continuing and contributory with that of defendant, a recovery is barred. In Center v. Yellow Cab Co., supra, the principle was definitely announced that "a defendant is never relieved of liability if he has it in his power to prevent injuring another, and this is so whether one is unaware of his peril by reason of his negligence or not".

Appellant's contention is that defendant motorman had an opportunity to avoid striking deceased and failed to exercise such opportunity (Townsend v. Butterfield, 168 Cal. 564, 143 P. 760; Palmer v. Tschudy, 191 Cal. 696, 218 P. 36); and in support of this claim directs us to testimony in the record given by a witness who had been employed by defendant railway company some nine years and who was

familiar with the type of trolley car involved in this accident, as well as acquainted with the intersection here involved, and whose testimony is in part as follows:

"Q. * * * You have a track that is level and it is dry, no moisture on the rails, with one of those 900 type of cars," (this is the type of car involved herein) "and you are coasting with the power off, and the speed of your car is twenty miles per hour, within what distance can you stop that car by a service application of the brakes? * * * A. I would say approximately ninety to one hundred feet.

"Q. * * * Now, then, assume the same situation except that you apply your brakes in emergency * * *, within what distance could you stop that car under those circumstances? * * * A. I would say ten feet less; that would make it about eighty feet."

It was then stipulated that these "900" type cars are forty-nine feet, two inches in length. From the foregoing testimony, appellant argues that had the motorman applied the brakes when he first became aware of the position of danger in which deceased had by her negligence placed herself and from which she could not extricate herself by reason of ignorance of her peril, the trolley car would not have traveled from a point eighty to one hundred feet west of the point of impact for a distance of approximately 178 feet.

[4, 5] We must therefore determine whether, under the circumstances here set forth, defendant motorman had the last clear chance to avoid the accident and failed to exercise ordinary care so to do. That the operator of the car should have had a *clear chance* implies that he should have had more than a bare *possible chance* to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the deceased. It requires no citation of authority for the statement that the motorman had a right to assume that when deceased was approaching the railroad crossing she was in full possession of her faculties of sight and hearing, and that she would look and see the car, hear the whistle, or observe the swinging wigwag, and stop to let the car go by. Walking as deceased was, she could have stopped practically instantly at any time prior to stepping upon the north track, while no duty rested upon the motorman to attempt to stop until he concluded, or should have concluded in the exercise of ordinary care, that she was about to step on to his track. That the motorman, while traveling twenty miles per hour, applied his emergency brakes when approximately eighty feet from the deceased and while she was in the neighborhood of nine or ten feet from the north track, seems to us an indication of an exercise of care greater than the ordinary care required of him by the law; because in the final analysis, the doctrine of the last clear chance is really founded upon the humane principle that no one can wilfully and wantonly run down and injure another simply because the latter, through his own negligence, places himself in a position of danger. It is when an act is committed with wilfulness and wantonness that contributory negligence on the part of the injured person is not an element which will defeat recovery. The motorman was under no duty to assume that the deceased would not do what many pedestrians do each day —walk toward a railroad track, stop within two or three feet thereof, and still not be in danger. It is true the motorman testified deceased was at all times "looking straight ahead", but this did not preclude her from seeing the wigwag in motion, and the motorman was not charged with knowledge that she was deaf and could not hear the whistle of the car. And even if we assume that there is evidence tending to contradict the testimony of the motorman as to when he applied the brakes, and there was just a possibility that the speed of the car might have been lessened and the accident avoided by their application when he first saw the deceased in the vicinity of the track upon which his car was traveling; yet to charge the motorman with negligence under the facts here present would be carrying the doctrine of last clear chance beyond the limits of the decisions, because, as was said in Choquette v. Key System Transit Co. and Santa Fe Ry. Co., 118 Cal.App. 643, 657, 5 P.2d 921, 927:

[6] "Where a person is approaching a place of danger and all the warnings of such danger have been given that reasonable care requires, those in charge of the dangerous instrumentality, seeing such person thus acting, are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue his approach until he gets into the very place of danger, when it is obvious that he could at any time, with the least care, stop and avoid it."

Deceased in the case at bar was not in a position of peril until she stepped upon the rail of the north track. Until almost the moment she was struck, then, no observation would have disclosed her in a position of danger, for she was not in such a position. In Richardson v. Southern Pacific Co., 88 Cal.App. 648, at page 655, 263 P. 1039, at page 1042 it was said:

"* * * If it were incumbent upon the motorman of an interurban train to stop each time he saw a pedestrian leave the sidewalk and approach the tracks, then necessarily such trains as we are dealing with here would have to be abandoned. The courts have never been backward in holding railroads, street railways, or even automobile drivers, to a rigid rule of care. Always have the courts manifested a solicitude for the general safety and protection of the foot-passenger and others enjoying the right of travel along roads or highways used by trains and street railways. But the law likewise requires on the part of each person the exercise of some degree of care for his own protection."

[7-9] With the warning of the swinging wigwag, the noise and whistle of the approaching trolley car, the motorman was justified in concluding that the deceased would not proceed on to the track. The law presumes that a person possesses and will exercise his normal faculties. Absentmindedness or forgetfulness on the part of this deceased to observe with her eyes when she could not hear, will not suffice as an excuse for her negligence as she was about to cross a railroad track. There is nothing in the evidence, in our opinion, which would justify an inference that the motorman, when he first saw the deceased, failed to exercise that degree of care which the law required of him. As soon as he perceived or realized that deceased might be inattentive to peril he sounded his whistle, and at this time there was nothing to create a doubt as to whether he sincerely believed the calamity would be prevented by the activity of the deceased herself. Under the circumstances, he did all that was required of him. This being so, one of the elements required for the application of the rule of last clear chance was absent, and the case is therefore governed by the ordinary rules of negligence and contributory negligence. In Holmes v. South Pac. C. Ry. Co., 97 Cal. 161, at page 169, 31 P. 834, it was said: "But the rule which permits a recovery notwithstanding some negligence on the part of the plaintiff or person injured is only properly applied in those cases where such negligence was the remote and not the proximate cause of the injury, —that is, where the negligent acts of the parties were independent of each other"; and when we apply this rule to the case here it is at once seen that even if it be conceded that there was negligence on the part of the railway company in the management of the trolley car at the time of and just preceding the accident, still the plaintiff here would not be entitled to recover, as such accident could not have occurred without the concurrent and active negligence of the deceased at the time. The defendant motorman was not the only one who could have prevented the accident, but, on the contrary, if the deceased had herself used ordinary care at the time she could not possibly have been harmed by defendant's car, which was confined to the track upon which it ran. Practically up to the very moment she stepped upon the track and was struck by the car it was within her power to escape injury by stopping. The deceased being actually and contemporaneously at fault until practically the moment of the collision, and the motorman having used ordinary care to avoid injuring the deceased, the latter's original negligence continued to be the proximate cause of her injury and death, and bars recovery. Green v. Los Angeles, etc., Ry. Co., 143 Cal. 31, 41, 76 P. 719, 101 Am.St.Rep. 68; Giannini v. Southern Pacific Co., 98 Cal.App. 126, 132, 276 P. 618; Girdner v. Union Oil Co., supra, page 203, 13 P.2d 915.

The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited, v. DELGADO et al.

Civ. 12141.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1939.

Hearing Denied by Supreme Court March 27, 1939.

Workmen's compensation ⇐436

Where there was sufficient evidence in record to support conclusion that separation between deceased employee and widow was merely temporary, caused only by financial conditions, award of compensation to widow was authorized.

Proceeding by the Zurich General Accident & Liability Insurance Company, Limited, petitioner, against Anita Torres Delgado and another for review of an award of the Industrial Accident Commission in favor of defendants.

Writ denied.

J. L. Kearney, of Los Angeles, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondent Industrial Accident Commission.

PER CURIAM.

The petition for a writ of review is denied, as there was sufficient evidence in the record to support the conclusion that the separation between the deceased employee and his widow, Anita Torres Delgado, was not a permanent separation in any sense of the word, but was merely a temporary separation caused only by financial conditions, and was not intended either by deceased or by his wife to be a permanent separation.

There was sufficient evidence to justify the commission in finding that the decedent was injured in the course of, and that his injury arose out of, his employment, from which injury he died, leaving surviving him, wholly dependent, the widow applicant herein. There was sufficient evidence to support the conclusion that decedent was legally liable for the support of his wife at the time of his death, and the commission was forced to the conclusive presumption that the said widow was dependent upon the deceased.

30 Cal.App.2d 436

JORDAN et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 12165.

District Court of Appeal, Second District, Division 1, California.

Jan. 24, 1939.

1. Mandamus ⇐3(3)
Prohibition ⇐3(1)

Where it affirmatively appeared in petition of parties beneficially interested that superior court was about to proceed in the ordinary course of law, and no facts were stated showing that remedy was inadequate, petition for a writ of prohibition and writ of mandate to the superior court was denied. Code Civ.Proc. §§ 1084–1108; § 1086.

2. Mandamus ⇐4(1)
Prohibition ⇐3(4)

Where criminal prosecution has been instituted and superior court is about to proceed with trial thereof, and in connection with which, if adverse judgment be rendered, defendant has right of appeal, such procedure constitutes "plain, speedy and adequate remedy at law," and hence defendant is not entitled to writ of prohibition or writ of mandate. Code Civ.Proc. §§ 1084–1108; § 1086.

[Ed. Note.—For other definitions of "Plain, Speedy, and Adequate Remedy," see Words & Phrases.]

Petition by Glen S. Jordan and E. P Jordan to the District Court of Appeal fo: a writ of prohibition and a writ of mandate to the Superior Court of the state of California, in and for Los Angeles County and the Honorable Frank G. Swain, Judge thereof.

Petition denied.

Morris Lavine, of Los Angeles, for petitioners.

PER CURIAM.

The petition of Glen S. Jordan and E. P. Jordan for a "writ of prohibition and writ of mandate" is denied, for the reason that the facts stated in said petition do not justify the issuance of the writ prayed for, for the following reasons to-wit:

[1] It affirmatively appears from the facts stated in said petition that the court

is about to proceed "in the ordinary course of law", and no facts are stated in the petition which would justify this court in issuing any writ under the provisions of sections 1084 to 1108 of the Code of Civil Procedure.

There is nothing in the petition which would justify the issuance of a writ under section 1086 of the Code of Civil Procedure, for the reason that it affirmatively appears from said petition that the court is about to proceed in the "ordinary course of law".

[2] It requires no citation of authority for the statement that where a criminal prosecution has been instituted and the court is about to proceed with the trial thereof, and in connection with which, if an adverse judgment be rendered a right of appeal exists, such procedure constitutes a plain, speedy and adequate remedy at law. There is no allegation in the petition which sets forth facts sufficient to show that the trial court is not proceeding in accordance with due process of law.



30 Cal.App.2d 428

MONNETTE v. TITLE GUARANTEE & TRUST CO.

Civ. 11664.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1939.

1. Vendor and purchaser ⇐335

As respects purchaser's right to recover purchase-money payments, a corporate vendor is in no position to take advantage of its selling agent's offer, made some months after it lost title to lots sold, to deliver deed therefor to purchaser and thereby place latter in default.

2. Vendor and purchaser ⇐334(5)

A purchaser, not being in default when she tendered cashier's check to vendor in payment of past-due last installment of purchase price and discovered that vendor no longer had title to lots sold, where vendor made no tender of deed on due date as provided by contract, was entitled to rescind contract and recover money paid thereon.

3. Appeal and error ⇐1008(1)

Whether purchaser's agent knew that corporate vendor held lots in trust for its selling agent at time of execution of contract for sale thereof was fact question for trial court, whose finding that agent did not have such knowledge is conclusive on appeal from judgment for plaintiff in purchaser's action to recover amount paid on contract.

4. Vendor and purchaser ⇐341(5)

A purchaser, recovering judgment against vendor for amount paid on rescinded contract for sale of lots, is entitled to interest from dates of payments, not merely from date on which she gave vendor notice of rescission.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Roland T. Kinney, for whom Lucile J. Monnette was substituted as party plaintiff, against the Title Guarantee & Trust Company, to recover the amount paid on the purchase price of two lots. Judgment for substituted plaintiff, and defendant appeals.

Affirmed.

M. J. Rankin and Milo V. Olson, both of Los Angeles, for appellant.

Frank M. Gunter and G. Harold Janeway, both of Los Angeles, for respondent.

YORK, Presiding Justice.

On September 9, 1930, the respondent as buyer, and appellant as seller, entered into contracts for the sale of two lots situated in the Del Rey hills. These contracts provided for an initial payment on the purchase price, the balance payable in equal annual instalments thereafter; and also provided that upon compliance by the buyer of all the terms and conditions therein expressed, seller would deliver a sufficient grant deed to the lots in question as well as a guarantee of title. On November 9, 1932, when the final payment upon the said contracts became due, appellant notified respondent of that fact, but the latter delayed making said final payment at the instance of appellant's selling agent, Dickinson & Gillespie Corporation, who advised respondent that appellant was having some difficulty with re-

gard to certain agreed street improvements. Appellant did not then or at any other time offer or tender to respondent either the deed or the certificate of title provided by the terms of the contracts.

On April 2, 1934, respondent tendered and offered to pay to appellant the unpaid balance of the purchase price upon receipt from appellant of the said deed and guarantee of title. Appellant made no attempt to comply with said offer, whereupon respondent obtained a title search from the Title Insurance & Trust Company from which she ascertained that on October 30, 1933, appellant had lost its title to the lots through foreclosure of a trust deed, and on April 4, 1934, respondent gave to appellant a written notice of rescission of said contracts of sale and demanded a return of all amounts paid by her upon the purchase price.

On April 16, 1934, respondent filed the instant action praying for the sum of $2,935.36 alleged to have been paid by her upon said contracts of sale. Prior to the commencement of said action, respondent Monnette had assigned to Roland T. Kinney, the original plaintiff herein, all her claim and demand against appellant by reason of the facts alleged in the complaint, and on January 13, 1937, said Kinney reassigned all said claim and demand to respondent, who was thereupon substituted as party plaintiff, and an amended and supplemental complaint filed wherein it is alleged that on May 2, 1935, appellant accepted the rescission made by respondent but failed to restore to respondent the money paid by her under the terms of the contracts.

During the course of the trial it was stipulated that "G. Harold Janeway had full and complete authority to represent his sister, Lucile J. Monnette, in all matters touching the purchase of the property described in the complaint and in the handling of the contracts mentioned in the complaint, and to act as her attorney-in-fact and agent in relation to same, and all acts done for or on her behalf by said G. Harold Janeway were authorized and ratified by said Lucile J. Monnette."

The trial court found in favor of respondent and from the judgment rendered for the amount prayed for in the complaint this appeal is prosecuted.

It is here urged by appellant (1) that respondent was guilty of the first breach of the contracts and therefore had no right to rescind on April 4, 1934; (2) that a tender of a deed at the date when the last instalment fell due would have been an idle gesture, therefore a formal tender of a deed was unnecessary to place respondent in default; (3) that appellant was acting as trustee, which fact was known to respondent, and judgment in no event should have been rendered against appellant in any capacity other than as such trustee.

Both contracts of sale contained the following forfeiture clause: "It is expressly understood and agreed that time is of the essence of this agreement and in the event of the failure of the Buyer to comply with all or any of the terms or conditions hereof in the manner and within the time herein specified, this agreement shall become null and void as fully as if it had never been made, and the Seller shall be released from all obligation in law or equity to convey said premises, and the Buyer shall forfeit all right thereto and to all moneys theretofore paid under this agreement, but the Seller on receiving full payment at the times and in the manner herein specified, and upon the Buyer complying with all the terms and conditions of this agreement, agrees to deliver to the Buyer a good and sufficient grant deed with a guarantee of title of the Title Guarantee and Trust Company showing the title to said premises vested in the Seller free of incumbrances. * * *"

Appellant here urges that the foregoing provision was never waived nor the time of payment of the final instalment extended by appellant and that the selling agent, Dickinson & Gillespie Corporation, had no authority to extend the time or otherwise waive or modify the terms of the said contracts.

Respondent bases her right to recovery upon the fact that no tender of a deed was made by appellant when the last instalment became due, and contends that the forfeiture clause heretofore referred to made the tender of the deed and certificate of title conditions concurrent with the payment of the final instalment.

It is revealed by the record herein that appellant held the property in question under a subdivision trust and that Dickinson & Gillespie Corporation was the selling agent, although the contracts for sale are silent with regard to these facts, there being no designation therein of appellant as trustee.

From the evidence adduced at the trial, it appears that Mr. Janeway held a note executed by Dickinson & Gillespie Corporation, carrying the endorsement of Fritz Burns, president of said corporation, and of Robert Burns, his brother, who was also an officer thereof, which note Mr. Janeway wished to have offset against the purchase price of the two lots which his sister was buying under the hereinbefore mentioned contracts of sale. When respondent received notice that the final payment would be due on November 9, 1932, Mr. Janeway telephoned to Mr. Robert Burns, who testified regarding said conversation as follows: "I told Mr. Janeway that if he would hold up making this payment that I believed in the near future we could work out an arrangement where we could offset that note and we could also get him credit for the street improvements that had not been put in. I told him that we were getting credit against contracts for the amount of the street improvement work on lots where there were larger balances owing, but that on his lots, or rather on the lots of Mrs. Monnette, we could not get that credit at present because the balances on the lots were equal to the amount of money necessary to release the lots for deed * * * In any event, I told him that if he made the payment at that time, I was sure he would pay his money in and he would not get any street improvements, or would he ever be able to get any credit for his street improvements, because the trust had no money; and I told him not to pay any money until I got in touch with him." Mr. Burns and Mr. Janeway had various other conversations relative to this matter, and on January 31, 1934, Mr. Burns transmitted a letter to Mr. Janeway in which it was stated:

"We are therefore writing you in regard to the contracts which you hold covering the above described lots. The principal balance on each of these contracts is $553.78 and the accrued interest to Feb. 9, 1934, is $64.59 on each, making a total of $1236.74 necessary to pay the contracts off in full.

"At the time these lots were sold, the original owner of the property agreed to grade the streets and install water mains and gas mains, and agreed that in the event the property was used for oil development, they would deduct the cost for such work from the balance owing on the contracts. We are enclosing herewith an estimate * * * estimating the cost of this work for said lots at $133.58.

"At present you own a note of the Dickinson & Gillespie Corporation in amount of $227.50 on which there is accrued interest in the amount of $37.87, making a total of $265.37, which amount may be deducted from the balance owing on these contracts.

"After making the above allowance, there remains a balance of $837.79 necessary to pay off these contracts. *As soon as we are in receipt of this amount we will have issued to you a deed and guarantee of title in accordance with our agreement.*" (Italics added.)

Mr. Janeway testified that on April 2, 1934, he called at the office of appellant and tendered a cashier's check for the balance due on the contracts to Mr. Utter, an employee of appellant, who stated: "We find ourselves in rather an embarrassing position about these lots. Negotiations are now with the Burns Brothers. If you want to leave this check we will give you a receipt for the money." Mr. Janeway replied that the contracts called for delivery of deed and certificate of title concurrently with the payment of said balance, and that he would prefer to have the deed delivered when he delivered the check. Mr. Utter then said that they were not prepared to deliver the deed and Mr. Janeway left and obtained a title report from which he learned that title to said lots was not in appellant. On April 4, 1934, he wrote appellant rescinding the contracts and "on behalf of Mr. Kinney and Mrs. Monnette, and as their attorney, (I) hereby demand payment from you of all amounts heretofore paid by them, respectively, on these contracts, together with legal interest on the respective payments, from date of payment."

In Kerr v. Reed, 187 Cal. 409, 202 P. 142, cited by respondent, which involved a contract containing a forfeiture clause almost identical with that here in question, the court stated (page 411, 202 P. page 143): "It is thoroughly established that when the final payment becomes due under a contract in which time is the essence of the contract, the obligation to make the payment and the obligation on the part of the vendor to make a deed are dependent and concurrent conditions. Sec. 1439, Civ. Code; Boone v. Templeman, 158 Cal. 290, 297, 110 P. 947, 139 Am.St.Rep. 126, and cases cited; Sausalito, etc., Land Co. v.

Sausalito Imp. Co., 166 Cal. 302, 308, 136 P. 57; Lemle v. Barry, 181 Cal. 6, 10, 183 P. 148; Lemle v. Barry, 181 Cal. 1, 3, 183 P. 150; Hoppin v. Munsey [185 Cal. 678], 198 P. 398."

It therefore appears that at any time between November 9, 1932, and the date of the foreclosure proceedings on October 30, 1933, it was within the power of appellant to have placed respondent in default by tendering a deed to the lots and demanding the balance due on the purchase price. However, the record reveals that a tender of the deed and certificate of title was never made at any time by appellant.

It is here argued by appellant that "assuming (but not conceding) that there was a duty on the appellant to tender a deed in order to place the plaintiff in default, that duty is not necessary where such a tender would have been unavailing. Such a tender on September 9, 1932, or November 9, 1932, would have been unavailing, it is obvious because when a tender was later made on January 31, 1934, payment was not then made."

Again quoting from Kerr v. Reed, supra, at page 411, 202 P. at page 143, "On December 4, 1913, the date of final payment, the vendor was to give the deed and the purchaser to tender the purchase money. Without action on the part of either, neither could claim the other was in default. * * * If the defendant had tendered his deed on December 4th, he might be in a condition to declare a default for the nonpayment of the amount then due, but without such tender it is clear he could not declare such default unless the tender was excused under the law, on the theory that it would have been a useless ceremony. Hoppin v. Munsey, supra. But here, according to plaintiff's testimony, both parties regarded the contract as still in force, after the plaintiff's statements of his inability to pay, and for that reason made arrangements to pay the taxes, and, according to plaintiff, on December 10th defendant recognized the contract as still in force. * * * It follows that the contract was in full force and effect at the time the vendor made the conveyance to a third party and thereby breached his obligation."

[1] In the instant case, neither offer nor tender of the deed was ever made by appellant to respondent. The offer of January 31, 1934, was made by Dickinson & Gillespie Corporation, some months after appellant had lost title, consequently appellant is not in any position to take advantage of such offer, and thereby attempt to place respondent in default.

[2] In the circumstances presented by the record and upon the authority of the decision of Kerr v. Reed, supra, it is conclusive that a tender of the deed by appellant when the final payment became due was essential to place respondent in default. Since respondent was not in default on April 4, 1934, when she tendered a cashier's check in payment of the last instalment and discovered appellant no longer had title to the lots, she was entitled to rescind her contracts and recover the money paid thereon.

[3] There is nothing in the contracts which would intimate in any way that appellant executed them as trustee or that the lots covered thereby were held in trust. It was attempted to be shown that Mr. Janeway had knowledge to that effect and that as agent of respondent such knowledge was imputable to her. Mr. Janeway testified that there was nothing in a transaction which he had negotiated a year or so before with reference to lots in the same tract which would indicate that it had any connection with the instant transaction, and that he did not know that appellant held the lots here in question as trustee for Dickinson & Gillespie Corporation. In the circumstances, this was a question of fact for the determination of the trial court, and that court's finding against appellant's contention is conclusive upon appeal.

[4] Appellant makes the further point that respondent is not entitled to interest from the respective dates of the payments made upon said contracts, but only from April 4, 1934, the date when she gave notice of rescission. There is no merit in this contention. See Bonnelfillio v. Ricks, 214 Cal. 287, 4 P.2d 929.

The findings and the judgment of the trial court are amply supported by the evidence.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

30 Cal.App.2d 590

PEOPLE v. DYER.

Cr. 2000.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1939.

1. Criminal law ⇐1159(4)

The jury's finding, implied in verdict of conviction for robbery, that three witnesses' identifications of defendant were trustworthy, is final and conclusive on conflict between such identifications and alibi testimony, evidence that police failed to find booty or gun in defendant's possession, and his denial of guilt when arrested.

2. Criminal law ⇐1036(1), 1169(2)

Admission of testimony in robbery trial as to witnesses' selection of defendant's photograph from numerous others in police "rogues' gallery" book and identification of defendant as robber from prisoners' "line-up" was erroneous, but not ground for reversal of conviction, where defendant did not object thereto and was otherwise positively identified by such witnesses.

3. Criminal law ⇐377

Defendant in robbery trial was entitled to prove his general reputation for traits of character involved in such crime, including his reputation for honesty.

4. Criminal law ⇐1170(1)

Exclusion of testimony in robbery trial as to defendant's reputation for honesty was not prejudicial error warranting reversal of conviction, in view of defendant's statement in jury's presence that he was convict on parole while working for witness.

5. Criminal law ⇐720(1)

The district attorney's remarks, comparing defendant's alibi in closing argument to jury at robbery trial with alibi unsuccessfully offered in murder case of considerable local notoriety, were permissible.

6. Criminal law ⇐823(16)

Error, if any, in court's statement as introduction to instructions on law of accessories in robbery trial that there was some evidence that some person was with defendant *held* cured by other instructions.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Percy Dyer was convicted of robbery in the first degree, and he appeals.

Affirmed.

Percy Dyer, in pro. per.

U. S. Webb, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for the People.

GRAY, Justice pro tem.

At the close of the trial in which appellant, although represented by the public defender, had actively examined witnesses, the jury found him guilty of robbery in the first degree, as charged in the indictment. Upon arraignment he had admitted a prior conviction of robbery. His motions for a new trial and in arrest of judgment having been denied, he was sentenced to imprisonment in the state penitentiary. He appeals in propria persona.

[1] Appellant does not dispute the sufficiency of the evidence to establish the commission of the crime by two unmasked men but he does question the sufficiency of witnesses' identification of him as a participant therein. The following summary of the essential evidence bearing upon this identification omits all reference to the other participant, as he is not a defendant: The usher of a theater testified that a man, whom he identified as appellant, approached him in the well-lighted lobby at about 10:45 p. m. and, while standing within two feet of him, inquired as to the presence of a former employee of the theater; that appellant, upon being advised of the latter's absence, asked for the manager, and that he notified the manager by an inter-office telephone that appellant wished to see him. The manager swore that in response to the telephone call he went downstairs into the lobby where he met a man whom he identified as appellant; that the latter, after inquiring for the former employee, approached closely and displayed a gun; that, as commanded by appellant, he accompanied him upstairs to an illuminated office, where he delivered to appellant money which he removed from the safe; that both then walked downstairs, out of the theater and along the sidewalk to the next corner where appellant hastily entered a parked automobile, the occupant of this automobile stated that the man entering the automobile, whom he identified as appellant, forced him, by threatening gestures with a gun, to drive several blocks, during which time they conversed, and that then appellant, after offering to give him taxi fare from four rolls of nickels which he took from a sack carried

under his coat, ejected him from the automobile and drove it away. Each stated that appellant was unmasked.

Each witness had ample opportunity, time and light for observation of the robber. Whether fear, engendered by his actions, weakened the accuracy of such observation depends upon whether such fear sharpened or dulled the witnesses' faculties. Four alibi witnesses fixed the times when they saw him so long before or after the commission of the crime as to in no wise negative his presence at its scene. Two others saw him at about the time of the crime at places so far from its scene as to make it improbable for him to have been there also. The failure of the police to find the booty or gun in appellant's possession, and his denial of guilt when arrested, do not necessarily prove his innocence. While the jury properly could have considered these matters in passing upon the credibility of the identifications, it was not compelled thereby to discredit them. Its finding, implied in the verdict, that such identifications were trustworthy is final and conclusive upon any conflict between these matters and the identifications. People v. Covington, 121 Cal. App. 61, 8 P.2d 490.

[2] The prosecution, in the direct examination of the three witnesses first mentioned, interrogated each as to his selection of a photograph from numerous others in a book called the "police rogues' gallery" as that of appellant, and as to his picking out of appellant, as the robber, from a "line-up" of prisoners. The appellant not only did not object to such questioning but, in an attempt to weaken their identifications and to show they were based upon the photograph and the "line-up" rather than observation at the time of the crime, personally and by attorney cross-examined these witnesses at to these occurrences. He also offered the contradictory testimony of several prisoners as to what happened at the "line-up". The admission of this testimony was erroneous, but appellant cannot complain since he did not object thereto. In view of the positive identification of appellant otherwise, such error does not warrant a reversal. People v. Cotton, 117 Cal.App. 469, 4 P.2d 247; People v. Covington, supra; People v. Lavender, 137 Cal.App. 582, 31 P.2d 439.

[3, 4] Appellant attempted to prove by the testimony of a former employer that his reputation for honesty, peace and quiet was good, but the court ruled that he could only prove his reputation for peace and quiet. In his argument in support of his offer, appellant personally stated in the presence of the jury that he was on parole from the penitentiary when working for the witness. Appellant was entitled to prove his general reputation for traits of character involved in the crime of robbery. As honesty has been held a trait involved in the kindred crimes of larceny (People v. Heape, 72 Cal.App. 226, 237 P. 66), and of burglary (People v. Osterhelt, 125 Cal.App. 723, 14 P.2d 140), the court's ruling appears to be wrong. But the exclusion of this evidence could not have injured appellant in the light of his own statement that he was a convict (People v. Pauli, 58 Cal.App. 594, 209 P. 88), nor could it, if the entire record is considered, have resulted in a miscarriage of justice, without which the conviction may not be reversed. People v. Derrick, 85 Cal.App. 406, 259 P. 481.

[5, 6] In his closing argument the district attorney compared appellant's alibi with an alibi unsuccessfully offered in a murder case of considerable local notoriety. Appellant did not assign these remarks as error, nor request that they be stricken out and the jury admonished to disregard them. However, such type of argument is permissible. People v. Molina, 126 Cal. 505, 59 P. 34; People v. Lee Yick, 189 Cal. 599, 209 P. 538. By way of introduction to its instructions on the law of accessories, the court said: "Now, of course, there was some evidence here that some person was with the defendant." Appellant argues that this statement assumed he was present at and committed the robbery, and therefore invaded the province of the jury in determining the ultimate fact in issue. However, the court advised the jurors that they were the exclusive judges of the weight of evidence and the credibility of witnesses; that they were not to understand that the court was expressing any opinions upon these matters, and that they were to disregard any assumption of the court that any fact was proven. It also fully and fairly charged them as to the elements of robbery, the burden of proof and the necessity of the prosecution proving every element of the crime beyond a reasonable doubt. The inadvertent statement, if error, was cured by these other instructions. People v. Dick, 37 Cal. 277; People v. Williams, 75 Cal. 306, 17 P. 211; People v. Follette, 74 Cal.App. 178, 240 P. 502.

Finding no reversible error in the record, the judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



30 Cal.App.2d 575

PEOPLE v. BURNS.

Cr. 3174.

District Court of Appeal, Second District, Division 2, California.

Jan. 27, 1939.

Criminal law ⇐1130(4)

Where appeal from conviction was regularly on calendar, but accused made no appearance, filed no brief, and made no request for extension of time in which to file brief, appeal was dismissed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

William Burns was convicted of murder in the second degree, and he appeals.

Appeal dismissed.

Ben Van Tress, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

CRAIL, Presiding Justice.

This is an appeal from a judgment of conviction of murder in the second degree. The case is regularly upon the calendar, due notice having been given to the defendant. The defendant has made no appearance in this court and has filed no briefs and has made no request for an extension of time in which to file a brief.

The Attorney-General moves the court for dismissal under section 1253 of the Penal Code. The motion is good and it is granted.

Appeal dismissed.

We concur: WOOD, J.; McCOMB, J.

30 Cal.App.2d 511

SHORTT v. LOS ANGELES GAS & ELECTRIC CORPORATION.

Civ. 12039.

District Court of Appeal, Second District, Division 2, California.

Jan. 25, 1939.

1. Appeal and error ⇐977(3)

It is only in rare instances and upon very strong grounds that the Supreme Court will set aside an order granting a new trial.

2. New trial ⇐70

Insufficiency of the evidence to justify the verdict is a ground for new trial appealing peculiarly to the discretion of the trial court.

3. Appeal and error ⇐1015(2)

The action of the trial court in granting a new trial is conclusive on the appellate court, if there is any appreciable conflict in the evidence.

4. Appeal and error ⇐1015(1)

The action of the trial court in granting a new trial is conclusive on the appellate court where the evidence, though not conflicting, is such that different inferences may reasonably be drawn therefrom.

5. New trial ⇐70

Where there was substantial evidence tending to sustain defendant's theory of collision between automobile of plaintiff's decedent and defendant's light pole, granting a new trial to defendant on ground of insufficiency of evidence to support verdict for plaintiff was discretionary.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Nellie Shortt against the Los Angeles Gas & Electric Corporation for the death of plaintiff's decedent in a collision between his automobile and an electric power pole. From an order of the superior court granting a new trial to defendant on the ground of insufficiency of the evidence to support the verdict, plaintiff appeals.

Order affirmed.

Irving E. Read, of Los Angeles, for appellant.

T. J. Reynolds, L. T. Rice, and Neil G. Locke, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from an order of the superior court granting a new trial to the defendant on the ground of insufficiency of the evidence to support the verdict.

The plaintiff's decedent was killed when his automobile struck an electric pole at the intersection of Venice boulevard and Twelfth avenue. It was the theory of the plaintiff during the trial, supported by substantial evidence, that the decedent's car ran into the pole because it was struck by an electric lamp which was hanging from a suspension wire near the center of the intersection; that said lamp suddenly fell as the decedent was passing under it, hitting the hood of his car and breaking into the windshield.

It was the theory of the defendant that the decedent's car first struck the buttons at the east end of the safety zone in the street and began to wobble and skid, and skidded clear over to the pole, striking the pole with undiminished force, causing the pole to heave up the suspension wire and with it the lamp, and that when the pole whipped back it dropped the lamp down a distance of eight or ten feet, whereupon the lamp broke loose from the wire; that the lamp did not hit the automobile.

There was evidence which tended to show that the lamp and supporting fixture were located two feet south of the center lane of the street, in other words, two feet on the wrong side of the street on which decedent was traveling, and that it would have been physically impossible for the lamp to have come in contact with the automobile.

Furthermore, a Mr. Bidwell testified as follows: "I was traveling east on Venice boulevard on the south half of the boulevard. I observed the [decedent's] Ford coupe the instant it struck the pole. I kept on going in my automobile until I found a place to park. As I passed the location of the street lamp, I did not pass any glass, wires down, arc lamp in the street, or anything like that. After hearing the automobile strike the pole, and after it got out of the range of my vision, I heard the noise of something falling. As I walked back from where I parked my car I saw the street lamp hanging over the trolley wire. As I crossed the intersection immediately after the car struck the pole, there was nothing in the intersection out of the ordinary. After I had gone by I heard a peculiar noise and I didn't know what it was until after I got out of the car and went back. When I came back I saw the lamp hanging over the trolley wire. When the car struck the pole it made a loud noise, it made a considerable impact. After I passed by I heard a crash; it sounded like something brittle falling. The first sound I heard was a thud, and the second sound was a crash. The crash occurred after I got by."

There was evidence to indicate that there was a mark on the pole about 14 inches above the ground, indented about one-half inch across an area of about 8 inches, and that there was an open space in the ground beside the pole where the pole had been temporarily pushed back by the automobile from 4 to 6 inches in width. There was evidence of a black rubber mark on the two southerly buttons on the east end of the safety zone. The same black marks continued along the safety zone and from there clear to the automobile.

There was evidence that glass from the street light was all on the southerly side of Venice boulevard and that there was no glass from the street light on the automobile, and that there was no windshield glass among the glass which was picked up off the street.

[1-4] The rules which the appellate court must follow where there is an appeal from an order granting a new trial for insufficiency of evidence have been fully set forth by this court in the case of Bonner v. Los Angeles Examiner, 17 Cal.App.2d 458, 62 P.2d 427. In that case, among other things, the court said [page 428]: "It has been said and quoted over and over again that 'it is only in rare instances and upon very strong grounds that the supreme court will set aside an order granting a new trial.' * * * 'Insufficiency of the evidence to justify the verdict' is a ground for new trial appealing peculiarly to the discretion of the trial court. * * * If there is *any* appreciable conflict in the evidence, the action of the trial court in granting a new trial is conclusive on the appellate court. * * * And the same is true where the evidence, though not conflicting, is such that different inferences may reasonably be drawn therefrom."

[5] In our view of the case there is substantial evidence which tends to sustain the defendant's theory of how the accident occurred, and therefore it is our duty to affirm the order.

Order affirmed.

We concur: WOOD, J.; McCOMB, J.

30 Cal.App.2d 604

BATE et al. v. LOS ANGELES RY. CORPORATION.

Civ. 12035.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1939.

Rehearing Denied Feb. 23, 1939.

Hearing Denied by Supreme Court March 30, 1939.

1. Trial ⇐178

The trial court may direct a verdict only when, disregarding conflicting evidence, giving plaintiff's evidence all value to which it is legally entitled, and indulging every legitimate inference therefrom, no evidence to support a verdict for plaintiffs may be found.

2. Street railroads ⇐117(17)

Alleged contributory negligence of motorist is ordinarily for jury, and may not be taken from the jury if reasonable minds might differ on the issue.

3. Street railroads ⇐117(28)

In action against street railroad for damages suffered in intersection collision between automobile and street car, motorist's contributory negligence in making left turn in front of approaching street car was for jury under evidence. St.1935, p. 185, § 544.

4. Street railroads ⇐99(12)

An automobile driver about to make a left turn was not obliged to continue to look at approaching street car which he had observed about two-thirds of a block away, but could assume that motorman would operate the car properly. St.1935, p. 185, § 544.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by John A. Bate and another against the Los Angeles Railway Corporation, for damages suffered in collision between automobile and street car. From a judgment on a directed verdict for defendant, plaintiffs appeal.

Reversed.

Rehearing denied; McCOMB, J., dissenting. Hearing denied by Supreme Court; SHENK, J., dissenting.

Frank E. Carleton, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondent.

WOOD, Justice.

In this action plaintiffs seek a judgment for damages suffered by them when an automobile driven by plaintiff John A. Bate was struck by a street car operated by defendant. Plaintiff John A. Bate seeks to recover for personal injuries and plaintiff Crissie A. Bate seeks to recover for damages to the automobile of which she was owner. The trial court directed the jury to return a verdict in defendant's favor "on the ground of contributory negligence on the part of the driver of the car". From the resulting judgment this appeal is prosecuted.

[1] The power of the trial court to direct a verdict is limited and has been well defined. It may direct a verdict only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn therefrom, no evidence of sufficient substantiality to support a verdict in favor of plaintiffs, if given, may be found. Mairo v. Yellow Cab Co., 208 Cal. 350, 281 P. 66.

Considering the evidence in the light of the foregoing rule, it appears that on December 6, 1937, at about 6 o'clock in the evening Mr. Bate was driving a heavy sedan in a northerly direction on the north bound street car track on Virgil avenue in the city of Los Angeles at a speed of from 15 to 20 miles per hour. When he was 50 feet south of the south curb line of Melrose avenue he signaled for a left turn and proceeded about 30 feet when he saw defendants' street car about two-thirds of a block away. Nothing in the operation or appearance of the car impressed him as unusual. It was quite dark and the car's headlight was lighted. Mr. Bate continued to extend his arm to give the turning signal and, proceeding at approximately the same speed, turned to the left near the center of the intersection. The front wheels of his automobile were over the west rail of the south bound tracks when the automobile was struck near the middle by the street car and was pushed 40 to 45 feet down the tracks. There was other traffic in and about the intersection, which was in a district defined as a business district. The speed of street cars at such intersections was limited by city ordinance to 20 miles per hour. At the time of the collision the street car was being operated at a speed of from 40 to 45 miles per hour.

[2, 3] The issue of the alleged contributory negligence of the driver of an automobile is ordinarily to be left to the determination of the jury and it may not be taken from the jury by the court if the circumstances in evidence are such that reasonable minds might differ on the issue. Mr. Bate entered the intersection first and he had the right to assume that the motorman of the street car would obey the law and operate the car in a proper manner. The law permitted him to make a left turn if he could do so "with reasonable safety". Vehicle Code, § 544, St.1935, p. 185. The jury could take into consideration the fact that it was nearly dark, that the street car was two-thirds of a block away, and that there was other traffic at the intersection which called for the attention of the driver of the automobile. The jury might reasonably have concluded that an ordinarily prudent driver would have made the turn as did Mr. Bate. He noticed nothing unusual about the operation of the car but even if he had noticed its undue speed, as stated in Runnels v. United Railroads, 175 Cal. 528, 532, 166 P. 18, 20, "he was not in law bound to believe that a car, though traveling at undue speed when he saw it half a block or more away, would continue to violate the law and not check its speed as it drew near an intersecting street". In the Runnels Case the driver of a team of horses drove across the street car tracks on January 4, at about 6 o'clock in the evening. The court held that the question of his alleged contributory negligence was a matter to be decided by the jury. We know of no rule which makes the act of the driver of an automobile in going in front of an approaching car negligence as a matter of law regardless of the attendant circumstances. On the contrary it has been frequently held that in such cases the issue of the negligence of the operator of the automobile ordinarily should be submitted to the jury. Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 P. 677; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 P. 152, 5 L.R.A.,N.S., 1059; Cowan v. Market Street Ry. Co., 8 Cal.App.2d 642, 47 P.2d 752; Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 P. 53; Ring v. Los Angeles Ry. Corp., 116 Cal.App. 93, 2 P.2d 404; Commonwealth Bonding, etc., Co. v. Railway Co., 42 Cal.App. 573, 184 P. 29. The words of the court in Ross v. Railways Co., 47 Cal.App. 753, 759, 191 P. 703, 706, are appropriate in the present situation: "But a traveler may cross an electric street railway track in front of an approaching car which he sees and hears and not be negligent. If, in view of his distance from the car, the rate of its speed, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross the highway, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury."

[4] Concerning the conduct of Mr. Bate defendant states that, "either he did not look in the direction of the car after making his first observation or if he did it was done heedlessly". In the absence of a warning of approaching danger there was no obligation upon Mr. Bate to continuously look at the street car. He was entitled to assume that the motorman would obey the law and operate the car properly and to direct his own attention to other conditions of traffic. Lee v. Stephens, 8 Cal.App.2d 650, 47 P.2d 1105; Simonsen v. L. J. Christopher Co., 186 Cal. 786, 200 P. 615.

The judgment is reversed.

I concur: CRAIL, P. J.

McCOMB, Justice (dissenting).

I dissent. In the majority opinion it is stated: "When he [plaintiff] was 50 feet south of the south curb line of Melrose avenue he signaled for a left turn and proceeded about 30 feet when he saw defendants' street car about two-thirds of a block away. * * * Mr. Bate continued to extend his arm to give the turning signal and, proceeding at approximately the same speed, turned to the left near the center of the intersection. The front wheels of his automobile were over the west rail of the south bound tracks when the automobile was struck near the middle by the street car."

From this statement one of two conclusions is inevitable: either the plaintiff's testimony was not correct when he stated that he saw the street car two-thirds of a block away when he was approximately 30 feet from the intersection; or he failed to look, or looking, failed to see that which was apparent.

If the first conclusion is correct, plaintiff was guilty of contributory negligence as a matter of law in failing to look and ascertain the position of the street car before turning across the tracks. If the second conclusion is correct, then he is equally guilty of contributory negligence for hav-

ing failed to see that which was clearly evident, or seeing it, for having turned immediately in front of the street car.

It needs no argument to demonstrate the physical impossibility of a collision between an automobile, traveling at the rate of 15 to 20 miles per hour twenty feet from a given point, and a street car which, at the time the automobile is 20 feet from the given point, is two-thirds of a block from the same point. Obviously from the fact that there was a collision, under the above stated facts it is clear that plaintiff turned immediately in front of the street car and was thus contributorily negligent.



KLEIN et ux. v. DUCHESS SANDWICH CO., Limited, et al. *

Civ. 10703.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1939.

Hearing Granted by Supreme Court March 30, 1939.

1. Food ⇐25

Evidence that sandwich allegedly containing maggots had been delivered in sealed package to restaurant by sandwich company about an hour before plaintiff purchased it was sufficient to present issue to jury, whether sandwich had been negligently prepared with deleterious ingredients.

2. Food ⇐25

Evidence that sandwich company was supposed to replace unsold sandwiches with fresh ones each day at restaurant where plaintiff purchased sandwich allegedly containing maggots, and that maggots could develop in two days was sufficient to present issue to jury whether deliveryman of sandwich company had been negligent in making exchange.

3. Food ⇐25

A manufacturer of foodstuffs may be held liable to ultimate consumer thereof for damages arising out of negligent preparation of foodstuffs, whether consumer is immediate purchaser or not.

4. Sales ⇐255

Where husband as agent for wife purchased sandwich which allegedly contained maggots, wife, in action for injury resulting from eating sandwich, was entitled to rely on breach of implied warranty of particular fitness. Civ.Code, § 1735.

5. Food ⇐25

One not party to implied warranty of particular fitness in sale of foodstuffs may recover in tort in event negligence be shown.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Herbert Klein and Alvina Klein, his wife, against the Duchess Sandwich Company, Limited, and others, for injury to the wife as the result of eating a portion of a sandwich allegedly containing maggots. From a judgment directing a verdict for the defendants, the plaintiffs appeal.

Reversed.

Elliott Johnson and D. W. Brobst, both of Oakland, for appellants.

O'Connor, Fitzgerald & Moran, of San Francisco (Harold H. Cohn, of San Francisco, of counsel), for respondents.

TYLER, Presiding Justice.

Action instituted by plaintiffs to recover damages for personal injury resulting to the wife as the result of eating a portion of a sandwich containing worms, described by her as maggots. The sandwich was served to her by the respondent Frank Kilpatrick in a sealed package, it having been prepared and sealed in wax paper by respondent Duchess Sandwich Company, Ltd., a corporation. The complaint was based upon two theories: one upon an implied warranty upon the part of the cafe keeper and the manufacturer as to the condition of the sandwich; the other upon the rule of negligence. At the conclusion of the evidence the trial court granted respondents' motion for a directed verdict. The issues involved are, does the doctrine of implied warranty of fitness of an article for the purpose for which it was intended extend beyond the immediate purchaser of such article, and whether or not the evidence discloses any negligence. We are of the opinion that both questions should have been submitted to the jury, and that the court erred in granting the motion.

*For subsequent opinion see 93 P.2d 799.

[1, 2] It appeared in evidence that respondent Frank Kilpatrick operated a small restaurant in the city of Oakland known as the Happy Daze Buffet. On July 21, 1936, appellant Mrs. Klein went to the restaurant to obtain something to eat. She was driven to the front door in an automobile operated by her husband, who informed Kilpatrick that he wanted a sandwich for his wife. The sandwich was placed on a tray and was delivered to the wife. It was wrapped in wax paper and sealed by two metal clamps which were placed there by respondent sandwich company prior to its sale to Kilpatrick. The wife opened the sealed package by breaking the original seals and then took a bite and swallowed it. It had a peculiar taste so she investigated and discovered the sandwich to be covered with crawling worms, which she described as maggots. She then showed the sandwich to Kilpatrick. She became ill and vomited. She then proceeded to the Duchess Sandwich plant. Thereafter she returned to her home, where she again vomited. After four days in bed, she was ordered to a sanitarium by her physician. She remained ill for a period of approximately six months. It further appeared in evidence that the sandwich purchased had been delivered about an hour previously to respondent Kilpatrick by the Duchess Sandwich Company. Each day the sandwiches, except those containing cheese, were replaced with fresh ones by the company. There was evidence to show that maggots can develop in two days. Under these circumstances we think there was sufficient evidence from which the jury could reasonably have found that the sandwich had been negligently prepared with deleterious ingredients; the method of distribution offered another premise from which the jury could have inferred that the sandwich company had been negligent; the unsold sandwiches were supposed to be replaced with fresh ones each day, and the jury could reasonably have found that the delivery man had been negligent in making the exchange. Gindraux v. Maurice Mercantile Co., 4 Cal. 2d 206, 47 P.2d 708; Cassini v. Curtis Candy Company, 113 N.J.L. 91, 172 A. 519.

[3-5] Respondents concede that a manufacturer of footstuffs may be held liable to the ultimate consumer thereof for damages arising out of the negligent manufacture or preparation of the same, whether the consumer be the immediate purchaser or not, their sole contention being that there is no evidence of negligence. As we have pointed out, maggots were present, and the mode and manner of delivery of the sandwiches was such that the jury might have inferred that unwholesome materials could have caused plaintiff's illness. Nor do we think respondents' contention, that only the immediate purchaser may rely upon the breach of an implied warranty, has any merit. Section 1735 of the Civil Code provides that where a buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies upon the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. This question is not one of first impression in this state. Here clearly the husband was the agent of the wife in making the purchase. Moreover, it is the well settled rule that one not a party to an implied warranty in the sale of foodstuffs may recover in tort in the event negligence be shown. Dryden v. Continental Baking Co., 11 Cal.2d 33, 77 P.2d 833.

The judgment is reversed.

We concur: WARD, J.; KNIGHT, J.



30 Cal.App.2d 514

SENEGRAM v. GROOBMAN et al.

Civ. 12032.

District Court of Appeal, Second District, Division 2, California.

Jan. 25, 1939.

1. Automobiles ⇐171(4)

Motorist first entering intersection had right of way over automobile approaching from right. St.1935, p. 186, § 550(a).

2. Automobiles ⇐206

Motorist entering intersection had right to assume that drivers of other automobiles would respect her right of way and that they would obey the law and drive in prudent manner.

3. Automobiles ⇐208

Motorist seeing automobile 200 feet away approaching intersection from right at 40 to 45 miles an hour was not bound to keep constant watch on such automobile while crossing intersection.

4. Automobiles ⇐245(80)

Whether motorist seeing automobile 200 feet away approaching intersection from right at 40 to 45 miles an hour and proceeding across intersection without again observing automobile was guilty of contributory negligence was for jury.

5. Damages ⇐144

Value of plaintiff's services to business conducted by him during period of inability to work because of injuries could not be considered as element of damage, in absence of special pleading.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Philip Senegram against Louis Groobman, doing business under the fictitious firm name and style of the Whittier Walnut Packing Company, Louis Groobman, individually, and Irene Groobman, for injuries sustained in an automobile collision. Judgment for plaintiff, and both plaintiff and defendants appeal.

Affirmed.

Henry Haves, of Los Angeles, for plaintiff.

Abe Richman, of Los Angeles, for defendants.

WOOD, Justice.

The plaintiff was injured on December 26, 1936, in a collision between an automobile driven by his wife and one driven by defendant Irene Groobman. The last-mentioned car was owned by defendant Louis Groobman and was being driven with his knowledge and consent. Defendants appeal from a judgment in favor of plaintiff in the sum of $1,750.

[1-4] Plaintiff was riding with his wife and it is claimed that she was guilty of contributory negligence as a matter of law. Mrs. Senegram was driving in a northerly direction on Chicago street in the city of Los Angeles and as she approached the intersection of Bird street she brought her automobile to a stop. She observed defendants' automobile approaching on the right at a distance of about 200 feet from the intersection, traveling in a westerly direction. She estimated that the speed of the defendants' car was between 40 and 45 miles per hour. She entered the intersection and did not again observe the defendants' car until the collision. Having entered the intersection first, Mrs. Senegram had the right of way. Sec. 550(a) of the Vehicle Code, St.1935, p. 186. She had the right to assume that drivers of other cars would respect her right of way and that they would obey the law and drive in a prudent manner. Robinson v. Clemons, 46 Cal.App. 661, 190 P. 203; Briggs v. Koyer, 138 Cal.App. 487, 32 P.2d 649; Wynne v. Wright, 105 Cal.App. 17, 286 P. 1057. It was proper for Mrs. Senegram to direct her attention to other conditions of traffic and she was not obligated to keep a constant watch upon the defendants' car. Lee v. Stephens, 8 Cal.App. 2d 650, 47 P.2d 1105. The issue of the alleged contributory negligence of Mrs. Senegram was for the determination of the trial court. Its finding that she was free from negligence is amply supported by the evidence.

Our disposition of the point just discussed makes it unnecessary to pass upon the contention of plaintiff that Mrs. Senegram's negligence, if any, was not imputable to plaintiff.

[5] An appeal is prosecuted by the plaintiff from "that portion of the judgment which limits the plaintiff's recovery to the sum of Seventeen hundred fifty Dollars ($1750.00)." Plaintiff owned and conducted his own business in which approximately fifty persons were employed. As a result of the accident he was incapacitated for about two months. He attempted to present evidence as to the value of his services to his business during the period in which he was disabled. In his appeal plaintiff contends that the court erred in refusing to admit this evidence. The element of damages sought by plaintiff must be specially pleaded. Hoffman v. Lane, 11 Cal.App.2d 655, 659, 54 P.2d 477. This he failed to do and consequently is not in position to complain of the ruling of the court.

The judgment is affirmed, neither party to recover costs on appeal.

We concur: CRAIL, P. J.; McCOMB, J.

30 Cal.App.2d 556

HART v. ANDREWS BROS., Inc., et al.

Civ. 2228.

District Court of Appeal, Fourth District, California.

Jan. 26, 1939.

1. Limitation of actions ⇐183(2)

Where particular statute of limitations pleaded as bar to an action contains two or more subdivisions, answer must plead the subdivision number as well as the section number to present the defense.

2. Limitation of actions ⇐180(6), 182(5)

Statute of limitations must be affirmatively pleaded, either by demurrer or by answer, or its benefits are waived.

3. Limitation of actions ⇐183(2)

Where maker failed to plead the subdivision of the statute of limitations relied upon by him to defeat action on notes, defense of statute of limitations was waived. Code Civ.Proc. §§ 337, 458.

4. Appeal and error ⇐110

No appeal lies from an order denying a motion for a new trial. Code Civ.Proc. § 963.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Augusta A. Hart against Andrews Brothers, Incorporated, a corporation, and Jennie Slayman, as administratrix of the estate of Joseph Slayman, deceased, upon three promissory notes signed by deceased. From an adverse judgment, defendant administratrix appeals.

Affirmed.

N. Lindsay South, of Fresno, for appellant.

Chester R. Andrews, of Fresno, for respondent.

MARKS, Justice.

This is an action on three promissory notes signed by Joseph Slayman for $1,000 each, made payable respectively on September 30, October 30 and November 30, 1931. The complaint was filed on August 2, 1937. It contained copies of two written instruments signed by Slayman dated in January and March, 1936, which plaintiff maintains, and which the trial court found, were promises to pay the indebtedness. Slayman died after the rendition of the judgment against him.

Slayman pleaded the statute of limitations in the following form: "That said promisory notes refered to and set forth in paragraph III are barred and each of them is barred by the statute of limitation, to-wit: Sect. 337 Code of Civil Proceedure of the State of California."

Section 337 of the Code of Civil Procedure contains two subdivisions. The second subdivision includes within its provisions three classes of accounts.

Section 458 of the Code of Civil Procedure provides as follows: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section —— (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred."

[1] It is now the settled law in California that where the particular code section pleaded as a bar to the action, contains two or more subdivisions, the answer must plead the subdivision number as well as the section number to present the defense of the statute of limitations; that an answer that merely pleads such section number without also pleading the proper subdivision number does not present the defense that the action is barred by a statute of limitations. Overton v. White, 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99. Numerous cases are cited and considered in that opinion.

[2] In 16 California Jurisprudence 603 it is said: "Since, as between persons acting in their own right, the statute of limitations is a personal privilege to be asserted or waived at the option of the one entitled to assert it, the statute must be affirmatively pleaded, either by demurrer or by answer, or its benefits are waived. This is true whether the action is one upon a demand which is governed by the general statute of limitations, or one which is governed by a statute relating to a particular proceeding."

[3] As section 337 of the Code of Civil Procedure contains two subdivisions, and as Slayman pleaded the section without pleading the subdivision relied upon by

him, his answer did not present the defense of the bar of the statute of limitations, and that defense was waived. He relies on no other defense here.

[4] No appeal lies from an order denying a motion for a new trial. Sec. 963, Code Civ.Proc.

The appeal from the order denying the motion for new trial is dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



30 Cal.App.2d 576

PEOPLE v. FLOHR.

Cr. 520.

District Court of Appeal, Fourth District, California.

Jan. 27, 1939.

Rehearing Denied Feb. 9, 1939.

Hearing Denied by Supreme Court Feb. 23, 1939.

1. Criminal law ⇐998

A judgment void on face of record may be attacked either by appeal from judgment or by motion to vacate judgment, but both remedies are not available in same case.

2. Criminal law ⇐1023(12)

Where a judgment is not void or illegally entered, but is merely erroneous, an order denying motion to vacate judgment is not reviewable when same points might have been presented upon appeal from judgment.

3. Robbery ⇐17(1)

Information charging that accused robbed a certain person while armed with a gun, stating time and place, was sufficient, in absence of demurrer, to support verdict and judgment of conviction. Pen.Code, §§ 211, 951, 952, 1158a.

4. Robbery ⇐1

"Robbed" means to take personalty in possession of another from his person or his presence, feloniously and against his will, by violence or by putting him in fear. Pen. Code, §§ 211, 1158a.

[Ed. Note.—For other definitions of "Rob," see Words & Phrases.]

5. Criminal law ⇐1141(2)

An appellant must produce a record which discloses that error relied on has in fact occurred.

6. Robbery ⇐28

Where information charged that accused was armed with gun when he committed robbery, verdict finding him guilty "as charged in the information" amounted to finding that accused was armed with gun at time of crime. Pen.Code, §§ 211, 1158a.

7. Robbery ⇐11

A gun is a "weapon" within statute relating to commission of robbery while armed with a weapon. Pen.Code, § 1158a.

[Ed. Note.—For other definitions of "Weapon," see Words & Phrases.]

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Ronald Flohr was convicted of robbery in the first degree, and he appeals.

Affirmed.

Ronald E. Flohr, in pro. per.

Earl Warren, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

MARKS, Justice.

By an amended information, filed on March 5, 1937, defendant and another were charged with "a felony, to-wit: Robbery in that on or about the 23rd day of February, 1937, in the County of Fresno, State of California, they did, while armed with a deadly weapon, to-wit: a gun, rob one W. L. McDonald". Defendant was tried and found guilty. Judgment was pronounced upon him on March 27, 1937. No appeal was taken from that judgment.

On August 26, 1938, defendant filed a motion to vacate and set aside the judgment. His motion was denied and this appeal was taken from the order denying it. As grounds for reversal of the order, defendant urges that: (1) The amended information failed to charge him with a public offense; (2) that the verdict was void as (a) it did not find the degree of the crime of which he was convicted, and (b) no separate verdict on the question of his being armed was returned, sec. 1158a, Pen.Code; and (3) that consequently the judgment pronounced upon him was void.

The attorney-general cites People v. Bowles, 135 Cal.App. 514, 27 P.2d 411,

and urges that the order denying defendant's motion is not appealable. It is obvious that all of the grounds urged in support of the motion to vacate the judgment were proper grounds to urge on an appeal from the judgment. In discussing the propriety of considering such grounds on an appeal from an order refusing to vacate the judgment, this court, in the Bowles Case, said:

"It is the contention of appellant upon this appeal that the judgment rendered on April 8, 1929, is a void judgment and was not rendered valid by its affirmance, and that, since it is void upon its face, it is subject to attack, direct or collateral, at any time. Numerous authorities support this established principle. It is also pointed out that a motion to vacate a void judgment is a proper mode of attack and that an appeal lies from an order refusing to vacate such a judgment. These contentions based upon established principles are correct. However, it is equally well established that, although a defendant in a criminal action is specifically permitted to appeal from an order made after judgment, affecting his substantial rights (subdivision 3, § 1237, Pen.Code), 'ordinarily a party who has a right to appeal from a judgment or order is not allowed to move to set it aside and then appeal from an order denying his motion' (8 Cal.Jur., p. 495, § 510). This latter rule is directly applicable to the situation here presented. The appellant could have properly presented, on his appeal from the judgment, precisely the same questions which he now seeks to present on his appeal from the court's order refusing to vacate the judgment, and obviously could have much sooner obtained whatever relief he was entitled to receive. The effect of sustaining appellant's contentions on this appeal 'would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing'. De la Montanya v. De la Montanya, 112 Cal. 101, 118, 44 P. 345, 349, 32 L.R.A. 82, 53 Am.St.Rep. 165. It is our opinion that a reviewing court is not warranted in entertaining an appeal from an order made after judgment where the same questions presented upon such appeal could have been fairly and properly raised on an appeal which has been taken from the judgment and the rights of appellant could have therein received full and adequate protection. People v. Walker, 132 Cal. 137, 142, 64 P. 133; People v. Brattingham, 91 Cal.App. 527, 267 P. 120; People v. Van Buren [134 Cal.App. 206], 25 P.(2d) 32."

Defendant urges that the Bowles Case cannot be controlling here because the defendant in that case appealed from the judgment, and in the instant case there was no appeal from the judgment and consequently the questions presented are for the first time before an appellate court. To a certain extent this argument is supported by People v. Hoffman, 132 Cal. App. 60, 22 P.2d 229, where this court reversed an order of the superior court denying a motion to vacate a judgment where no appeal had been taken from it and where it appeared on the face of the record that the information "did not state a public offense and that defendant could not be prosecuted thereunder, and no judgment of conviction could be based upon it". [Page 230.]

[1, 2] The true rules governing both situations seem to be that where a judgment is void on the face of the record it may be attacked either by appeal from the judgment or by a motion to vacate the judgment; that both remedies are not available in the same case; "that, where a judgment is not void or illegally entered, but is merely erroneous, an order denying a motion to vacate the same is not reviewable when the same points might have been presented upon an appeal from the judgment". People v. Ramirez, 139 Cal.App. 380, 33 P.2d 848, 849. See, also, People v. Birdsell, 21 Cal.App.2d 682, 70 P.2d 231. It follows that unless the record here shows on its face that the judgment pronounced on defendant is void, the trial court committed no error in denying the motion. As there was no appeal from the judgment and the questions raised by defendant were presented to the trial court and are urged on this appeal for the first time, we must consider the questions presented in order to determine if the judgment is void on the face of the record.

We have already quoted the charging portion of the amended information.

Defendant first urges that the amended information does not charge a public offense because it did not allege that he feloniously took "personal property in the possession of another, from his person or immediate presence, and against his will" and that such taking was "accom-

plished by means of force or fear". Sec. 211, Pen.Code.

[3, 4] While the brevity of the amended information is not to be approved for general use, we believe that in the absence of a demurrer, it sufficiently apprised defendant of the offense with which he was charged so that the verdict and judgment rendered under it cannot be held to be void. Our reasons for this conclusion are set forth in People v. Fallai, 99 Cal.App. 297, 278 P. 449, as follows [page 450]:

"The short form of information authorized by the 1927 amendment to section 951 of the Penal Code is as follows: '(Title of the Court). The district attorney of the County of ——— hereby accuses A. B. of a felony (or misdemeanor), to-wit: (giving the name of the crime, as murder, burglary, etc.) in that on or about a certain date (stating it) in the county of ——— State of California, he (here insert statement of the act or omission, as for example, "murdered C. D.")' (St.1927, p. 1043); and in connection therewith section 952 as amended by St.1927, p. 1043, of the said Code provides that in charging an offense the information shall be sufficient if it contains in substance a statement that the accused has committed some public offense therein specified, that such statement may be made in ordinary and concise language without any technical averments, and may be in the words of the enactment describing the offense or in any words sufficient to give the accused notice of the offense of which he is charged. The code (Pen.Code § 211) defines robbery to be 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear;' and in its relation to the law the word 'robbed' is defined by Webster to mean: 'To take personal property in the possession of another from his person or his presence feloniously and against his will by violence or by putting him in fear.' It would appear, therefore, in view of the foregoing definitions, that the word 'robbed' as it is used in the administration of the criminal laws has a fixed and well-defined meaning, and, that being so, it would be wholly unreasonable to hold, we think, that appellant did not know what was intended when he was charged with having 'robbed John J. Fitzgerald of one gold watch' and the other personal property above mentioned."

[5] We must next consider the question of the validity of the verdict. The record presented is far from satisfactory. However, the rule is "that an appellant must produce a record which discloses that the error relied on has in fact occurred. People v. Ferguson, 124 Cal.App. 221, 12 P.(2d) 158, 960." People v. Ramirez, supra.

Defendant urges that the jury did not determine the degree of the robbery of which it found him guilty. We find in the record a copy of a verdict in which the jury found defendant "guilty of robbery in the first degree".

Defendant urges that the jury did not find a special verdict on the question of his being armed at the time of the commission of the offense as required in section 1158a of the Penal Code. We find in the record the following verdict: "We, the jury in the above entitled action, find the defendant, Ronald Flohr, guilty as charged in the information. N. M. Bartlett, Foreman."

In People v. Mercado, 59 Cal.App. 69, 209 P. 1035, the court said [page 1038]: "The form of a verdict is to be regarded as immaterial, provided the intention to convict of the crime charged is unmistakably expressed. People v. McCarty, 48 Cal. [557] 559; People v. Swenson, 49 Cal. [388] 390, 391; People v. Holmes, 118 Cal. [444] 448, 50 P. 675; Pen.Code, § 1404. It should be construed in connection with the information and the plea of defendant. People v. Tilley, 135 Cal [61] 62, 67 P. 42."

[6, 7] The amended information charged that defendant was armed with a gun when he committed the robbery. The quoted verdict found him guilty "as charged in the information" which is equivalent to a finding that he was armed with a gun at the time of the commission of the crime. That a "gun" falls within the definition of the word "weapon", appearing in section 1158a of the Penal Code, cannot be doubted. We find no merit in this argument of defendant.

As the last ground for reversal of the order defendant urges that the judgment pronounced upon him was void. This contention is based solely on the insufficiency of the amended information and of the

verdict. We have already discussed these questions and need give them no further consideration.

The order is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



30 Cal.App.2d 582

GUILLOT v. HAGMAN et al.

Civ. 12006.

District Court of Appeal, Second District, Division 2, California.

Jan. 27, 1939.

Rehearing Denied Feb. 23, 1939.

Hearing Denied by Supreme Court March 27, 1939.

1. Appeal and error ⇐930(1)

On defendant's appeal from judgment for plaintiff, Supreme Court was required to review evidence in light most favorable to plaintiff.

2. Negligence ⇐136(9)

Issues of negligence and contributory negligence become issues of law instead of fact only when facts are clear and indisputable and when no other inference than that of contributory negligence or lack of negligence can be drawn therefrom.

3. Automobiles ⇐245(72)

In pedestrian's action for injuries sustained when struck by automobile while crossing street, question of pedestrian's contributory negligence was for jury.

4. Automobiles ⇐245(6)

In pedestrian's action for injuries sustained when struck by automobile while crossing street, negligence of automobile driver was for jury.

5. Automobiles ⇐244(50)

Where center line of drive intersected tangent of curve of boulevard at about a 65 degree or 70 degree angle and pedestrian crossing boulevard was following a course at right angles to tangent of the curve of the boulevard, such course representing the shortest distance to opposite curb, evidence sustained jury's implied finding that pedestrian was within zone in which he might rightfully assume that motorist would exercise reasonable care to avoid hitting pedestrian. St.1935, p. 99, § 85.

6. Automobiles ⇐244(6, 36, 50)

Where center line of drive intersected tangent of curve of boulevard at about a 65 degree or 70 degree angle and pedestrian crossing boulevard was following a course at right angles to tangent of the curve of the boulevard, such course representing the shortest distance to opposite curb, when struck by automobile, evidence sustained implied finding that driver of automobile was guilty of negligence which was proximate cause of accident and that pedestrian was free from contributory negligence. St.1935, p. 99, § 85.

7. Trial ⇐296(4)

In pedestrian's action for injuries sustained when struck by automobile, formula instruction, containing phrase if you believe that plaintiff "being himself free from any negligence contributing directly and proximately to the happening of the accident," was not erroneous as leaving out element of contributory negligence and directing jury that pedestrian was free from negligence where court carefully instructed jury regarding contributory negligence.

8. Automobiles ⇐192(8)

Conditional seller which had not given statutory notice of transfer of automobile until some time after accident was not relieved from ownership liability. St.1935, pp. 115, 154, §§ 177(b), 402(f).

9. Automobiles ⇐192(8)

Compliance with statute regarding notice of transfer of automobile is condition which must be first fulfilled before conditional seller may be relieved of his liability as owner of automobile. St.1935, pp. 115, 154, §§ 177 (b), 402(f).

10. Appeal and error ⇐1050(1)

In action by pedestrian struck by automobile against conditional seller who did not give notice of transfer until after accident, admission of second conditional sales contract between same parties, dated four days after accident, was not prejudicial error. St.1935, pp. 115, 154, §§ 177(b), 402(f).

11. Appeal and error ⇐1170(9)

Where it appeared that there had been no miscarriage of justice in pedestrian's action for injuries sustained when struck by automobile, Court of Appeal would not discuss in detail alleged erroneous instructions. Const. art. 6, § 4½.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Personal injury action by E. F. Guillot against Earl P. Hagman, the Kelley Kar Company, and others. From an adverse judgment, the Kelley Kar Company appeals.

Affirmed.

For prior opinion of District Court of Appeal, see 85 P.2d 503.

Kenneth J. Murphy, of Los Angeles, for appellant.

Kryne Van Den Akker, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

[1] This is an appeal by the Kelley Kar Company from a judgment in favor of the plaintiff in an action for damages arising out of a collision between an automobile, driven by defendant Earl Hagman, and plaintiff as a pedestrian. It is the contention of the appellant that the plaintiff was guilty of contributory negligence as a matter of law, and that as a matter of law defendant Earl Hagman was not guilty of any negligence. It is our duty to view the evidence in the light most favorable to the plaintiff.

The accident occurred after dark on September 26, 1937, at the intersection of Eureka drive with Ventura boulevard in the city of Los Angeles. Ventura boulevard runs east and west, but curves slightly at the intersection. Eureka drive extends into Ventura boulevard, but not beyond it. Shortly before the accident the plaintiff parked his automobile on the south side of Ventura boulevard, a few feet west of Eureka drive, walked to the southwest corner of the intersection and, as a pedestrian, started to cross Ventura boulevard. The plaintiff proceeded a distance of from 7 to 10 feet from the curb, then stopped, waiting for traffic conditions to be favorable so that he could proceed safely. During that period 25 or 30 cars with their lights lit passed in both directions. After looking both east and west, the plaintiff, thinking his way clear proceeded to cross Ventura boulevard, continuing to look in both directions while doing so. He proceeded until he passed the double white line marking the center of the boulevard, a distance of over 60 feet from the south curb and, continuing for a short distance, was struck without warning by the right front portion of defendants' car which was operated by defendant Earl Hagman, the son of defendant Paul Hagman, and which was proceeding in a westerly direction along Ventura boulevard. The car had been purchased from appellant by Paul Hagman under a conditional sales contract on the previous day. Defendant Earl Hagman did not see plaintiff until he was within a distance of 25 feet from the point of impact. At the time of the accident the street lights at the intersection were lighted. In attempting to cross the boulevard, plaintiff was following a course which represented the shortest distance between the north and south curb lines of the boulevard.

[2-4] The principal argument advanced by appellant in support of its contention that plaintiff was guilty of contributory negligence as a matter of law and that as a matter of law defendant Earl Hagman was not guilty of any negligence is that plaintiff was not crossing the boulevard in an unmarked cross-walk and therefore was not entitled to the right of way. Such issues become issues of law instead of fact only when the facts are clear and indisputable, and when no other inference than that of contributory negligence or lack of negligence can be drawn from the facts. McQuigg v. Childs, 213 Cal. 661, 3 P.2d 309. In our opinion, the evidence was such that the question of contributory negligence of the plaintiff or lack of negligence on the part of defendant Earl Hagman was one of fact which was properly submitted to the jury for its determination.

[5] Appellant claims that a prolongation of the sidewalk lines of the sidewalk on the west side of Eureka drive across the boulevard represents the unmarked crosswalk, relying upon section 85 of the Motor Vehicle Code, St.1935, p. 99. This section defines an unmarked crosswalk to be: "That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles." Since the center line of Eureka drive intersects the tangent of the curve of Ventura boulevard at about a 65 degree or 70 degree angle, it cannot be said that the intersecting roadways meet at right angles. Plaintiff in his attempt to cross the boulevard was following a course at right angles to the tangent of the curve of the boulevard, such course representing the shortest distance between the north and south curb lines from the southwest corner of the in-

tersection. If plaintiff had been compelled to follow the course suggested by appellant in order to be within the unmarked crosswalk, he would have been exposed to danger for an unreasonably long time because of the greater length of such diagonal course. Municipal ordinance, section 80.-39, of the city of Los Angeles provides: "No pedestrian shall cross a roadway at any place other than by a route at right angles to the curb, or by the shortest route to the opposite curb except in a marked crosswalk." The course which plaintiff was following was fully in compliance with the above ordinance. There was sufficient evidence to sustain the implied finding of the jury that plaintiff was within the zone in which he might rightfully assume that defendant Earl Hagman and other motorists would exercise reasonable care to avoid hitting him.

[6] There is substantial evidence in the record to sustain the implied findings of the jury that the defendant driver was guilty of negligence which was the proximate cause of the accident, and that the plaintiff was free from negligence which contributed to the accident.

The appellant next contends that the instructions of the court on the subject of negligence and contributory negligence were erroneous and prejudicial. Appellant's objections, however, are mainly based upon the claim that the plaintiff was negligent as a matter of law and that there was no evidence to show that the defendant driver was negligent. We have already held that these contentions are untenable. All of the instructions, but one, concerning which appellant complains under this point have heretofore been approved by the appellate courts of this state.

[7] The instruction which has not heretofore been approved is a formula instruction which contains the phrase, "therefore, * * * if you believe * * * that the plaintiff, E. F. Guillot, being himself free from any negligence contributing directly and proximately to the happening of the accident * * *." The contention of the appellant is that this formula instruction leaves out the element of contributory negligence, and appellant even contends that the instruction directs the jury that the plaintiff was free from any negligence. But the fact is that in six or seven other instructions the court carefully instructed the jury, at the defendants' request, on the question of the contributory negligence of the plaintiff. The court merely used the wrong tense of the verb when it used the word "being", intending to use the word "was", so that in essence the instruction read, "if you believe from the evidence that the plaintiff, E. F. Guillot, was himself free from any negligence", etc. There is nothing in appellant's contention which would warrant a reversal.

The appellant next contends that the judgment against it is without support in the evidence and is contrary to law. In this respect, it should be noted that appellant entered into a valid conditional sales contract for the sale of the automobile to defendant Paul E. Hagman at about 12 o'clock noon on Saturday, September 25, 1937, and at that time delivered possession of the car to defendant Hagman. The accident occurred on the following day, which was a Sunday. The notice of transfer required by section 177(b) of the Vehicle Code, St. 1935, p. 115, was not sent in until a later date and was not received by the department of motor vehicles until October 8, 1937. Considering section 402 (f) of the Vehicle Code, p. 154, alone, it would seem that appellant would be absolved from ownership liability because of the fact that it was a conditional vendor. We are, however, confronted with the rule, as stated by the court in Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744, and Schmidt v. C. I. T. Corp., 14 Cal.App.2d 92, 57 P.2d 1016, to the effect that the exception from ownership liability under section 1714¼ of the Civil Code (now sec. 402 [f] of the Vehicle Code) does not run in favor of a conditional vendor until he has complied with the provisions of the Vehicle Act relative to giving notice of the transfer or to changing the ownership certificate. The court states at page 87, 37 P.2d at page 747, in the case of Bunch v. Kin, supra: "In the case of a conditional sale, * * * the seller, in order to escape liability as owner, had first either to give notice of the sale to the division of motor vehicles under section 45¾ of the California Vehicle Act [now sec. 177 [b] of the Vehicle Code], or to see that the requirements of section 45 of the same act were complied with, namely: That a new certificate of ownership be issued in which he is named as legal owner. Until one or the other of these things were done, the former owner, so far as liability to a third person is concerned, continued to be the owner."

[8, 9] It is therefore apparent that since appellant had not given the notice of transfer required by section 177(b) of the Vehicle Code until some time after the accident, it was not relieved from ownership liability by virtue of the provisions of section 402 (f) of the same code. Compliance with the provisions of the code regarding notice is a condition which must first be fulfilled before the conditional vendor may be relieved of his liability as owner.

[10] A second conditional sales contract between the same parties, dated four days after the accident was introduced in evidence. Appellant now contends that it was error for the court to permit proof of the second contract. However, in the light of the foregoing opinion, it was wholly immaterial whether the interest which the conditional vendee acquired was obtained by virtue of the first or second contract, since in any event the appellant failed to give the notice of transfer prior to the accident.

The appellant next contends that the rulings of the court on the admission of evidence constituted prejudicial error, but we see no ground for the reversal of the case on this contention.

[11] Finally, the appellant contends that the instructions given by the court on owner's liability were erroneous, and further that the court's refusal to give to the jury appellant's requested instruction No. 22 was erroneous. We do not set the instructions out in full because of their length and because in our view of the case there has been no miscarriage of justice (Constitution of California, art. 6, sec. 4½), and it is not necessary for us to discuss the instructions in detail.

Judgment affirmed.

I concur: McCOMB, J.

WOOD, Justice (dissenting).

I dissent. Provision is expressly made in the Vehicle Code that the vendor of an automobile under a contract of conditional sale is not liable for the negligence of the vendee "until the vendor or his assignee retake possession of such motor vehicle". Sec. 402f. In section 177(b) of the Vehicle Code it is provided: "Every dealer upon transferring by sale, lease or otherwise any vehicle, whether new or used, of a type subject to registration hereunder, shall immediately give written notice of such transfer to the department upon the appropriate form provided by it * * *." In Bunch v. Kin, referred to in the majority opinion it is said that this provision was made for the protection of the vendor. In that case the vehicle had been sold and delivered six months prior to the accident and no notice had ever been given to the department of motor vehicles and it was properly held that the vendor was not relieved from liability. Any language used in the opinion which might be construed as holding that in all circumstances the vendor is liable until the notice be actually given was not necessary to the determination of the issues then before the court.

It will be noted that in the present case the sale and delivery was made on Saturday at 12 o'clock noon and the accident occurred on Sunday, the following day. It is provided in section 10 of the Political Code: "Every Saturday from twelve o'clock noon until twelve o'clock midnight is a holiday as regards the transaction of business in the public offices of this state * * *." It is apparent that it was practically impossible for the vendor to notify the department of motor vehicles "upon the appropriate form" before the accident occurred. In construing a statutory provision the "interpretation must be reasonable". Sect. 3542, Civ.Code. In Lewis v. Curry, 156 Cal. 93, 101, 103 P. 493, 496, it was held that, "There is no precise definition, so far as time is concerned, of the words 'forthwith' and 'immediately.' In every case the meaning depends upon the circumstances of the case and the act to be performed." The rights, obligations and responsibilities of the parties must be determined as of the time of the accident, on Sunday, September 26. In my opinion a reasonable interpretation of the statute in question forces the conclusion that the Kelley Kar Company was not then liable. The fact that notice was given to the department several days later cannot create a liability where none had theretofore existed.

The rights and obligations of the parties were not changed by the making of a second conditional sale contract four days after the accident. Both contracts covered the same car, the only substantial difference being in respect to the provision for the payment of the balance of the purchase price. Both contracts provided for the down payment of $300, the first contract providing for the payment of the balance in a lump sum and the second providing for monthly payments. The vehicle was sold and delivered under the first contract.

BRILL et al. v. LOS ANGELES COUNTY et al., and four other cases.*

Civ. 10928–10932.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1939.

Hearing Granted by Supreme Court March 27, 1939.

1. Municipal corporations ⇐977

A demand, required by city charter or statute, for payment of money due from city, as for taxes paid under protest, before filing of suit therefor, is condition precedent to such action. Pol.Code, §§ 3819, 4075; Los Angeles City Charter, § 376.

2. Municipal corporations ⇐977

The framers of city charter provision, requiring demand for payment of money due from city before bringing suit therefor, must be held to have enacted it in light of prior judicial construction of like provision in previous charter as making such demand condition precedent to action against city on claim for money, as for taxes paid under protest. Los Angeles City Charter, § 376; Pol.Code, § 3819.

3. Municipal corporations ⇐977

A city, adopting county system of taxation, did not waive provision of its charter requiring demand for payment of money before bringing suit therefor, as for taxes paid under protest, in absence of ordinance delegating to county officials city's right to appear in and defend action against it. Los Angeles City Charter, §§ 2, 342, 376; Pol. Code, § 3819; Const. art. 11, §§ 6, 16.

4. Municipal corporations ⇐1016

The right to sue chartered city is statutory, but city's right to defend itself against suit is constitutional.

5. Municipal corporations ⇐1027

The rights to sue chartered city and defend against such suit cannot be delegated by party entitled to sue or city to any other body, officer, or individual. Const. art. 11, § 13.

6. Municipal corporations ⇐1016, 1018

The constitutional right of incorporated municipalities to appear and defend, compromise or settle litigation against them has not been abrogated or limited by statutes. Pol.Code, §§ 3804, 3819.

7. Municipal corporations ⇐977

The statute authorizing action against county to recover back taxes paid under protest does not permit suit against county alone for money paid into city treasury by county officers, to whom city, by adopting county system of taxation, delegated power to levy, assess and collect taxes for municipal purposes. Pol.Code, § 3819; Const. art. 11, §§ 6, 16.

8. Municipal corporations ⇐977

A city has inherent right to defend action by taxpayer seeking enforceable judgment against city for amount of taxes paid under protest to county officials as city's ex officio agents. Pol.Code, § 3819; Const. art. 11, §§ 6, 16.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Actions by Mary H. Brill and others, as executors of the last will of William J. Hunsaker, deceased, Eugene W. Britt, Daniel M. Hunsaker, Mary H. Brill and Rose H. Steehler, respectively, against Los Angeles County and the City of Los Angeles to recover taxes paid under protest. Judgments for defendants, and plaintiffs appeal.

Affirmed.

Daniel M. Hunsaker and Lloyd E. Keiser, both of Los Angeles, for appellants.

Holbrook & Tarr and W. Sumner Holbrook, Jr., all of Los Angeles, amici curiae in support of Appellant on behalf of County Auditor H. A. Payne of Los Angeles County.

Ray L. Chesebro, City Atty., and Leon T. David, Asst. City Atty., both of Los Angeles, and John W. Holmes, Deputy City Atty., of Pasadena, for respondent City of Los Angeles.

J. H. O'Connor, County Counsel, and Everett W. Mattoon, former County Counsel, both of Los Angeles, for respondent Angeles County.

NOURSE, Presiding Justice.

The several plaintiffs in these five cases sued to recover taxes paid under protest. From a judgment for defendants on the pleadings in each case the plaintiffs have appealed, and have by stipulation consolidated all cases for hearing upon the briefs filed in the Steehler case. The single question presented for decision is whether it is necessary under the provisions of the

* Subsequent opinion 108 P.2d 443.

Los Angeles city charter to present a claim to the city as a condition precedent to the maintenance of an action to recover municipal taxes paid under protest.

The taxes were assessed and collected by the proper officials of the County of Los Angeles pursuant to authority theretofore delegated by the city under provisions of article 11 of section 6 of the Constitution. They were paid under protest conformably with the provisions of section 3819 of the *Political Code,* and thereupon transmitted to the city, as required by section 16 of article 11 of the Constitution. The actions to recover such taxes were brought against both county and city, but no demand for payment was filed with the city for payment. It is the city's position in this litigation that such demand is required by section 376 of its charter.

An understanding of the question involved requires the quotation of these constitutional and statutory provisions.

Section 6 of article 11 of the Constitution reads in part: "Cities and towns * * * may, by charter provision or amendment, provide for the performance by *county officers* of certain of their municipal functions, whenever the discharge of such municipal functions by county officers is authorized by general laws or by the provisions of a county charter framed and adopted by authority of this Constitution." Section 16 of the same article reads: "All moneys, assessments, and taxes belonging to or *collected for the use of any* county, *city,* town, or other public or municipal corporation, coming into the hands of any officer thereof, shall immediately be deposited with the treasurer, or other legal depositary, *to the credit of such city,* town, or other corporation, respectively, for the benefit of the funds to which they respectively belong."

Section 3819 of the Political Code read when this litigation arose, in part as follows: "At any time after the assessment-book has been received by the tax collector, and the taxes have become payable, the owner of any property assessed therein, * * * may pay the same to the tax collector under protest, * * * and when so paid under protest, the payment shall in no case be regarded as voluntary payment. And such owner may at any time within six months after such payment *bring an action against the county,* in the superior court, to recover back the tax so paid under protest."

Section 376 of the Los Angeles City Charter reads: "No suit shall be brought on *any claim for money* or damages against the City of Los Angeles * * * until a demand for the same has been presented, as herein provided, and rejected in whole or in part."

Section 2 of the charter provides that the city "shall have the right and power, *subject to the restrictions in this charter contained,* * * * to transfer * * * functions of the city government" to approximate functions of the state or county government.

Section 342 of the charter provides: "Until otherwise provided by ordinance, the city shall *continue to use,* for purposes of municipal taxation, the county system of assessment and tax collection * * *." (All italics ours.)

The ordinance enacted in conformity with these provisions (No. 40302) transfers to the county officials the power of assessment and collection of "taxes levied for municipal purposes" and the sale and redemption of property in cases of nonpayment.

[1] The contentions of the respondents briefly stated are that the city delegated to the proper officials of the county the power to assess and collect its municipal taxes, thereby making these officials special agents of the city. That it did not and could not make the *county* its agent for any purpose, and that, therefore, the city alone has power to defend, compromise, or pay a judgment for refund of taxes collected by these agents in its behalf. Upon this premise the city accords to the county officials so selected the power to assess and collect and the power to receive payment under protest, but the city insists that any suit to recover taxes so paid must be brought against the municipality subject to the restrictions of the charter relating to presentation of claim for payment.

This contention finds full support in the early case of Farmers etc. Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795, which involved the precise question arising out of a like provision of an earlier charter of the city. There the Supreme Court, after reviewing numerous cases of the same nature, said that it was the policy of the law as declared in these cases that [page 796] "the public corporation shall always be given an opportunity to pay before being subjected to an action upon any money demand". As to the application of

the charter condition requiring demand before suit to cases involving the recovery of taxes paid under protest the court said, pages 658-659, 91 P. page 797: "The policy of the law applies as well to them as to other demands against a city, and the reasons for the rule when applied to such a claim are as cogent as when applied to any other claim." And further, "Assuming that the charter provision [adopting the county system of taxation] should be read as making it [Section 3819 of the Political Code] applicable, *it must be construed subject to the provisions of the charter as to claims and demands against the city.*" (Italics ours.)

The rule of the Farmers Bank case is so directly in point that it must control our decision here. Appellants argued that it has been overruled or so distinguished that it is no longer an authority. This position cannot be maintained. They cite Keyes v. San Francisco, 177 Cal. 313, 173 P. 475, as one case which has rejected the rule. That case involved a provision of the San Francisco charter which merely required that *demands* must be approved by the supervisors before paid. The court expressly held that this was far from the "sweeping provisions" of the Los Angeles Charter. In this connection the court said, pp. 318, 319, 173 P. page 477: "Respondent cites no case in which it has been held that these provisions of the charter apply to a claim for the repayment of taxes paid under protest. Geimann v. Board of Police Com'rs, 158 Cal. 748, 112 P. 553, the only decision referred to arising under the present charter of San Francisco, was an action by policemen for salaries alleged to be due them. Such demands are specifically named in the charter and are clearly within the sections above quoted, but bear no resemblance to the claim in controversy. Neither can any reliance be placed upon such sweeping provisions as were considered in Farmers' and Merchants' Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795, and the cases there discussed. McCann v. Sierra County, 7 Cal. 121; People v. Board of Supervisors, 28 Cal. 429; Alden v. Alameda County, 43 Cal. 270; Rhoda v. Alameda County, 52 Cal. 350; Bigelow v. Los Angeles, 141 Cal. 503, 75 P. 111. The cases against the city of Los Angeles turned upon the following section of the charter: 'No suit shall be brought upon any claim for money or damages against the city of Los Angeles, * * * until a demand for the same has been presented as herein provided, and rejected in whole or in part. * * *' The other cases cited were decided upon the basis of section 24 of the County Government Act (Stats. 1855, p. 51) which was repealed by the Political Code. See Lehn v. San Francisco, 66 Cal. 76, 4 P. 965. Section 24 provided that: 'No person shall sue a county in any case, for any demand, unless he or she shall first present his or her claim or demand to the board of supervisors' for allowance, and the same shall be rejected in whole or in part. Manifestly the sections of the San Francisco charter on the subject of prior demand are not of the *sweeping and all-inclusive* character of the provisions just quoted." (Italics ours.)

Appellants cite Birch v. Orange County, 186 Cal. 736, 200 P. 647, as overruling the Farmers Bank Case. We do not so construe it. That was an action to recover taxes under section 3819. The county contended that demand should have been made under section 4075 of the Political Code. The court merely held that the latter section did not purport to declare what demands should be presented, but prescribed the method by which certain claims should be itemized and presented. In commenting on the Farmers Bank Case the court said that the decision was in pursuance of an express declaration that no suit should be brought until a demand had been made. It was said, page 744, 200 P. page 650: "Under earlier decisions in this state the same rule was applied in suits against a county, but these decisions were under a statute which expressly required such presentation to be made to the board of supervisors in all cases before action could be maintained. McCann v. Sierra County, 7 Cal. 121; Alden v. Alameda County, 43 Cal. [270] 272; Rhoda v. Alameda County, 52 Cal. 350; Keyes v. San Francisco, 177 Cal. 313, 319, 173 P. 475. We have no such sweeping requirement at the present time which would hold against a reasonable implication under a special statute to the contrary." Here it should be noted that both of these decisions have been nullified by the amendment to section 4075 of the Political Code in 1931, St. 1931, p. 197, declaring that no action shall be brought on any claim unless demand has first been made.

Finally appellants cite Spencer v. Los Angeles, 180 Cal. 103, 179 P. 163, to the same purpose. But there is less comfort in that than in either of the others. The

Spencer Case was a suit to recover a special assessment under a street opening act. On the question at issue the court said, page 119, 179 P. page 170: "It has been decided, and must now be considered as settled, that where the charter of a city provides that demands must be presented to its council or some officer of the city for approval or rejection, and that no payments can be made nor suit be brought thereon until after such presentation and rejection, that the cause of action does not accrue until such presentation has taken place."

From the foregoing it is obvious that the Farmers Bank Case has not been overruled and that, until overruled, it must be taken as settled law that where the charter or statute requires a demand before suit is filed, such demand is a condition precedent to the action. Cases adhering to the rule are: Crim v. San Francisco, 152 Cal. 279, 281, 92 P. 640; Geimann v. Board of Police Com'rs, 158 Cal. 748, 752, 112 P. 553; Douglass v. Los Angeles, 5 Cal.2d 123, 130, 53 P.2d 353; Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 580, 59 P.2d 104; and many others which need not be cited.

[2] We cannot, at this late date, argue the question of the *intention* of the charter framers in the enactment of section 376. It is beside the question that that section appears under the chapter relating to "Finance". It is identical, in so far as the question here is concerned, with the section which was held applicable to this class of cases in the Farmers Bank Case. This section having been so construed before the adoption of the present charter, the settled rules of decision require the holding that the framers of the present charter enacted this section in the light of the prior judicial construction.

[3] Appellants argue that the rule should not be applied to this case because when the city adopted "the county system" of taxation it waived all charter provisions including section 376. The respondent replies that there was a limited delegation of power in section 342 of the charter which reads: "Until otherwise provided by ordinance the city shall *continue to use,* for purposes of municipal taxation, the county system of assessment and tax collection." The system thus continued was that outlined in section 52 of the 1917 charter which was not self executing but required a delegation by municipal ordinance subject to all the "restrictions and limitations" provided in the charter. Section 2 of the present charter. The only ordinance brought to our attention which effects this purpose delegates to the county officials the limited power of assessment and collection of the municipal taxes, and the power to act in the sale and in the redemption of property sold for non-payment. Nowhere does it appear that the city delegated to any county official its important function of determining whether litigation against it should be compromised or contested, or its right to appear and defend in case of contest.

[4, 5] The following principles are well settled: The right to sue a chartered city is statutory, but the right of the city to defend itself against suit comes from the Constitution. These rights have been reasserted by the Los Angeles charter in section 2. They are rights which cannot be delegated to any other body, officer, or individual. Section 13 of article 11 of the Constitution. This power to delegate is strictly limited by the Constitution. Prior to 1914, sections 12 and 13 of this article explicitly prohibited the delegation of the power to assess or collect municipal taxes to anyone other than the corporate authorities of the municipality. By the amendment in that year to section 6 of the same article a city was authorized to delegate to county officials "certain of their municipal functions, whenever the discharge of such municipal functions by county officers is *authorized* by general laws or by the provisions of a county charter".

[6] We can find no provision in the charter of The City of Los Angeles which delegates to the county or to any of its officials the right to defend a civil suit on behalf of the city. There is no provision in the charter of Los Angeles county, or in any general statute, which authorizes it to so appear and defend. Neither section 3804 nor section 3819 of the Political Code cover the subject. They authorize the board of supervisors to order the refund of taxes illegally collected, and permit the taxpayer to sue where a refund is denied, but no general law authorizes the county officers to appear and defend, compromise, or settle any litigation against the municipal corporation. This is a constitutional right enjoyed by all incorporated municipalities, a right which has not been abrogated or limited by any of these enactments.

[7, 8] We may thus summarize: The city, in adopting the "county system of taxation", delegated to the proper county officials the power to levy, assess, and collect taxes for municipal purposes, and to make refunds thereof under certain circumstances. The city has at no time delegated to the county its right to appear and defend in civil actions. Such right is inherent and cannot be delegated under existing laws. Under section 16 of article 11 of the Constitution the county officials collecting these taxes for the city, as ex officio agents and officials of the city for that purpose, are required to pay the proceeds forthwith to the city treasury. They then become the property of the city, subject to the "lien" of the protest upon payment. The right to recover is nevertheless a right to be asserted against the city and the validity of the adverse claim is a matter which the city may litigate. The statutes do not provide for the enforcement of such a judgment against the city when the county alone is sued and the county alone is adjudged liable. This conclusion is compelled by the terms of section 6 of article 11 of the Constitution which permit the delegation of municipal functions to county "officials", but not to the county. These officials thereupon become officials of the city for the limited purposes contained in the delegation. Thus, when section 3819 permits the taxpayer to sue the "county" it means to sue upon a claim for which the county is liable. If section 3819 is to be construed as permitting suit against the county alone to recover money paid into the city treasury and thus becoming the property of the city, then the code section is, to that extent, unconstitutional as taking the property of the city without due process. If the section is to be construed as merely permitting a suit against the *proper* defendant, whether city or county, then it must be read in harmony with the charter restrictions as to maintenance of actions against the city. If the taxpayer does not sue the city and the latter comes in voluntarily and then raises the bar of the charter section, there might be a different result as pointed out in Southern Service Co. v. Los Angeles, Cal.Sup., 82 P.2d 397. Rehearing granted. But when the taxpayer sues the city, *seeking an enforceable judgment against it,* the city has the inherent right to defend. In such a case all the decisions written support the view that the requirement for a prior demand and an opportunity to pay, settle, or compromise, is a condition precedent.

Since all the parties agree that this is the only question to be determined on these appeals, the judgments are each affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



30 Cal.App.2d 538

PEOPLE v. ANGELOPOULOS et al.

Cr. 1642.

District Court of Appeal, Third District, California.

Jan. 26, 1939.

1. Criminal law ⇐576(1)

When defendant has not consented to a continuance and prosecution fails to show good cause therefor, upon motion of accused, it is mandatory upon court to dismiss the action when more than 60 days has elapsed without bringing case to trial. Pen. Code, § 1382; Const. art. 1, § 13.

2. Criminal law ⇐576(3)

When there has been a trial and failure to determine the guilt or innocence of accused, the time for another trial begins to run from the date of the mistrial. Pen. Code, § 1382; Const. art. 1, § 13.

3. Criminal law ⇐576(3)

Where three defendants jointly charged with crime appeared separately and after mistrial, one defendant demanded retrial within 60-day period from date of mistrial, but court on motion of other two defendants granted continuance beyond 60-day period, the one defendant was entitled to dismissal as to him. Pen.Code, § 1382; Const. art. 1, § 13.

4. Criminal law ⇐1163(1)

A defendant need not affirmatively show that he was prejudiced by a continuance of trial beyond 60-day period prescribed by statute. Pen.Code, § 1382; Const. art. 1, § 13.

5. Criminal law ⇐1163(1)

Prejudice to defendant is presumed from violation of constitutional guaranty of

speedy trial. Pen.Code, § 1382; Const. art. 1, § 13.

6. Criminal law ⇐1163(1)

The burden is on the prosecution to show good cause for failure to try defendant within 60-day period prescribed by statute when motion for dismissal of prosecution is made on that account. Pen.Code, § 1382; Const. art. 1, § 13.

7. Criminal law ⇐1134(10)

The validity of order denying defendant's motion to dismiss criminal action for failure to award him a speedy trial may be challenged on appeal from a judgment of conviction.

8. Criminal law ⇐1023(8), 1134(10)

Order refusing to dismiss information is not separately appealable, but it may be reviewed on appeal from a subsequent judgment of conviction.

9. Criminal law ⇐576(1)

The continuance of trial beyond statutory limit of time over objection of a codefendant for mere convenience of his associates is denial of speedy trial to the objector and entitles the objector to dismissal of prosecution against him. Pen.Code, § 1382; Const. art. 1, § 13.

10. Arson ⇐18

An information for burning personalty with intent to defraud insurer need not allege that the insurer is a corporation provided it is adequately identified. Pen.Code, §§ 450a, 950–956.

11. Arson ⇐2

The purpose of statute making it a felony to burn property with intent to defraud insurer is to prevent the destroying of property by fire for purpose of enabling the insured to fraudulently collect the insurance from the insurer. Pen.Code, § 450a.

12. Arson ⇐25

In prosecution for burning personalty with intent to defraud insurer, it is sufficient to allege and prove that the fire insurance carrier is a de facto corporation. Pen. Code, § 450a.

13. Arson ⇐18

Information charging the burning of personalty with intent to defraud a certain named insurance company was not fatally defective for failure to specifically allege that the insurance carrier was a corporation. Pen.Code, § 450a.

14. Arson ⇐37(3)

In prosecution for burning personalty with intent to defraud insurer, evidence *held* to sufficiently support allegation of information with respect to existence of insurance and identity of insurer. Pen.Code, § 450a.

15. Arson ⇐19

Information charging the burning of personalty with intent to defraud insurer should allege that the insured property was burned with intent to injure or defraud the insurer, it being insufficient to merely allege that property was insured. Pen.Code, § 450a.

16. Arson ⇐19

Information charging the defendants with burning property with intent to defraud the carrier of insurance thereon and that property was at the time insured by certain company against loss or damage by fire sufficiently alleged that property was burned with intent to defraud the insurer. Pen.Code, § 450a.

17. Witnesses ⇐388(7)

Admission of defendant's statement, taken by district attorney with aid of his stenographer shortly after defendant's arrest, in rebuttal for purpose of impeaching defendant, was error, where defendant's attention had not been called to alleged conflict between his testimony and statement. Code Civ.Proc. § 2052.

18. Criminal law ⇐1170½(1)

Error in admission in rebuttal of statement of defendant for impeachment purposes without having laid foundation therefor did not require reversal, where statement did not contain any material admission in conflict with testimony which defendant gave at trial.

19. Criminal law ⇐1170½(5)
Witnesses ⇐274(2)

In prosecution for setting fire to contents of building and for burning personalty with intent to defraud insurer, asking a defendant's character witness on cross-examination if witness had ever heard of the defendant being charged with white slavery was error and prejudicial, notwithstanding court instructed jury to disregard it. Pen. Code, §§ 448a, 450a.

20. Criminal law ⇐877

In prosecution for burning personalty with intent to defraud insurer where theory of prosecution was that defendant's clerks actually performed the job and that owner

was not present when fire was started, verdicts finding the owner guilty but finding the clerks not guilty were inconsistent and irreconcilable. Pen.Code, §§ 450a, 971.

21. Arson ⇐37(1)

Evidence *held* insufficient to sustain conviction for setting fire to contents of a store building. Pen.Code, § 448a.

22. Arson ⇐37(2)

Evidence *held* insufficient to sustain conviction for attempting to burn merchandise, equipment, and fixtures with intent to defraud an insurer. Pen.Code, § 450a.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Nicholas Theophan Angelopoulos, alias Nicholas Angelo, Pete Krekos, and Tom Condos were convicted of setting fire to the contents of a store building, and the first-named defendant was convicted of attempting to burn merchandise and equipment of grocery store with intent to defraud the insurance carrier thereof, and the defendants appeal.

Reversed with directions.

A. J. Carlson, of Modesto, for appellant Angelopoulis.

E. H. Zion, of Modesto, for appellant Krekos.

Gumpert & Mazzera, and C. H. Hogan, all of Stockton, for appellant Condos.

U. S. Webb, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants were jointly charged, tried and convicted of setting fire to the contents of a store building in Modesto, contrary to the provisions of section 448a of the Penal Code. The defendant, Angelopoulos, also known as Angelo, was also convicted of a second count of the same information wherein it was charged that the defendants attempted to burn the merchandise and equipment of the grocery store with intent to defraud the insurance carrier thereof, contrary to section 450a of the same code. The other two defendants were acquitted of the second charge. Each defendant appeared separately with different attorneys. After conviction their motions for new trial were denied. From the judgment of conviction and from the orders denying the motions for new trial each defendant has separately appealed. The appeals were heard together. For convenience the first-named defendant, who was the owner of the merchandise and fixtures in question, will be referred to as Angelo.

The information contained five counts. The first count charged the defendants under section 448a with burning the store building. The second count charged them, under section 450a, with burning the merchandise, equipment and fixtures contained in the same building, with the intent to injure and defraud an insurance company, to-wit: Peoples National Underwriters of Baltimore American Insurance Company. The third count charged an attempt to burn the building contrary to section 451a of the Penal Code. The fourth count charged a conspiracy to commit arson, and the fifth count charged a conspiracy to burn the merchandise and building to defraud the insurance company.

The three last counts were dismissed. A motion for separate trials of the defendants was denied. The first trial resulted in a disagreement of the jury on December 17, 1937. The case was then set for trial for February 15, 1938. Each defendant appeared in court on the last-mentioned date with separate counsel. The defendants Krekos and Angelo asked for a continuance of the case for their personal convenience. The defendant, Condos, opposed that continuance and announced that he was then ready for trial. He demanded a speedy trial within sixty days from the date of the mistrial of the cause. His objection was overruled and the case was set for trial for May 3, 1938, which was more than a month beyond the sixty-day limitation prescribed by statute. No legal ground for such continuance was attempted to be shown. The defendant, Condos, then promptly moved to dismiss the action as to him, under the provisions of section 1382 of the Penal Code. That motion was denied without a showing of good cause. The defendants were jointly tried on May 3, 1938. Before the jury was impaneled the defendant, Condos, again moved to dismiss the cause as to him for failure to grant him a speedy trial, which was again denied without a showing of good cause. The trial resulted in a verdict convicting the three defendants on the first count. The defendant, Angelo, was also found guilty under the second count. The defendants, Krekos and Condos, were found not guilty on the second count. A separate motion for new trial by each of the defendants

was denied. A judgment of conviction was accordingly pronounced against each defendant. From those judgments and from the orders denying their motions for new trial, the defendants have separately appealed.

It is contended the verdicts, judgments and orders denying new trial are not supported by the evidence; that the court erred in receiving evidence at the trial, and in giving to the jury certain instructions. The defendant Condos asserts that he was denied a speedy trial as provided by section 1382 of the Penal Code.

[1] We are persuaded the court erroneously denied the motion of the defendant, Tom Condos, to dismiss the cause against him, under the provisions of section 1382 of the Penal Code, for failure to bring the case to trial within sixty days from the date of the mistrial thereof, no good cause for a continuance beyond said sixty-day limitation having been shown. When the defendant has not consented to a continuance of the cause against him, and the prosecution fails to show good cause therefor, upon motion of the accused person it is mandatory upon the court to dismiss the action when more than sixty days have elapsed without bringing the case to trial. Under such circumstances the court has no discretion to deny the motion. Ex parte Ford, 160 Cal. 334, 335, 339, 116 P. 757, 35 L.R.A.,N.S., 882, Ann.Cas.1912D, 1267; People v. Morino, 85 Cal. 515, 24 P. 892. Article 1, section 13, of the Constitution of California guarantees an accused person a speedy trial. That constitutional provision is construed by section 1382 of the Penal Code to limit the time within which the trial must be had to a period of sixty days, unless by the defendant's conduct or acquiescence he consents to extend that time, except when the business of the court, the illness of the judge, or some other good reason for delay prevents the trial during that period of time. In the case of Ford v. Superior Court, 17 Cal.App. 1, 118 P. 96, it is said [page 97]: "'The statute is a construction of the constitutional provision so far as to indicate what is a reasonable time within which the case should be brought to trial in order that the constitutional guaranty may be kept; and it may be fairly interpreted to mean that this guaranty is violated whenever 60 days is allowed to elapse without a trial, there being no good reason for delay and the defendant not consenting thereto. * * It is sufficient for the defendant, in order to make out his case upon a motion for a dismissal in the trial court, to show that he has been detained without a trial for more than 60 days.'"

[2] Where there has been a trial and a failure to determine the guilt or innocence of an accused person, the time for another trial begins to run from the date of the mistrial. In 8 California Jurisprudence, page 203, section 277, it is said in that regard: "The rule in California is that the defendant must be brought to trial the first time within sixty days after the finding or filing of the indictment or information, and thereafter within sixty days from the first trial, if that trial results in a disagreement of the jury, or within sixty days after the return of the remittitur, if a new trial be awarded by an appellate court."

[3] In the present case the three defendants were jointly charged with the crimes. They appeared separately by different attorneys. The defendant, Condos, demanded a separate trial, which was refused. The cause was tried and resulted in a disagreement by the jury on December 17, 1937. The case was again set for trial for February 15, 1938, within sixty days from the mistrial. The defendant, Condos, was present in court on the last-mentioned day with his attorney ready for trial. The other defendants and their respective attorneys were also present in court at that time. These last-mentioned attorneys then moved for a continuance of the trial to a date beyond sixty days from the mistrial, to-wit, on May 3, 1938. That motion was made solely for the accommodation of two of the defendants, Krekos and Angelo. The defendant, Condos, specifically objected to continuing the trial to a time beyond sixty days from the date of the mistrial.

His objection was overruled and the trial was set for May 3, 1938. No reason for the continuance of the trial was assigned, except that it was granted for the convenience of the other two defendants. It is not contended the pressure of court business, the illness of the judge, or any necessary accommodation to the court was the reason for granting the continuance. Yet, for the convenience of two defendants, the third defendant was denied a speedy trial. The defendant, Condos, promptly moved the court under the pro-

visions of section 1382 of the Penal Code to dismiss the action against him. The motion was denied without a showing of cause therefor. On May 3, 1938, when the cause was finally called for trial, the defendant, Condos, appeared in court with his attorney and again moved to dismiss the action against him for failure to award him a speedy trial. That motion was also denied without cause having been shown justifying the continuance beyond the sixty-day period of limitation. The defendant was then forced to trial which resulted in a verdict of conviction of the charge contained in the first count of the information. From that judgment he has appealed.

[4-6] It is not necessary for the defendant to affirmatively show that he was prejudiced by a continuance of trial beyond the sixty-day period prescribed by statute. The constitutional provision and section 1382 of the Penal Code absolutely guarantee an accused person a speedy trial unless good cause for denying it is first shown. Prejudice to the defendant is presumed from the violation of that guaranty. The burden is on the prosecution to show good cause for the delay when a motion for dismissal of the action is made on that account. Harris v. Municipal Court, 209 Cal. 55, 64, 285 P. 699.

[7-9] The validity of the order denying a defendant's motion to dismiss a criminal action against him for failure to award him a speedy trial, may be challenged on appeal from a judgment of conviction. The order refusing to dismiss the information is not separately appealable. It may be reviewed on appeal from a subsequent judgment of conviction. Ex parte Ford, 160 Cal. 334, 348, 116 P. 757, 35 L.R.A.,N.S., 882, Ann.Cas.1912D, 1267; 8 Cal.Jur. 209, sec. 280. The continuance of a trial beyond the statutory limitation of time, over the objection of a codefendant, for the mere convenience of his associate, is a denial of a speedy trial to the objector, and under such circumstances, upon his motion under section 1382 of the Penal Code, it is mandatory for the court to dismiss the action against such objector.

It is claimed by the defendant, Angelo, that there is a fatal variance between the allegation of the second count of the information and the proof with relation to the identity of the fire insurance carrier, which it is charged the defendants sought to defraud. It is also asserted the information is fatally defective for failure to allege that the fire insurance carrier was in fact a corporation.

There is no merit in these contentions. The information charges in ordinary and concise language that the defendants burned the property with the intention of defrauding the insurance carrier, "Peoples National Underwriters of Baltimore American Insurance Company".

[10] It has been held the information should allege that the company is a corporation, if that be a fact. People v. Schwartz, 32 Cal. 160. That case, however, was decided in 1867, under the comparatively strict provisions of the Practice Act. Since the enactment of the more liberal provisions of sections 950–956 of the Penal Code, regarding the essential allegations of a criminal charge, we are of the opinion it is no longer necessary in charging a violation of section 450a to state that the fire insurance carrier is a corporation, provided it is adequately identified. Section 956 of the Penal Code provides that: "When an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, *an erroneous allegation as to the person injured,* or intended to be injured, or of the place where the offense was committed, or of the property involved in its commission, *is not material.*"

[11] Section 450a makes it a felony to burn property "with intent to injure or defraud the insurer * * * whether the property of himself or of another, which shall at the time be insured by any person or corporation against loss or damage by fire". The purpose of the statute is to prevent the destroying of property by fire for the purpose of enabling the insured to fraudulently collect the insurance from the carrier thereof. The gist of the offense is burning the property with an intent to defraud the fire insurance carrier. The offense is just as grave a violation of law whether the fire insurance carrier be an individual, partnership, company or corporation. In 6 Corpus Juris Secundum, Arson, p. 748, § 28 (2) c, it is said in that regard: "In the statutory crime of burning insured property, an allegation that the property was insured in a particular company is immaterial to the state's case, and so proof that the property was insured elsewhere does not constitute a fatal variance."

[12] It is sufficient under our present liberal procedure to allege and prove under the provisions of section 450a that the fire insurance carrier is a de facto corporation. People v. Morley, 8 Cal.App. 372, 97 P. 84; People v. Hughes, 29 Cal. 257; 6 C.J.S., Arson, p. 748, § 28 (2) c. In the Morley Case, in which a hearing by the Supreme Court was denied, it is said [page 85]: "Proof that it was a de facto corporation and acting as an insurance company is sufficient."

In 6 Corpus Juris Secundum, above cited, the author of the text says: "Where the indictment alleges that insurer of the property burned is a corporation, proof that such corporation is a corporation de facto is sufficient and not variant, and, likewise, where it is unnecessarily averred that the insurer was a corporation, evidence establishing a de facto corporate existence is sufficient."

[13] The information was not fatally defective for failure to specifically allege therein that the insurance carrier was a corporation.

[14] The evidence sufficiently supports the allegation of the information with respect to the existence of insurance against loss by fire and the identity of the insurance company. Harry R. Windus testified that he was the Modesto insurance agent for the Peoples National Underwriters of Baltimore American Insurance Company, which is mentioned in the information as the carrier of the fire insurance on the property in question. He said that he insured the merchandise in that store with his company December 4, 1937, for $3,000, and he insured the fixtures for an additional $2,500. He identified his insurance company by name as the same one which is designated in the information. As proof of that insurance a so-called "cover note" for the character and amount of insurance above mentioned was offered in evidence. The agent explained that the cover note was executed and delivered to the insured to guarantee the liability and terms of the contract of insurance pending the issuance of the formal policy by the company. It was a binding temporary contract of insurance. There is no doubt the company named in the information was the insurer against loss by fire of the merchandise and fixtures in the store at the time of the fire.

[15, 16] It is true the information should allege that the insured property was burned "with intent to injure or defraud the insurer". It is insufficient to merely allege that the property is insured. There are various classes of insurance. Property may be insured against earthquakes, tornadoes and other calamities. The section in question merely forbids the burning of property to defraud an insurer thereof against fire. Count two of the information, however, fully meets that requirement. It charges the defendants with burning the property with intent to defraud the carrier of insurance thereon. It concludes, after describing the burned property, by reciting that the property "was at said time insured by Peoples National Underwriters of Baltimore American Insurance Company, *against loss or damage by fire*". That is an adequate definite assertion that the insurance in question was for the purpose of indemnifying the owner against loss or damage by fire. It is therefore sufficient in that regard.

[17, 18] The admission in evidence of the statement of the defendant Angelo, over his objection was erroneous. That ruling, however, does not constitute reversible error for the reason that the statement does not appear to contain any material admission in conflict with the testimony which he gave at the trial. It was taken by the district attorney with the aid of his stenographer, shortly after the defendant's arrest. It was recorded in shorthand and transcribed into longhand. It was a competent statement to have been received as a part of the prosecution's evidence in chief. But it was offered in rebuttal for the evident purpose of impeaching him after the defendant, Angelo, had been cross-examined. On cross-examination Angelo was asked if he did not leave keys to the front door of his store on his desk for his clerk, Pete Krekos. Over objection that it was not proper cross-examination, he replied that he did leave the keys on his desk, but that he did not tell Pete they were there, nor did he say he had left them *for him*. He was not asked if he had not previously made a contrary statement to the district attorney. The foundation for his impeachment on that subject was not laid. When the stenographer was subsequently called to the witness stand and interrogated regarding the contents of that statement, the objection was formally made that the record was incompetent since no foundation was laid for its introduction, and that the defendant was entitled to see the transcript and have his attention called to the alleged discrepancy. The objection was

overruled, and the entire statement was read into the record from the stenographer's shorthand notes. No motion was made to receive the evidence as a statement of defendant's admissions on the prosecution's case in chief. If it was received for impeachment purposes, clearly the defendant was entitled to have his attention first called to any alleged conflict of testimony. Sec. 2052, Code Civ.Proc. It does appear that it was a voluntary statement of the defendant. As such, it should have been offered as a part of the prosecution's case in chief. However, it appears to contain nothing in substantial conflict with his testimony adduced at the trial. In the challenged statement the defendant said in effect that he had two sets of keys to the front door of the store; that when he went away he gave one set to Pete Krekos, and that he placed the other set "on the desk, I left them by some papers. Q. Did you say anything to Pete about leaving the keys on the desk? A. I says to Pete or Miles, I don't know which,—'There's the keys, if you open up yourself.'" The discrepancy in the evidence is trivial. Angelo admitted he left a set of keys with Pete Krekos. The only significance of this evidence is the question as to whether he also left the other set of keys for the use of the clerk Condos. It seems to be immaterial.

While the ruling which admitted the statement in evidence was technically erroneous, we are unable to say it was prejudicial or reversible error.

[19] It was prejudicial error for the assistant district attorney, on cross-examination, to ask a character witness called in behalf of the defendant Condos if he had ever heard of the defendant being charged with white slavery. People v. Wells, 100 Cal. 459, 34 P. 1078. There is no evidence that that question was asked in good faith. After much controversy and argument over the matter the court instructed the jury to disregard it. We assume the effect of that insinuation was prejudicial.

Harold R. Hoff, an insurance agent who had lived in Stockton for thirty years, testified that he had known the defendant Condos for nine years and that his general reputation for truth and honesty was good. On cross-examination, the first question the assistant district attorney asked the witness was, "Have you ever heard of Mr. Condos being arrested on a white slave charge?" There was no effort to justify the asking of that question. In a case of this nature, based wholly on circumstantial evidence, with unsatisfactory proof of the guilt of the defendant, such unfair questions may be very harmful. We do not infer that erroneous question standing alone would constitute reversible error, provided we could say there was not a miscarriage of justice in this case. But upon reading the record in this case, we are unable to so hold.

[20] The defendant Angelo insists that the verdicts are inconsistent and irreconcilable. The objection appears to be well taken. We are unable to reconcile the verdicts. The three defendants were convicted of burning the property contrary to section 448a. The evidence is uncontradicted that Angelo was not present when the fire was started. The prosecution concedes that fact. He was then in San Francisco. The theory of the prosecution is that Angelo hired Krekos and Condos to burn the property. If they did burn the property for pecuniary reward, they acted as his agents. But having participated in burning the property to defraud the insurance company for the benefit of their employer, they became principals and were equally guilty with Angelo of burning the property to defraud the insurance company, under section 971 of the Penal Code. Yet the jury convicted Angelo under the second count, but acquitted those who are alleged to have actually performed the job. If Krekos and Condos were not guilty of violating section 450a, certainly Angelo could not be found guilty of that offense, for the only possible theory of the prosecution is that the clerks actually performed the job. The verdicts on the second count of the information are inconsistent and irreconcilable. It is, therefore, necessary to reverse the judgment against Angelo on the second count of the information.

[21, 22] After a careful review of the record, we are of the opinion the verdicts and judgments are not supported by the evidence. The evidence is entirely circumstantial. Every circumstance of the case is reasonably reconcilable with the theory of the innocence of the defendants. The most that may be said of the evidence in this case is that some circumstances may tend to create suspicion that the defendants may have set the fire. In arson cases, based wholly on circumstantial evidence, it has been held that over-insurance of the property sought to be burned, supported by other incriminating circumstances, may be suffi-

cient to support a judgment of conviction. In the present case, however, the property was not insured for more than its reasonable value. It was insured for considerably less than its value. The defendant, Angelo, had just spent twenty-five hundred dollars in installing new shelving, counters and fixtures and in remodeling the front of the building in preparation for conducting a grocery business. He held a ten-year lease on the property on easy terms. He had sublet one-third of his floor space to a reliable butcher for two-thirds of the cost of his rental for the first three years. He was not bankrupt. He still had deposited to his credit in the bank nearly $500. He had been operating the store only twenty days at the time of the fire. A merchant's hope for success should last longer than that. It is unreasonable to assume a merchant would attempt to burn his stock of goods and store under such circumstances. The other defendants had absolutely no motive to burn the store, unless they were hired by the owner to set the fire. There is no substantial evidence of that fact. Their conduct refutes that theory.

The strongest arson case which we find reported similar to the circumstances of the present cause, in which a judgment of conviction was sustained, is People v. Patello, 125 Cal.App. 480, 13 P.2d 1068. That case is distinguishable from this one in several essential particulars. The defendant, Patello, and his sister lived in a two-story building which he purchased on a contract. He owned only a $1,500 interest in the building. He was delinquent in his payments to the extent of $300. The value of the building was less than $2,000. He carried insurance on it in the sum of $3,000. The value of the furniture did not exceed $600. His sister carried insurance on the furniture in the sum of $1,500. The property was over-insured. The night of the fire the defendant went away. His sister went to the home of a neighbor for the night. He knew she had done so. Yet after the fire he denied that he knew his sister was absent from their home. The doors and windows of the house were all closed and locked. The curtains had been drawn. Fires had been built and started in three different rooms. Some furniture, debris and floors, were saturated with kerosene oil. The over-insurance, the alleged absence of the defendant and his sister from their regular dwelling place, the careful preparation for the fire in three rooms, the inaccessibility of the house to strangers, the drawing of the curtains, and the denial that the defendant knew where his sister had gone for the night, are suspicious circumstances which distinguish that case from this one, and which warranted the court in sustaining the judgment.

In the present case the defendant Angelo had a credit in the bank in July, 1937, of $3,700. He planned to conduct a grocery business at Modesto. For that purpose he leased a large one-story brick building for ten years at $65 per month for the first two years; at $75 per month for the following two years, and at a gradual increase of rent thereafter. He sublet one-third of the floor space for the term of three years to a reliable butcher by the name of Thomas Green, for $45 a month. Angelo bought a new refrigerator for $945 on instalments of $23.45 per month. He paid $170 cash toward the purchase price of that box. He also bought a cash register for about $500, on instalments of $18 per month, upon which he paid $35 cash. He bought a new stock of high-class groceries and merchandise, appraised at about $4,000, upon which he paid $1,800 cash. It was conceded their retail value was $4,100. He installed in the store shelving, counters and fixtures at an expense of several hundred dollars. The stock was neatly arranged on shelves and counters. He remodeled the front of the store at a cost of $400. He was not delinquent in the payments of rent, instalments or otherwise. He still had cash in the bank in excess of $500 and some securities. He was advertising liberally in several newspapers. His stock of merchandise was insured for only $3,000 and the fixtures, which were apppraised at $3,000, were insured for $2,500. He had been operating the store less than three weeks at the time of the fire. Except for the first few days, he was not conducting a profitable business. The day of the fire he took in $83 from sales of goods. He had not complained of a lack of business. There is no evidence of his discouragement because of poor business. His preparations for a substantial mercantile business at a cost of nearly all the money he possessed, the careful, orderly and business-like arrangement of his stock, the subletting of a portion of his floor space upon good terms, and elaborate advertising of the business in newspapers, and substantial, though not yet profitable, bulk of sales, render unreasonable the theory that in less than three weeks he lost hope of success and planned to burn his stock to recover insurance which would leave him a total loss of two or three thou-

sand dollars. Without more tangible and incriminating evidence than this record contains, that theory of the guilt of the defendants does not appeal to reason.

The front of the store building was equipped with four pair of double doors to permit the entire front to be opened for display and business. The upper portions of these doors contained glass windows. Most of the doors were fastened on the inside with padlocks. There was one double door on the side of the building, in the alley. There were two windows in the rear of the building and several in the side walls. These windows were located four or five feet above the ground, and most of them were screened.

After the fire occurred a crate was found leaning against the wall beneath the window at the rear of the building, indicating that someone had made an effort to enter the building by that means. The screen over that window, was however, found closed. Immediately after the fire was discovered, the side door was found open. It was usually fastened by a bar on the inside. It is reasonable to assume someone may have found the screen over the rear window open, and after entering the building in that manner the screen may have been closed on the inside and the side door opened as a quick and secret way of escaping into the alley after the fires were set. At least there is undisputed evidence that the crate was deliberately placed beneath the rear window.

The defendant employed the two co-defendants as clerks. The good reputation of one of them was vouched for by several reputable witnesses from that community. There were also two boys employed as helpers in the store. Both of them left the store, as usual, quite early on the night of the fire. One of the boys was attending a scout meeting. It is conceded the defendant Angelo drove to San Francisco the afternoon of the fire. He said that he went down there to consult the Greek consul about disposing of some collaterals which he owned. That fact is not disputed. Before leaving for San Francisco he gave one set of store keys to one of the clerks and left the other keys on his desk. It was the duty of the clerks, Krekos and Condos, to open the store early each morning. They were expected to remain in the evening until about 9 o'clock. Condos lived twelve miles south of Modesto. Krekos lived in town and ate his meals at a restaurant.

On the night of the fire, August 23rd, Krekos and Condos were about the store until 9:20 o'clock. They were seen there by a druggist who conducts a business nearby. They spent some time that evening, washing the store windows. Mr. Green, the butcher, remained in the store until 8:30 p. m. that night. He talked with the co-defendants and was told that Angelo had gone to San Francisco. He said they told him the keys had been left with which to open the store in the morning. He related no suspicious circumstances or conduct on their part indicating preparation for the setting of the fire. He used a telephone in the back room and knew a can of floor oil was kept there for use. After the fire occurred, a small box containing a number of newspapers was found in the store. Green testified that it was not there before he left the shop that night. There is no proof that any of the defendants subscribed for any of those newspapers. Their presence was not accounted for.

Krekos and Condos closed the store at 9:20 that night. Their conduct was observed by others, and no stealth or suspicious evidence of preparation for a fire was observed. The building was apparently accessible to others from the outside. The side door was found open when the firemen arrived. Before leaving the store that night, Krekos placed the receipts of the day's sales, consisting of checks and cash amounting to $83, in a sack, and hid it in a box on a shelf in the store. They were seen by a druggist inside the store just before they left. No suspicious circumstances are related. They put out the lights, went out the front door, locking it behind them, and stood in front talking for a few moments. They then drove away in the automobile owned by Condos. He left Krekos at a restaurant where he calmly ate his supper. Condos drove to his home twelve miles south of town. At 10:18 o'clock, about one hour after they left the building, a fire alarm was heard. Krekos was told of the fire and rushed to the store, where he found the firemen engaged in extinguishing the fire. He boldly entered the front door and walked to the place where he had hidden the sack of money. He openly took the sack in his hand and started to walk out with it. A fireman asked what he had in the sack, and he replied that it was the cash receipts of the day which he had hidden there. It was promptly taken from him.

When the firemen arrived they found accumulations of pasteboard boxes, crates, toilet paper and other inflammable materials, which had been saturated with oil, piled in five different places in the store, in each of which piles fires were blazing. Burned matches and oiled rags were scattered about. There is no doubt the fire was of incendiary origin. That fact was conceded at the outset of the trial. There was ample time for an outside stranger to have entered the building and set the fires after the clerks were seen to leave for the night. The fires were soon extinguished after considerable damage had resulted from both the fires and the water which was applied.

After the arrest of the defendants, it is perfectly natural for one to say, "If they did not set the fire, who did?" But it is not incumbent on the defendants to produce the culprit. The identity of that individual may be as much of a mystery to them as to others. Mystery fires are common. The defendants are entitled to a reversal of the judgment unless their guilt was established according to the rules of criminal law.

It is improbable that men who were planning to burn a stock of merchandise for financial reward would frankly disclose the planned absence of the proprietor, consume their time in the useless job of washing windows, and deliberately leave in the store a sack containing $83 to be destroyed in the fire. Such conduct is not consistent with the guilt of the clerks. It is equally improbable that a man who had just deliberately started a fire to destroy the store, would rush directly to the burning building and boldly walk into the very presence of the firemen who were engaged in extinguishing it, and openly take the sack of money to remove it. That is not the act of a guilty man. A man who planned such a crime for financial profit would certainly take the sack of money with him when he left after starting a fire with the purpose of destroying the building.

The morning following the fire, Condos returned to town and went to a restaurant to order a lunch, according to his usual custom. He was asked what he wanted a lunch for, since there was a fire at his store the previous night. He was apparently surprised to hear of the fire. That was evidently the first information he had of the fire. There was nothing in his manner or conduct to indicate that he had previous knowledge of the fire or that he had participated in starting it. Several reputable citizens of that community testified to the previous good reputation of Condos.

One incident is cited by the prosecution as evidence that Angelo hired his clerks to set the fire. When he went to San Francisco he withdrew from the bank $250. When he reached the city he called Krekos about 9 o'clock on the telephone and asked him how everything was going. Angelo, however, brought back with him all of the money he drew from his bank account except $90, which he spent in the payment of bills. He said that he called Krekos just to be satisfied the business was being conducted properly in his absence. It was Krekos, himself, who told of the telephonic communication from Angelo. The conduct and explanations of the defendants regarding every circumstance seem inconsistent with the theory of their guilt. There is no substantial conflict in their evidence. It is conceded Angelo was not present and he did not personally set the fire. The circumstances and conduct of his co-defendants indicate strongly that they did not do so. It seems unreasonable to assume that the owner of a store would delegate to his clerks a job so dangerous to his liberty. The theory that he hired his clerks to perform that job during his absence is purely speculative. There is no evidence that he paid them money, or that he promised to reward them for that act. He did withdraw from his account in the bank $250 when he went to San Francisco, but he brought most of that money back with him when he returned. To affirm the judgment in this case on such unsatisfactory evidence would be going far beyond any similar case that has been called to our attention. We are persuaded the verdicts of conviction in this case were the result of prejudice against unwelcome members of an alien race.

The judgments and the orders are reversed as to each appellant. The court is directed to dismiss the action against the defendant, Condos, and to grant the motions of the other defendants for new trial, setting the case against them for retrial on the first count, if the court is so disposed.

I concur: PULLEN, P. J.

In re STOBIE'S ESTATE.

LIPSEY, Secretary of the Department of Institutions, v. SHACKFORD.

Civ. 2249.

District Court of Appeal, Fourth District, California.

Jan. 25, 1939.

Hearing Denied by Supreme Court March 23, 1939.

1. Constitutional law ⇐64
Insane persons ⇐52

Where original statute provided that monthly rate for maintenance of insane persons at hospitals should be "actual cost thereof as may be" determined by director of hospital, omission of quoted phrase from subsequent statute did not materially change statute so as to render the statute subject to the objection that it was an unconstitutional delegation of legislative power. Pol.Code, § 2176, and § 2180, as amended by St.1929, p. 1467; St.1937, p. 1155, §§ 6650, 6651.

2. Insane persons ⇐63

The estate of an insane person is liable only for his care, support and maintenance in hospital for insane. Pol.Code, § 2176, and § 2180, as amended by St.1929, p. 1467; St. 1937, p. 1155, §§ 6650, 6651.

3. Insane persons ⇐52
States ⇐119

The state cannot engage in private or quasi private business or make a profit from its hospital for the insane. Pol.Code, § 2176, and § 2180, as amended by St.1929, p. 1467; St.1937, p. 1155, §§ 6650, 6651.

4. Insane persons ⇐63

The cost of maintenance of an insane person in state hospital, for which insane person's estate is liable, should include not only actual money expended but should consider capital investment, depreciation and other legitimate expenses of the state. Pol. Code, § 2176, and § 2180, as amended by St. 1929, p. 1467; St.1937, p. 1155, §§ 6650, 6651.

5. Constitutional law ⇐299
Insane persons ⇐63

The statute making insane person's estate liable for his care and support in state hospital does not deprive the estate of property without due process of law in view of provisions for notice and appeal. Pol.Code, § 2176, and § 2180, as amended by St.1929, p. 1467; St.1937, p. 1155, §§ 6650, 6651; Const. art. 1, § 13.

6. Evidence ⇐83(1)

An administrative officer charged by Legislature with an administrative duty is presumed to perform duty in accordance with Constitution and state laws.

7. Evidence ⇐83(1), 89

Presumption that an administrative officer will perform his duty according to law prevails until attacked and until evidence is presented showing dereliction and that officer has been arbitrary or discriminatory.

8. Insane persons ⇐63

A charge of $40 per month against insane person's estate for his care in state hospital would not be disturbed by court where annual cost per capita was $213.78 and capital investment in the institution exceed $3.000,000. Pol.Code, § 2176, and § 2180, as amended by St.1929, p. 1467; St. 1937, p. 1155, §§ 6650, 6651.

9. Insane persons ⇐63

Value of insane person's services as storekeeper in hospital for insane could not be offset by his guardian against cost of caring for such person where such duties were part of his treatment. Pol.Code, § 2176, and § 2180, as amended by St.1929, p. 1467; St. 1937, p. 1155, §§ 6650, 6651.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Proceeding in the matter of the estate of Wilbur J. Stobie, an incompetent person, by Howard H. Lipsey, as Secretary of the Department of Institutions of the State of California, against Frank A. Shackford, as guardian of the person and estate of Wilbur J. Stobie, to recover for the care and maintenance of the incompetent. From an order directing defendant to pay $1,000 to the medical superintendent of the Stockton State Hospital, defendant appeals.

Affirmed.

J. A. Chase, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Jean Morony, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from an order directing the guardian of the person and estate of Wilbur J. Stobie, an incompetent person, to pay to the medical superintendent of the Stockton State Hospital of California, one thousand dollars "on account of the amount due said State Hospital for the

care, support and maintenance therein of said Wilbur J. Stobie, an insane person, for the period of July 1, 1935, to July 31, 1937".

Wilbur J. Stobie was adjudged an incompetent person and committed to the state hospital at Stockton. He is permanently insane. His estate is of the value of about twelve thousand dollars.

On July 31, 1937, a petition was filed in the matter of the estate of the incompetent praying for an order directing the guardian to pay out of the estate the sum of one thousand dollars for the care, support and maintenance of the incompetent for twenty-five months. It was alleged that the sum of forty dollars per month was a fair and reasonable charge for such services; that such sum had been fixed and determined by the director of institutions with the approval of the department of finance as the charge to be made for such services; that demand had been made on the guardian for the payment of that charge, and payment had been refused. The answer of the guardian denied that any sum in excess of twenty dollars per month was a fair and reasonable charge for such services and offered payment of that sum.

Provisions, pertinent here, for the payment of the costs of transportation of an insane person to a state hospital, for his care, support and maintenance there, were formerly found in sections 2176 and 2180 of the Political Code. The provisions of those sections have been reenacted into sections 6650 and 6651 of the Welfare and Institutions Code, St.1937, p. 1155. Sections 6650 of the Welfare and Institutions Code is identical in legal effect with the same provisions of section 2176 of the Political Code, which contained the following: "The husband, wife, father, mother, or children of an insane person or inebriate, or the estate of such insane person or inebriate, shall be liable for the care, support and maintenance of any insane person or inebriate in a state hospital * * *."

Section 2180 of the Political Code, prior to its amendment in 1933, Stats. 1933, chap. 893, p. 2305, contained the following: "The monthly rate for the care, support, and maintenance of all insane persons at the hospitals for the insane and where there is liability to pay for such care, support and maintenance, shall be *the actual cost thereof as may be* determined by the director of institutions, with the approval of the department of finance, but not to exceed forty dollars per month payable in advance; * * *."

The italicized words were omitted from the amendment of the Political Code section in 1933 and from section 6651 of the Welfare and Institutions Code.

Counsel for appellant seriously contends that the omission of the words "the actual cost thereof as may be" from the amended section, and from the section of the Welfare and Institutions Code, renders the present enactment unconstitutional for the reason that it delegates to the director of Institutions, subject only to the approval of the department of finance, the uncontrolled and unguided power to determine the amount to be collected for the care and control of insane patients.

In support of the foregoing argument appellant cites 11 Am.Juris. 947, sec. 234; 12 A.L.R. 1435; 54 A.L.R. 1104; Tarpey v. McClure, 190 Cal. 593, 213 P. 983; and Board of Administration of Illinois v. Miles, 278 Ill. 174, 115 N.E. 841. The force of those authorities is in accord with the ruling in the Tarpey Case where our Supreme Court said [page 987]:

"On the other hand, the Legislature may, without violating any rule or principle of the Constitution, confer upon an administrative officer a large measure of discretion, provided the exercise thereof is controlled and guided by rules prescribed therefor (Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 P. 319; Hall v. Geiger-Jones Co., 242 U.S. 539, 553, 37 S. Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643, even though, in exercising that discretion, he may be called upon to exercise judgment of a high order (Frasher v. Rader, 124 Cal. 132, 56 P. 797; Cook v. Civil Service Comm., 160 Cal. 589, 592, 117 P. 663; Suckow v. Alderson, 182 Cal. 247, 187 P. 965; People v. Sacramento Drainage Dist., 155 Cal. 373, 103 P. 207). * * * Thus the decision to levy or not to levy this assessment is committed wholly to the discretion of the engineer, and in the exercise of this discretion he is uncontrolled and unguided by anything to be found in the act. If the act had made it the mandatory duty of the engineer to issue warrants for these necessary expenses and the mandatory duty of the directors to levy an assessment to pay those warrants, then it might well be said that such assessment was in fact levied, not by the engineer or

by the directors, but by the Legislature itself. But where, as here, the power to decide whether or not a given tax shall be levied is committed to the uncontrolled and unguided discretion of an executive officer, it amounts to such a delegation of legislative power as is prohibited by the Constitution."

Appellant admits that the quoted provision of the Political Code, prior to the amendment of 1933, was constitutional for the reason that the action of the director of institutions was then directed and controlled by the enactment of the legislature to a computation of the cost to the state of the care, support and maintenance of the insane person. A similar enactment was held constitutional by the supreme court of Idaho in State ex rel. Macey v. Johnson, 50 Idaho 363, 296 P. 588, where it was said [page 590]: "The statute authorizes the commissioner of public welfare to collect, if the inmate has sufficient funds or property, the 'actual charges and expenses' for the 'care and safekeeping' of the patient, and the medical superintendent is limited in fixing the sum to be so recovered by the above provision. There is thus a guide for, and limitation on, his acts in this regard; the delegation of this duty is not a delegation of legislative authority."

[1-4] We cannot regard the omission of the quoted phrase from the present enactment as materially changing the force and import of the sections. Now, as heretofore, the estate of an insane person is only liable for his "care, support and maintenance". The state cannot engage in private or quasi-private business or make a profit from its hospital. Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510. Its agent is only authorized to collect for the "care, support and maintenance of any insane person". The statute makes the estate of the insane person liable for his care, support and maintenance only, which is but another way of saying that the liability is only for the cost of such service. As the state cannot make a profit from its care of patients in its hospitals the words used in the present statute rather clearly imply that the amount to be collected from the estate of the insane person must be limited by the cost of that person to the state. That cost should not only include the actual money expended but should take into consideration the capital investment, depreciation, and other such legitimate expenses of the state.

Appellant urges that the statute is unconstitutional because it violates the due process of law guaranty of the Constitution. Art. 1, sec. 13, Const. In considering this question in Sherer v. City of Laguna Beach, 13 Cal.App.2d 396, 57 P.2d 157, it was said [page 160]:

"Due process of law does not entitle a person to have a hearing before any particular board, tribunal, or court. It is satisfied if he be given a fair hearing upon reasonable notice before a board, tribunal, or court having jurisdiction of the proceedings and the parties. As was said in Ex parte Wall, 107 U.S. 265, 2 S.Ct. 569, 589, 27 L.Ed. 552: '* * * "Perhaps no definition," says Judge Cooley, "is more often quoted than that given by Mr. Webster in the Dartmouth College Case: 'By the law of the land is most clearly intended the general law—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.'" Cooley, Const. Lim. 353. The question, what constitutes due process of law within the meaning of the constitution, was much considered in this court in the case of Davidson v. New Orleans, 96 U.S. 97 (24 L.Ed. 616); and Mr. Justice Miller, speaking for the court said: "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the state a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."' See, also, City of Seattle v. Kelleher, 195 U.S. 351, 25 S. Ct. 44, 49 L.Ed. 232."

[5] The fact that this case is before this court is sufficient answer to appellant's argument of lack of due process of law. The statute requires the state to go into the superior court to collect the money due it. There the guardian is brought into court, after notice, and is given a tribunal in which to present his evidence and, in any lawful manner, resist the claim against the estate. A right of appeal from the judgment is given. Due process of law can require no more.

Lastly, appellant urges that there is no evidence in the record to support the judgment, and that the judgment is in excess of the actual cost to the state of the care,

support and maintenance of the insane person.

The evidence is largely in the form of stipulations in which we find that the parties agreed that the monthly rate of forty dollars for the care of the incompetent was fixed by the director of institutions with the approval of the department of finance after an investigation of the assets of the estate of the incompetent and after an investigation of his requirements in the state hospital. It was also stipulated that the average per capita operating cost of the Stockton hospital for the fiscal year ending June 30, 1935, was $213.78 and that the state's capital investment in that institution was $3,288,478.15.

[6, 7] There is a presumption that an administrative officer, charged by the legislature with an administrative duty, will perform that duty in accordance with the Constitution and laws of the state of California. Such a presumption will prevail until it is attacked and some evidence presented that the officer has been guilty of dereliction and that the action taken by him has been arbitrary or discriminatory. People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3.

[8] In the instant case there is no evidence upon which to base the conclusion that the director of institutions acted arbitrarily or discriminatorily in fixing the cost to the state of the care, support and maintenance of the incompetent. The stipulated average per capita cost of the hospital only represented the average cash expense to the state of maintaining each patient during the fiscal year ending June 30, 1935. The state has a large capital investment in the Stockton hospital. The actual cost to the state of maintaining each patient in that hospital should include consideration of this investment. Therefore, as appellant has failed in any satisfactory manner to attack the action of the director of institutions in fixing the cost of the care, support and maintenance of the incompetent at forty dollars per month "there is no basis for the intervention of this court". People v. Globe Grain & Milling Co., supra.

[9] It is also suggested that the incompetent has been engaged in performing the duties of storekeeper in the hospital; that if such services were performed in private industry they would be worth thirty cents an hour. It also appears that those duties were part of the physical and medical treatment of the incompetent. Under such circumstances we cannot see what relation those services and their value can have to the questions before us. The value of his services cannot be offset against the cost of caring for the incompetent.

The order is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



30 Cal.App.2d 559

PEOPLE v. KRUSE.

Cr. 518.

District Court of Appeal, Fourth District, California.

Jan. 26, 1939.

1. Homicide ⇐268

In prosecution for manslaughter, whether act of defendant in striking deceased with his fist, who then fell and struck the pavement with his head, caused his death was for jury, where victim died from a blood clot caused by fractured skull on the day after a fight with defendant.

2. Homicide ⇐236(1)

In prosecution for manslaughter, state was not required to prove beyond any possible doubt that blows struck by defendant caused the death of victim, or to affirmatively establish that a later and independent injury did not take place.

3. Criminal law ⇐730(12)

Remarks of deputy district attorney that defendant had been in penitentiary once and that it did not do him any good, although improper, did not require reversal of conviction for manslaughter where trial court instructed that such remarks could be considered only for purpose of affecting credibility of defendant as a witness and, when repeated, instructed jury to disregard them.

Appeal from Superior Court, Fresno County; T. R. Thompson, Judge.

Chris Kruse was convicted of manslaughter, and from the judgment and an

order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Tom Okawara and Milo Popovich, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with the crime of manslaughter in connection with the death of one James Jackson. He was found guilty by a jury and has appealed from the judgment and from an order denying his motion for a new trial.

The appellant concedes that Jackson died as the result of a blood clot caused by a fractured skull, but earnestly contends that there is no evidence to connect him with the fatal injury. From the testimony of two eyewitnesses it appears that at about 10 o'clock p. m. on June 28, 1938, the appellant had some sort of an argument with Jackson, who was a colored man, in front of a cafe on a street in Fresno. One of these witnesses testified that "the colored guy didn't want to fight"; that the appellant "backed him up"; that all at once the appellant hit Jackson in the jaw and knocked him down; that when hit Jackson's hands were hanging down at his side; that Jackson was assisted to his feet but was staggering; that the appellant then hit him again in the jaw and he fell over backwards; that the "back of his head" hit the pavement; and that he "didn't wake up no more". Both of these witnesses testified that you could hear Jackson's head hit the sidewalk, one of them saying: "It hit pretty hard. You could hear it."

Someone assisted Jackson to the curb and when the ambulance arrived, some five or ten minutes later, he was able to enter it and was taken to the emergency hospital, where he walked in and "laid down" on the table. A nurse dressed a laceration over his right eye after which he was taken to the police department and then allowed to go. The nurse testified that she saw no other injuries, that Jackson complained of none, and that he left the emergency hospital about 10:30 p. m. Another witness testified, through a deposition, that at about 11 or 11:30 o'clock that night he saw Jackson drinking what he thought was wine in a place about a block from where the fight had occurred, that he asked him how he felt, and that he replied: "Pretty good."

So far as disclosed by the evidence Jackson was next seen about 2 o'clock a. m. on June 29, 1938, partially undressed, lying on his back across the bed in his room at a hotel some six or seven blocks from where the fight occurred. The manager of this hotel also observed him in this position at about 8 o'clock that morning and again at 2 o'clock that afternoon. At about 8 o'clock that night the manager, again noticing that he had not changed his position, went in and attempted to rouse him, without success. He called an ambulance and Jackson was taken to the general hospital, where he was admitted about 10:30 o'clock p. m. on June 29, 1938, and he died without regaining consciousness about 10 o'clock the next morning.

The doctor who examined Jackson after his admission to the hospital and two doctors who performed an autopsy testified, and pictures of the skull of the deceased were admitted in evidence. All three doctors agreed that death was caused by a blood clot on the brain following a skull fracture. From the testimony of these physicians it appears that there was nothing on the outside of the head to indicate the existence of this fracture and that the only laceration on the head which could be seen was one over the right eye. One of the doctors described the fracture as being "above the right ear, extending back across the base of the skull and over down to about the lower portion of the opposite ear". At a point above and slightly back of the right ear the fracture divided into two lines so that the entire fracture is described as having the form of an "inverted Y". All three doctors testified that this fracture could have been caused by a fall on the sidewalk; that it could have been caused by being struck with a blunt instrument or by a stick of wood; and that a person receiving such an injury could walk around. One doctor testified that as between a fall on the sidewalk and being struck with something it was more likely that the latter would have caused more laceration. He further testified that a person with such a fracture would have constant pain so long as he remained conscious; that he might live for three or four days, depending upon how long it took to form a blood clot with sufficient pressure against the brain; and that a man might receive such a fracture and walk around for several hours before lapsing into unconsciousness. Another doctor testified

that it would be possible for a man with such a fracture to live thirty-five or forty hours, and under some circumstances even longer; that he probably would have a headache; that drinking liquor would probably hasten the formation of the blood clot; and that he would be able to walk around and climb stairs until the pressure of the blood clot on the brain reached a certain point. The doctors also testified that one tooth was missing from Jackson's jaw and that there was evidence that its removal had been recent.

The appellant testified that he had formerly been a prize fighter; that he was in a cafe where the people were talking about the Louis-Schmeling fight; that he heard Jackson say that now the colored people would be "as good or better than the whites"; that he then told him "Well,—here is one Schmeling you are not going to knock out, or any other colored man"; that Jackson then "rushed me out the door"; that Jackson then struck him with his left hand and he hit Jackson three times and walked away and did not stop to see whether or not Jackson fell; and that he struck him twice on the face and once on the body.

The appellant contends that the evidence is not sufficient to sustain the judgment in that there is no evidence to connect the cause of death with any act upon his part. The main argument is that the uncontradicted testimony of the eyewitnesses is to the effect that the deceased, when he fell to the pavement as the result of a blow from the appellant, struck the back of his head as distinguished from the right side of the head, whereas the uncontradicted testimony of the physicians is that the impact which caused the fracture was on the right side of the head and above the right ear. It is argued that these facts conclusively prove that Jackson must have received another blow above his right ear, between the time he left the police station and 2 o'clock the next morning when he was seen on his bed, which blow resulted in his death. The evidence, however, does not necessarily show the facts relied upon but is subject to a different interpretation and justifies a different inference.

One of the eyewitnesses to the fight testified that Jackson, when hit by the appellant, fell down and hit his head in the back. When asked what part of the back of Jackson's head struck the sidewalk he replied: "I seen a little cut, a kind of blood, right in here some place." He then indicated a location which is described in the record as "the upper left-hand portion of the back of the head". When asked whether the position was "right on the top of the head", he replied, "Right in here some place." It appears from the testimony of the nurse and doctors, however, that the only cut and blood was just above Jackson's eye. The other eyewitness, when asked where Jackson hit his head, replied: "Oh, I couldn't see very good but I think it was about right in there." He then indicated the position and when appellant's counsel asked him if he was referring "to the back of the head and slightly to the left" the trial judge said: "Of course, he drew his finger across his head to the right-hand side, too, in indicating." The evidence indicates that the eyewitnesses were not too sure about the exact point where the impact occurred, which is not surprising under the circumstances, where parties in a crowd were watching such a fight. While both witnesses were sure that the back of Jackson's head struck the sidewalk their evidence is hardly sufficient to definitely establish that the point of impact was on the left side of the head. From the evidence of the eyewitnesses the jury may well have concluded that the actual point of impact, when Jackson's head struck the sidewalk, was on the right side of the rear half of the head rather than on the left side.

[1] Moreover, all three doctors testified that while you might naturally expect the place where the most fracture appeared, which in this case was over the right ear, to be the point of impact, you could not be sure of the point of impact from the appearance of the fracture, and that the location of the impact could not be told from the location of the blood clot. From the testimony of all three doctors it appears that while the most likely place of impact, in their opinion, was a little above and to the rear of the right ear, it was not possible to say that it was not at another point. It appears, without dispute, that the back of the deceased's head struck the sidewalk as the result of a blow given him by the appellant and it appears from the testimony of the doctors that the fracture which led to Jackson's death could well have been caused by such an occurrence. The matter was not only one for the jury, but the evidence sufficiently sustains its implied finding that the death of Jackson was caused by one of the blows delivered by the ap-

pellant. This inference was reasonable in the absence of any evidence that the deceased sustained any other injury during the four hours intervening between his fall and the time he was seen lying across his bed.

It is further argued that Jackson must have received a later injury with which the appellant was not connected because he made no further complaint at the emergency hospital, he was treated only for a laceration over the eye, the nurse observed no other injury, and he made no complaint about any pain when he was seen drinking about 11 or 11:30 o'clock that night. Not only did the doctors testify that a man might walk around several hours without knowing that his skull had been thus fractured, but it appears from their testimony that there was nothing on the outside of the head to indicate any such injury. The doctor who examined him at the hospital testified that it took him a half hour to discover that the skull was fractured and it is not surprising that the nurse at the emergency hospital did not observe it. Her attention was directed to the cut above the eye, which was bleeding, and she made no further examination. Apparently, the man had also lost a tooth but it is entirely natural that he should not have expected or requested treatment for that at the emergency hospital, and it is also natural that having just been engaged in a fight he would desire to say as little as possible while in the hands of the police. The witness who testified that he saw Jackson at 11 or 11:30 that night was impeached by showing that he had been twice convicted of a felony and the jury may not have believed him. If they did believe him, the fact that he was seen at that time is entirely consistent with the testimony of the doctors that a man in that condition could walk around for several hours, although he would suffer some pain or a headache. The amount of pain he suffered may have been affected by the liquor he was drinking and it is not surprising that he told the man who inquired as to how he felt that he felt "pretty good" in view of the fact that he had already gotten in trouble that night by talking too much.

[2] The appellant relies particularly upon the rules concerning circumstantial evidence set forth in People v. Lamson, 1 Cal. 2d 648, 36 P.2d 361, and People v. Staples, 149 Cal. 405, 86 P. 886. In the latter case it is said [page 894]: "The deduction to be drawn from these circumstances is, ordinarily, one for the jury, but where, in a case such as this, every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction." The case now before us does not rest entirely on circumstantial evidence and every incriminating circumstance is not equally compatible with innocence. There is direct evidence of eyewitnesses that blows were struck as a result of which Jackson fell backward, his head striking the pavement with such force that the impact was heard by bystanders. From the testimony of the experts this could well have caused the fracture which unquestionably led to the hemorrhage which caused death. These circumstances are not "equally compatible with innocence" and the only possibility of innocence arises from a conjecture that the fracture may have resulted from a later injury from another source. It is argued that the deceased may have fallen on his way home or that he may have been attacked by someone else. There is, of course, no evidence of any such occurrence and while such a thing is possible it cannot, under the circumstances, be said to be reasonably possible. Beyond any reasonable doubt the blows struck by the appellant caused the death of Jackson and the prosecution was neither required to prove this beyond any possible doubt nor to affirmatively establish that a later and independent injury did not take place. People v. Bellamy, 109 Cal. 610, 42 P. 236; People v. Black, 111 Cal.App. 90, 295 P. 87; People v. Breuer, 15 Cal.App.2d 745, 60 P.2d 162.

[3] The only other point raised is that the district attorney was guilty of prejudicial misconduct in his argument to the jury. In this argument the deputy district attorney, in referring to the appellant, said: "He has been in the penitentiary once, and it didn't do him any good." Counsel for the appellant then assigned this as prejudicial misconduct, stating that while the fact of prior conviction was admitted the same went only to the credibility of the witness. The trial judge stated that the matter went only to the credibility of the witness and instructed the jury that it could be considered only for that purpose. The deputy district attorney then said: "I say that it didn't do Kid Kopecks any good." Counsel for the appellant assigned this as prejudicial misconduct and asked

the court to instruct the deputy district attorney to desist from such tactics. The trial judge then very clearly and carefully told the deputy district attorney that he had no right to make such an argument, warned him to desist, and instructed the jury to disregard what had been said.

While the remarks in question were entirely improper and should not have been made, and while the deputy district attorney was deserving of severe censure for having made them, we cannot feel, under the circumstances of this case, that it can reasonably be said that they may have affected the result. The trial judge clearly and firmly disapproved of the remarks and instructed the jury to disregard them. It cannot be said that the remarks were of such a character that their effect could not have been cured by the court's instructions, and this is not one of those close cases where it may be said that the improper remarks may have led to a miscarriage of justice.

For the reasons given the judgment and order appealed from are affirmed.

We concur: MARKS, J.; GRIFFIN, J.



30 Cal.App.2d 424

McFAUL et al. v. DECK et al.

Civ. 11682.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1939.

Hearing Denied by Supreme Court March 23, 1939.

1. Licenses ⇐18½

An expression of purpose to create tenancy in common, by instrument conveying interest in oil venture and substance of provision in which expression "tenancy-in-common" was used, did not as matter of law classify transaction as one unaffected by Corporate Securities Act as a transfer creating a "tenancy-in-common." St.1917, p. 673.

2. Licenses ⇐18½

The courts will look through form to substance in determining whether a transaction comes within purview of Corporate Securities Act, since neither use of a phrase nor substance of a clause necessarily determines the legal effect of an instrument. St. 1917, p. 673.

3. Licenses ⇐18½

An instrument conveying interest in oil venture but retaining in grantor control over property for purpose of developing oil and gas thereon constituted a "security" within Corporate Securities Act requiring a permit for sale of security, notwithstanding expression of intention in instrument to create joint tenancy. St.1917, p. 673.

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

4. Licenses ⇐39

Sale of securities in violation of the Corporate Securities Act constitutes constructive fraud. St.1917, p. 673.

5. Licenses ⇐39

Sole stockholder of oil company and another as alter ego of corporation were personally liable for purchase price of certain interests in oil venture which they had sold without obtaining permit from commissioner of corporations in violation of Corporate Securities Act. St.1917, p. 673.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Minnie A. McFaul and others against John Deck and another to recover the purchase price of certain interests in an oil venture. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Derthick, Cusack & Ganahl, of Los Angeles, for appellants.

Herlihy & Herlihy, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment for plaintiffs in a suit to recover the purchase price of certain interests in an oil venture. In the form of an action for money had and received, plaintiffs sought the recovery on the grounds of constructive fraud alleged to have resulted from the failure of defendants to first obtain a permit from the commissioner of corporations of the state of California authorizing the sale.

The issues were tried upon an agreed statement of facts which later, by stipulation, became the findings. The sole ques-

tion involved is whether, under the facts presented, a permit was necessary to accord validity to the instrument purporting to transfer the interest sold.

It is contended by appellant that the transaction did not come within the purview of the Corporate Securities Act of the state of California, St.1917, p. 673, for the reason that the instrument of transfer created a tenancy in common in real property between the seller and the buyer. Respondents, contending to the contrary, point out that although the instrument in question uses the term "tenancy-in-common", nevertheless the evidence reveals that the interest conveyed was not a tenancy in common, and that such term was used in an attempt to circumvent the provisions of the Corporate Securities Act.

The agreed statement of facts reveals that the Tujax Oil Company is a California corporation. There was issued and outstanding ten shares of capital stock of the corporation, all of which was issued to and paid for by the defendant John Deck, who, as owner of such stock was authorized to appoint and elect, and did appoint and elect, the board of directors of said corporation. On June 1, 1936, an agreement in writing was executed between the Tujax Oil Company as first party, and plaintiffs Minnie A. McFaul, William D. McFaul and Margueritte McFaul Rasco, as second parties.

The pertinent portion of the instrument is as follows:

"This Agreement, made and entered into this 1st day of June, 1936, by and between Tujax Oil Company, a California Corporation, First Party, and Minnie A. McFaul or Wm. D. McFaul and/or Margueritte McFaul Rasco of Santa Monica, California, Second Parties,

"Witnesseth:

"Whereas, First Party is the owner and holder of an oil and gas sublease recorded in Book 14021, Page 167, Official Records of Los Angeles County, California, which Sublease affects * * * and other property, all in the City of Redondo Beach, County of Los Angeles, State of California; and

"Whereas, First Party is drilling a well for oil and gas upon Lot Twelve (12), one of the lots above described, which well is now being drilled in the oil zone; and

"Whereas, Second Parties have joined First Party in the drilling of said well and have paid One Thousand Two Hundred Dollars ($1200.00) as part of the expense of such drilling;

"Now, Therefore, in consideration of the premises, the parties hereto agree as follows:

"1. First Party has transferred, sold and assigned to Second Parties, and hereby does transfer, sell and assign to Second Parties, one percent (1%) interest in and to said sublease, insofar as said sublease affects the real property hereinabove described, and any well or wells drilled thereon, and in and to any and all oil, gas or other hydrocarbon substances produced and saved from any well or wells drilled thereon.

"2. First Party hereby agrees to complete the well now being drilled thereon without further costs or expense to Second Parties. Second Parties agree that their part of the oil and gas produced from said property and any well or wells thereon shall be sold by First Party at the same price and upon the same terms as First Party's oil and gas are sold, and First Party agrees to pay to Second Parties, one percent (1%) of the gross money paid by the purchaser for all of the oil and gas produced from said well, payment to be made on the tenth day of each month for all oil and gas paid for by the purchaser during the next preceding calendar month deducting therefrom Second Parties' proportion of the cost of operating said well and paying taxes and other Governmental charges, which deduction First Party guarantees and warrant shall not exceed Eight Dollars ($8.00), for each month.

"3. First Party and Second Parties agree that it is their intent and purpose to create a tenancy-in-common between them in the leasehold estate created by the oil and gas sublease hereinabove mentioned as to the real property herein described, which tenancy-in-common shall continue for and during the continuance of said sublease and it is further expressly agreed that Second Parties shall have all of the rights, benefits, privileges and emoluments of a tenant-in-common in and to said leasehold upon the above described real property.

"In Witness Whereof, etc. * * *"

[1, 2] Neither the use of a phrase nor the substance of a clause in all cases conclusively determines the legal effect of an instrument. Kelly v. McDonald, 98 Cal.

App. 121, 276 P. 404. Grammatically a sentence or paragraph may appear definitely to establish the intention of the parties to an extent that by reason of its clarity it would further appear to be impregnable. Nevertheless, such a sentence or paragraph may in fact be legally vulnerable. The use, therefore, of the expression "tenancy-in-common", as well as the substance of subdivision 3 of the above-quoted document, does not necessarily, as a matter of law, classify the transaction in question among those unaffected by the Corporate Securities Act. As hitherto declared, "In decisions in this state and in other jurisdictions where it has been contended that a transaction under attack did not come within the Corporate Securities Act because it constituted only a sale of specific real or personal property or an interest therein, the courts have looked through form to substance and found that in fact the transaction contemplated the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers were to share." Domestic & Foreign Pet. Co., Ltd., v. Long, 4 Cal.2d 547, 555, 51 P.2d 73, 76. See, also, People v. Jackson, 24 Cal.App. 2d 182, 74 P.2d 1085.

[3, 4] Among other things, it is evident from an examination of the foregoing document that the Tujax Oil Company expected and intended to maintain dominion and control over the real property described, for the purpose of developing oil and gas thereon. Under such circumstances the instrument is a security within the meaning of the Corporate Securities Act. See People v. Daniels, 25 Cal.App. 2d 64, 76 P.2d 556; People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506. It is unnecessary to cite authorities in support of the proposition that the sale of such securities constitutes constructive fraud. There is no difference in principle between the attempt to create a tenancy in common and the effort to escape the application of the Corporate Securities Act by the use of deeds conveying small fractions of real property.

[5] It is likewise unnecessary to cite authorities in support of the proposition that the defendants are personally liable as the alter ego of the corporation.

The judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

30 Cal.App.2d 451

NORTON v. JOHN M. C. MARBLE CO. et al.

Civ. 12020.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1939.

Hearing Denied by Supreme Court March 23, 1939.

1. Malicious prosecution ⇐38

Actions for malicious prosecution are not favored.

2. Malicious prosecution ⇐15

Whoever believes on reasonable grounds that a civil wrong has been done or a crime committed, may institute appropriate legal proceedings without danger of liability in action for malicious prosecution.

3. Malicious prosecution ⇐24(4), 25(3)

A final judgment duly rendered after trial on merits, in court having complete jurisdiction, adverse to defendant, is, unless procured by fraud, conclusive proof that proceedings were prosecuted with "probable cause," as respects plaintiff's liability for malicious prosecution, notwithstanding the judgment is reversed on appeal.

[Ed. Note.—For other definitions of "Probable Cause," see Words & Phrases.]

4. Malicious prosecution ⇐49

Where plaintiff in action for malicious prosecution had been convicted of contempt of court and complaint admitted the conviction, an allegation of want of probable cause was not a sufficient allegation of "fraud," relative to plaintiff's conviction, to sustain the action.

[Ed. Note.—For other definitions of "Fraud," see Words & Phrases.]

5. Malicious prosecution ⇐49

In action for malicious prosecution, where plaintiff has been convicted, averments of conspiracy and of knowledge of falsity of charge and expressions such as "premeditatedly, wickedly, and with studied care and protracted deliberation," are not allegations of "fraud" relative to plaintiff's conviction, which will sustain the action.

6. Malicious prosecution ⇐49

In action for malicious prosecution, where complaint admits plaintiff's conviction, the facts, constituting the fraud relative to the conviction, must be set forth.

7. Judgment ⇐656

Where plaintiff instituted one action for malicious prosecution after he had been ac-

quitted of practicing law without a license, and instituted another such action against some of same defendants after he had been convicted of contempt of court in another proceeding, that court ruled that his complaint in first action was not demurrable was not res judicata as to whether in second action he had sufficiently alleged fraud relative to his conviction so as to sustain the second action.

8. Pleading ⇐236(2)

Where, before plaintiff sought opportunity to amend his complaint, there had been a trial upon the issue of law presented by defendants' demurrer, plaintiff was not entitled under statute to amend complaint as matter of course. Code Civ.Proc. § 472.

9. Malicious prosecution ⇐54

Where plaintiff in malicious prosecution, failed to allege that his conviction was obtained by fraud, and, in petition to set aside an order sustaining demurrers to his complaint, did not offer to allege that his conviction was obtained by fraud, trial court properly refused to permit amendment of his complaint, especially where plaintiff contended the allegations were not necessary.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by M. G. Norton against the John M. C. Marble Company and others for alleged malicious prosecution. From an adverse order and judgment, plaintiff appeals.

Affirmed.

M. G. Norton, of Los Angeles, in pro. per.

Overton, Lyman & Plumb, by Chalmers L. McGaughey, all of Los Angeles, for respondents John M. C. Marble Co. and John M. Marble.

Henry O. Wackerbarth, of Los Angeles, in pro. per.

CRAIL, Presiding Justice.

This is an appeal from a judgment of dismissal in an action for the recovery of damages for malicious prosecution after the sustaining of the defendants' demurrers to the complaint without leave to amend, and from an order denying the plaintiff's motion to set aside the order sustaining the demurrers.

The demurrers were sustained on the ground that the plaintiff having alleged in his complaint that he was convicted before the municipal court, there was no allegation that said conviction was obtained by fraud, and therefore the complaint conclusively showed probable cause for the prosecution.

The complaint is sufficient in all respects, unless it fails to contain said allegations. Plaintiff contends said allegations are not necessary.

The plaintiff was the attorney for certain parties in the municipal court in an action which he lost, and thereupon he set out and presented a proposed bill of exceptions. Defendants filed proposed amendments thereto and the plaintiff filed objections and reservations and an affidavit in support thereof containing certain allegations against the municipal judge, which the defendants in this action thereupon in an affidavit alleged to be in contempt of court and got out an order to show cause returnable before the court for the punishment for contempt of the plaintiff herein. The complaint herein alleges the above and proceeds to allege the trial of the contempt proceedings and the plaintiff's conviction at the conclusion of said trial. It further alleges the discharge of the defendant by means of certain habeas corpus proceedings brought before the appellate department of the superior court upon the record in the contempt proceedings.

The portion of the complaint setting forth how the judgment was obtained in the municipal court against the plaintiff is as follows: "That the procurement by the above named defendants of the order to show cause requiring plaintiff to appear and answer an alleged affidavit charging an alleged contempt of court, as hereinbefore fully set forth and described, and the *conviction of the plaintiff by the said Municipal Court* of the city of Los Angeles, in Division 19 thereof, Hon. Hugh J. Crawford, judge presiding therein, as also hereinbefore set forth and described, and the causing of plaintiff's imprisonment, restraint of his liberty, and abuse while in custody, by the defendants, was without probable cause, and the said acts of said defendants were committed by said defendants purposely, maliciously, premeditatedly, wickedly, and with studied care and protracted deliberation, and with the intent on the part of said defendants pur-

posely, maliciously, premeditatedly, wickedly, and without probable cause to harass, annoy and injure the plaintiff" etc.

The complaint contains no allegation that the conviction in said contempt proceedings of the plaintiff herein was procured by fraud.

[1-3] "Actions for malicious prosecution have never been favored in the law. The interests of society demand that private wrongs be redressed and crimes brought to light, and, to that end, that whoever believes on reasonable grounds that a civil wrong has been done or a crime committed may institute appropriate legal proceedings without danger." 16 Cal. Jur. 737. It has become a rule of law in this state that a final judgment duly rendered after trial on the merits, in a court having complete jurisdiction, adverse to the defendant in the proceedings in which the judgment is rendered, is, unless procured by fraud which may be either extrinsic or intrinsic, conclusive proof that the proceedings were prosecuted with probable cause, notwithstanding the fact that the judgment is reversed on appeal. Carpenter v. Sibley, 153 Cal. 215, 94 P. 879, 15 L.R.A.,N.S., 1143, 126 Am.St.Rep. 77, 15 Ann.Cas. 484; Holliday v. Holliday, 123 Cal. 26, 55 P. 703.

In the case of Carpenter v. Sibley, supra, the court said [page 880]: "They urge, further, that probable cause is shown by a judgment of conviction, even though that judgment be afterwards reversed, and there is authority of much weight supporting this contention. Root v. Rose, 6 N.D. 575, 72 N.W. [1022] 1023; Nehr v. Dobbs, 47 Neb. [863] 867, 66 N.W. 864. Respondents next contend that the complaint itself shows plaintiff's conviction, and thereby conclusively establishes, against his pleading, the presence of probable cause for his prosecution. Respondents recognize that the general principle that the conviction establishes probable cause is subject to the modification that the judgment of conviction has not been procured by fraud at the instance or instigation of the defendants. Such, of course, is the established rule. Holliday v. Holliday [123 Cal. 26, 55 P. 703]; Crescent Live Stock Co. v. Butchers' Union, 120 U.S. 141, 7 S.Ct. 472, 30 L.Ed. 614."

In Holliday v. Holliday, supra, the court said [page 704]: "* * * when a person is charged before a competent court having jurisdiction of the matter, and is tried and found guilty, the judgment rendered, unless it is shown to have been obtained by means of fraud, is conclusive evidence of probable cause for making the charge, even though it is afterwards held to be unauthorized, and reversed on appeal."

The rule as above stated has been followed by our appellate courts (Black v. Knight, 44 Cal.App. 756, 770, 187 P. 89) and referred to in Plum v. Becket, 120 Cal.App. 507, 511, 7 P.2d 1111, Roos v. Harris, 203 Cal. 201, 202, 263 P. 225, and Bullock v. Morrison, 118 Cal.App. 112, 114, 4 P.2d 812.

The fraud relied upon to overcome the presumption of probable cause arising from the conviction of the complaining party need not be extrinsic fraud such as would support an action for the setting aside of the judgment itself, but the fraud may be intrinsic. In Carpenter v. Sibley, supra, this idea is expressed as follows: "So we find it laid down that the general rule now is 'that if the declaration or complaint shows a conviction of the plaintiff, yet if it be averred that the conviction was procured by fraud, perjury, or subornation of perjury, or other unfair conduct on the part of the defendant, the presumption of probable cause is effectually rebutted.'" Also it is apparent that the "other unfair conduct on the part of the defendant" must amount to fraud.

[4-6] The bare allegation of want of probable cause contained in the complaint is not a sufficient allegation where a conviction before the trial court is admitted in the complaint. Averments of conspiracy and of the knowledge of the falsity of the charge and the sprinkling of the complaint with vituperative epithets such as "premeditatedly, wickedly, and with studied care and protracted deliberation" are not allegations of fraud. White v. Brinkman, 23 Cal.App.2d 307, 313, 73 P.2d 254. The facts constituting the fraud must be set forth. Under the circumstances the complaint herein showed on its face probable cause, and therefore the demurrers were properly sustained.

[7] On the same day on which the plaintiff herein filed this action for malicious prosecution he filed a second action against these and other defendants in which he alleged that he was maliciously prosecuted in a criminal action for practicing law without a license. On the same day that the court sustained the demur-

rers in the instant action, it overruled demurrers of the same defendants in the second action, and the plaintiff argues that this ruling in that action, numbered 404286 in the trial court, and numbered 12021 in this court, was contrary to the ruling of the same judge in the instant case, and that it is res judicata. The action in number 404286 in the superior court was based upon a criminal proceeding instituted by the city attorney of the city of Los Angeles against the plaintiff, in which the plaintiff was tried for practicing law without a license. He was acquitted of this charge in the trial court. In that case there was no prior conviction. Hence the trial court in passing upon the demurrers held that a cause of action had been stated in that case and overruled the demurrers, but this ruling in no way affects the question which is before us on this appeal.

The plaintiff's next contention is that: "A conviction below followed by an acquittal on appeal does not establish the guilt of the person so convicted. So far from that being the fact, the contrary is the established law of res judicata. * * * An acquittal above establishes the innocence, not the guilt, of the prisoner". This contention of the plaintiff and the authorities upon which he relies are beside the point. We are not discussing the law of res judicata, but the law of probable cause in a malicious prosecution.

[8] Finally, the plaintiff complains that the trial court erred in refusing to give the plaintiff an opportunity to amend his complaint, and in this connection he contends that it is the statutory right of any pleader, authorized by section 472 of the Code of Civil Procedure, to amend once as a matter of course. A mere reading of the section makes this contention untenable. The section reads: "Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or entered in the docket, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading; * * *." There had been a trial upon the issue of law involved upon the demurrer before the plaintiff sought opportunity to amend his complaint.

[9] An examination of the plaintiff's petition to set aside the order sustaining demurrers, etc., discloses that plaintiff made no offer to allege that the conviction in the contempt proceedings before Judge Crawford was obtained by fraud, either extrinsic or intrinsic, and since the allegations contained in this petition would not have supplied the deficiency which existed in the complaint, the trial court properly refused to permit further amendment. Brick v. Cazaux, 9 Cal.2d 549, 556, 71 P.2d 588; Stewart v. Douglass, 148 Cal. 511, 83 P. 699; Pollard v. Forest Lawn M. P. Ass'n, 15 Cal.App.2d 77, 59 P.2d 203.

Even on appeal the plaintiff does not contend that he could make the necessary allegations. His contention is, as shown on the bottom of page 23 of plaintiff's brief, that said allegations are not necessary.

The judgment and order are affirmed.

We concur: WOOD, J.; McCOMB, J.



30 Cal.App.2d 467

SWARTZBAUGH et al. v. SARGENT.

Civ. 2176.

District Court of Appeal, Fourth District, California.

Jan. 24, 1939.

1. Records ⇐9(13)

In quiet title suit between adjacent landowners, wherein plaintiffs relied upon decree rendered in torrens title action, evidence supported finding that defendant was not served with notice or process in such action. Land Title Law, St.1915, p. 1932; p. 1935, § 12.

2. Records ⇐9(7)

An occupant of realty which was sought to be registered in names of alleged owners in torrens title proceeding, at time proceeding was instituted, should have been served with notice and process. Land Title Law, St.1915, p. 1932; p. 1935, § 12.

3. Records ⇐9(13)

In quiet title suit, where plaintiffs relied upon decree in torrens title action, and defendant, who was in possession of part of

registered property at time such action was instituted, was not personally served with notice or process, decree was not binding upon defendant and was subject to attack by him. Land Title Law, St.1915, p. 1932; p. 1935, § 12.

4. Boundaries ⇐46(1)

To establish an agreed boundary line, there must have been an uncertainty or belief of uncertainty in location of line, express or implied agreement fixing line and actual designation of line upon ground and occupation in accordance therewith.

5. Boundaries ⇐37(5)

In quiet title suit between adjacent landowners, evidence supported finding of agreed boundary lines.

6. Appeal and error ⇐996, 1010(1)

A finding supported by direct evidence and reasonable inference drawn therefrom by trial court could not be disturbed on appeal.

7. Appeal and error ⇐110

An order denying motion for new trial is not appealable. Code Civ.Proc. § 963.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action to quiet title by Lola Desirra Swartzbaugh and another against E. L. Sargent, wherein defendant filed a cross-complaint. From an adverse decree, plaintiffs appeal.

Affirmed.

Rutan, Mize & Kroese, of Santa Ana, (Harold H. Coyle, of Placentia, of counsel), for appellants.

Forgy, Reinhaus & Forgy and R. M. Crookshank, all of Santa Ana, for respondent.

MARKS, Justice.

Plaintiffs brought this action to quiet title to the south one-half of the southwest quarter of the northeast quarter, and the southeast quarter of the northeast quarter of section twenty-six, township four south, range 10 west, S. B. B. & M. in Orange county. They allege that the north line of the first described land is six hundred sixty feet north of the south line of the quarter section, and the west line of the second described tract is thirteen hundred eighteen and one-half feet east of the west line of the quarter section as originally located.

Defendant filed an answer and cross-complaint in which he asserted title to the north one-half of the southwest quarter of the northeast quarter of section twenty-six. He alleged that the south boundary line of his property is six hundred fifty and ninety-nine one hundredths feet north of the south line of the quarter section and twelve hundred ninety-six and thirty-six hundredths feet west of the east line of the section.

This is really a boundary line dispute. The land claimed by the parties overlap about nine feet along the south line and an average of about fifteen feet along the east line of defendant's property.

Plaintiffs rely principally upon a decree of the superior court of Orange county in a case brought under the Land Title Law of California (Stats.1915, p. 1932) commonly known as the Torrens Title Act. That decree established title in John Josiah Swartzbaugh (predecessor in interest of Ruth Baldus) and Lola Desirra Swartzbaugh to the land as described in their complaint, with certain exceptions not important here.

Defendant alleged that he and Mr. and Mrs. Swartzbaugh had agreed on boundary lines more than twenty years prior to the commencement of this action and that such lines had been recognized and observed as the true boundary lines for that period of time. He also alleged that although he was named in the Torrens Title action no notice of its pendency or any process was ever served upon him and that he had no knowledge of the action or judgment rendered in it until about seventeen years after the decree was entered.

The trial court found that the Torrens Title decree was void as to defendant because of lack of notice and service of process; that the then owners had agreed on the boundary lines substantially in the locations alleged by defendant; that they had recognized and observed those agreed boundary lines as the true boundary lines for more than twenty years and until 1933 when the present dispute arose. A decree was rendered quieting defendant's title to the property claimed and actually occupied by him, being substantially the same property described in his pleadings, and quieting title to plaintiffs' property with the agreed boundary lines established as the true boundaries.

Two questions are presented for our consideration: The effect of the Torrens Title decree in view of the defect of no notice or process having been served on defendant, and the sufficiency of the evidence, under

the law of this state, to support the finding of the agreed boundary lines.

[1] While the evidence on the question of service is conflicting, there is ample evidence in the record to support the finding that defendant was not served with notice or process in the Torrens Title action. It is not claimed that he assented to the proceeding or to the registration of any of the property there described.

Section 12 of the Torrens Title Act provides that all nonconsenting adjacent owners must be served with a notice of the proceeding if they reside in the state and can, with reasonable diligence, be found. That defendant was an adjoining owner is not questioned. Swartzbaugh knew the exact property defendant then occupied and was farming. At the time of the proceeding defendant was residing on his property and this was known to Mr. and Mrs. Swartzbaugh. Section 12 also contains the following: "All parties who have not joined in the petition or assented thereto in writing and who appear by the petition or petition and abstract or report of the examiner of titles to be interested in the fee, all occupants named in the petition and the husband and wife of the applicant, if married, shall be personally served with a copy of the notice, attached to a copy of the petition, if they reside in the state and can, with reasonable diligence, be found and served therein."

[2] We must bear in mind that, according to plaintiffs' complaint, and actually, defendant was in possession of part of the property that Mr. and Mrs. Swartzbaugh sought to have registered in their names in the Torrens Title proceeding at the time those proceedings were instituted. Therefore, defendant should have been served, as an occupant of the property, as required in section 12 of the Torrens Title Act.

The effect of the failure to serve one in possession of part of the registered property was considered in the case of Follette v. Pacific L. & P. Corp., 189 Cal. 193, 208 P. 295, 23 A.L.R. 965, where the Supreme Court said [page 298]: "From these excerpts from the body of the said Land Title Law it appears to be the clear intendment of the law that as to every occupant of lands with respect to which the establishment and registration of the title is sought there must be a personal service of notice which serves as the process by which such person shall be brought within the jurisdiction of the court in which the proceeding for the establishment and registration of the title to the premises is pending. Any other interpretation of these essential provisions of the act giving the court jurisdiction over the subject-matter and the parties interested in such proceedings would permit the petitioner, by the mere omission of the name or names of those persons who were in the actual occupation of the premises in question from his petition, to avoid the express requirement of the law as to the personal service of the notice or process upon such person or persons. This would be to permit him to take advantage of his own wrong, and to thus violate one of the most ancient and salutary axioms of our law."

The Supreme Court then proceeded to discuss substituted service by publication, which in some cases is held to satisfy the constitutional requirement of due process of law, and thus concluded: "This, however, is not such a case, since under the express terms of the Land Title Law under review the only service of notice of the proceedings to establish title which could be made upon occupants of the property was personal service. The provisions of the act as to publication of notice can have application only to those who were not in the possession or occupancy of the premises, and hence those provisions are a false quantity in the consideration of the case at bar. The case stands as though the only provision in the law as to the giving of notice was that requiring personal service upon the class of claimants in which this defendant is; and that notice not having been given, there was in that proceeding and as to this defendant no due process of law."

[3] It follows here that, as defendant was in possession of part of the registered property, and as no notice or process in the Torrens Title action was personally served on him, the judgment in that action was not binding upon him and was subject to attack by him in this action.

The consideration of the sufficiency of the evidence to support the finding of agreed boundary lines between the properties of Mr. and Mrs. Swartzbaugh and defendant requires a brief summary of the evidence offered on that question.

All of section twenty-six, in which the respective properties are located was at one time owned by the Stearns Rancho Company, the common source of title of the parties here. A portion of the holdings of the Stearns Rancho Company, which included the property in question here, was subdivided into sections in 1901 or 1902 by

Capt. C. T. Healy, a civil engineer employed by that company. At least his locations of the northeast corner, and probably the center point of this section, had been preserved and proof of these locations was made during the trial. As is not unusual in these old surveys this section did not contain six hundred forty acres of land. The amount of the shortage does not appear.

The first sale of any of the land in the northeast quarter of section twenty-six was made to J. A. Smith, who purchased the northwest quarter of the northeast quarter of that section on a conditional sales contract. The date of this contract does not appear. The deed to Smith was dated January 13, 1905. Capt. Healy set stakes at the southeast and southwest corners of the Smith property, 1,320 feet south of the north line of the section. Smith went into possession of and occupied all of this property. According to Col. H. S. Finley, who again surveyed this property for the Stearns Rancho Company in 1901 or 1902, this left the north and south dimension of the southwest quarter of the northeast quarter of section twenty-six at about 1,307 feet.

Smith also bought the north one-half of the southwest quarter of the northeast quarter of section twenty-six. This property was surveyed and its corners located by Col. Finley. He gave it a north and south dimension of 653.5 feet and an east and west dimension of 1,321.88 feet. The location of the corner stakes set by Col. Finley at the northeast, the southeast and the southwest corners of this property were preserved and proved at the trial. It is probable that this property was deeded by the Stearns Rancho Company to Smith in 1905. Sargent purchased and went into possession of this property during the year 1914. The corner stakes set by Col. Finley were then in place. He continued to occupy all of the property designated by those stakes and was in possession of it at the time of trial.

John J. and Lola Desirra Swartzbaugh acquired title to the south half of the southwest quarter, and the southeast quarter, of the northeast quarter of section twenty-six on February 26, 1906. John J. Swartzbaugh conveyed his half interest in it to Ruth Baldus on November 24, 1934.

Mr. and Mrs. Swartzbaugh went into possession of their property in 1906. They recognized the corners of the Sargent (then Smith) property as set by Col. Finley and did not dispute those lines or make any claim to any of that property until about the year 1933, when a survey of their property was made. They then asserted that the south line of the Sargent property encroached on their property slightly more than nine feet, and on its east line more than an average of fifteen feet.

The differences between the parties over their boundary line, which is the south line of the Sargent property, arises chiefly from the shortage in the acreage of the quarter section and the fact that Capt. Healy in setting the southerly corners of the northwest quarter of the northeast quarter of section twenty-six gave Smith a full 1,320 foot north and south dimension, and Col. Finley, in setting the stakes for what is now the Sargent property, attempted to divide the shortage equally between the north half (Sargent) and the south half (Swartzbaugh) of the southwest quarter of the northeast quarter of section twenty-six. Plaintiffs maintain that the shortage should be borne equally by the three ownerships, if they are not to be given the full acreage called for in their Torrens Title certificate.

The explanation of the controversy over the location of the east line of the Sargent property is found in the testimony of an engineer employed by plaintiffs to survey their property. He testified that the center point of the section has been moved more than forty feet from its original location fixed by the Capt. Healy survey. This change, with the shortage in the section, explains his location of this boundary line.

It should be observed that the measurements of the three engineers who had surveyed defendant's property did not exactly agree even when the computations were made from a common starting point. However, these differences were slight and need not affect our conclusions.

It is established beyond question that the accepted lines of use of the properties, as conformed to by both Mr. and Mrs. Swartzbaugh and defendant for more than twenty years, were substantially those lines established by the Col. Finley survey and which were found to be the agreed boundary lines by the trial court.

Defendant planted his property to orange trees in 1914 and 1915. He constructed an irrigation pipe line paralleling, and about two feet west, of the east line of his property as established by Col. Finley. A number of his orange trees were planted on the strip on the east end of this property now claimed by plaintiffs. He planted the south

row of his orange trees about twelve and one-half feet north of the south line of his property, as established by Col. Finley. Plaintiffs' property was planted to walnut trees which were set back a convenient distance from those lines. The owners of both properties observed these lines as the lines of planting, cultivation, use and occupation.

John J. Swartzbaugh testified as follows:

"Q. What I mean is this, when you planted your grove, you also paid attention to these stakes that were set? A. Yes.

"Q. And you kept on your side of the stakes and Sargent kept on his side of the stakes, isn't that correct? A. Yes.

"Q. And that was over twenty years ago, wasn't it? A. Something like twenty years. * * *

"Q. And in the last twenty years nobody ever raised any question about the boundaries until Mr. Bates came out, did they? You and Sargent never had any trouble about the boundary, did you? A. I never knew where the boundaries were. Those stakes was there.

"Q. And you ploughed up to that line between the stakes on one side and Sargent ploughed up to the line between the stakes on the other side? A. Yes.

"Q. You never had any trouble with him about the boundaries at all? A. No.

"Q. You never discussed the boundary between yours and Mr. Sargent's properties until Mr. Bates came out there, isn't that right? A. Oh, we talked about the boundary. When he set his trees out we talked about the boundary, that he couldn't find any face to the twenty acres.

"Q. What? A. He couldn't find any face to the twenty acres.

"Q. What do you mean by that? A. Straight line.

"Q. No straight line to the twenty acres? A. Yes.

"Q. And then he set his trees out so they would come on a line down between the stakes? A. He had a point row on the north and a point row on the east.

"Q. But he kept on his side of the stakes? A. Yes.

"Q. And you kept on your side of the stakes, isn't that right? A. Yes, sir.

"Q. And neither one of you kicked about the boundary of the other in the twenty years, did you? Approximately twenty years? A. No.

"Q. There was no dispute between you as to who owned the property? A. No.

"Q. You simply went up to the line, the east stake, and figured that was your line, isn't that right? A. Yes, sir.

"Q. And it wasn't until Bates came out and told you that your lines went further into the Sargent line that you raised any question, isn't that right? A. When I sold a piece there that man there got Bates to survey it, and he said my piece was nine feet, eight or nine feet short.

"Q. That was the first time you knew it, wasn't it? A. Yes."

Plaintiffs urge that the evidence we have outlined fails to support the finding of agreed boundary lines, because: (1) There was no dispute about their locations, and, (2) There was no express agreement that any line should be taken and accepted as the true boundary line.

[4] The question of an agreed boundary line is discussed in Roberts v. Brae, 5 Cal. 2d 356, 54 P.2d 698, where it is said [page 699]:

"The authorities indicate that in order to establish an agreed boundary line it is necessary to show that there was an uncertainty or belief of uncertainty in the location of the line, that there was an agreement, express or implied, fixing the line, and that there was an actual designation of the line upon the ground and occupation in accordance therewith. Muchenberger v. City of Santa Monica, 206 Cal. 635, 642, 275 P. 803; Ross v. Burkhard Inv. Co., 90 Cal.App. 201, 205, 265 P. 982, 985. The case last cited declares that 'It is only when the owners of contiguous tracts of lands, * * * are uncertain as to the real boundary line which separates their respective properties, by mutual agreement, either express or implied, consent to accept a specified line as the true boundary, and thenceforth occupy and use their respective properties in accordance therewith for a considerable length of time that the contracting parties and their privies in title will be estopped from repudiating the agreed boundary.' * * *

"In Clapp v. Churchill, 164 Cal. 741, 745, 130 P. 1061, 1062, it is declared that 'the doctrine of an agreed boundary line and its binding effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. * * * This does not mean that the inference of an agreement arising

from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement and to be valid that agreement must have been based on a doubtful boundary line.' This is recognized in Board of Trustees v. Miller, 54 Cal.App. 102 [105], 106, 201 P. 952. * * *

"Here there is no substantial evidence tending to rebut or overcome the presumption of an agreement raised by long acquiescence and occupation. As indicated above, the defendant Scheiber has been in possession for 38 years and the defendant Brae and her predecessors for 35 years. Plaintiff had been the owner of her property for over 10 years prior to the commencement of this action and in occupancy for a longer period. From other evidence it is apparent that the buildings, the lines, and the possessions of the parties have been the same for a long period during which period there apparently have been no title disputes and no admissions that the lines were not true ones. In addition to long acquiescence and occupation, we have in the present case the existence of substantial and permanent improvements, owned by the defendants, upon the disputed pieces of land. Under the circumstances, we are satisfied that agreed boundary lines were established which entitled the defendants to their respective possessions."

[5, 6] Under the rules thus laid down, the evidence supports the finding of agreed boundary lines. That there was an uncertainty as to the true boundary lines is established in the testimony of Mr. Swartzbaugh. The Finley stakes were in evidence and the owners recognized the lines established by those stakes as the true boundary lines between their properties. The pipe line was constructed and their trees were planted on the assumption that the lines established by those stakes were the true boundary lines. They cultivated their properties up to these lines. These conditions existed for about twenty years. From it the trial court was fully justified in drawing the inference of an agreement on those boundary lines as the actual boundaries of the properties. It follows that as the challenged finding is supported in the particular of an uncertainty as to the boundaries by the direct evidence of Mr. Swartzbaugh, and in the particular of the agreement on the boundary, by a reasonable inference drawn from the evidence by the trial court, that finding cannot be disturbed here. Main See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; Witherow v. United American Ins. Co., 101 Cal. App. 334, 281 P. 668.

[7] Plaintiffs have attempted to appeal from the order denying their motion for a new trial. Such an order is not appealable. Section 963, Code Civ.Proc. The attempted appeal from that order is dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



30 Cal.App.2d 457

LE CYR v. DOW.

Civ. 2103.

District Court of Appeal, Fourth District, California.

Jan. 24, 1939.

1. Pleading ⇐236(1)

Allowing amendment to pleading is discretionary.

2. Libel and slander ⇐98

In action for slander where defendant in answer admitted some allegations of complaint, allowing defendant at trial to amend answer so as to deny all allegations was not abuse of discretion where plaintiff was not put to any disadvantage in meeting the issue and plaintiff did not ask for continuance.

3. Pleading ⇐229

Courts should be liberal in allowing amendments to pleadings.

4. Pleading ⇐248(1), 261

Ordinarily, courts will not permit the filing of an amendment to a pleading that raises a new cause of action or a new defense.

5. Pleading ⇐229

Usually, a party should not be permitted to amend answer to deny a fact that had been theretofore specifically admitted.

6. Witnesses ⇐276

Where plaintiff called defendant under statute as witness, plaintiff was not re-

quired to lay foundation of circumstances of time, place, and parties present before he was entitled to ask defendant if defendant had a conversation with other persons or what the conversation was, or, if defendant made a statement, what that statement was, unless plaintiff intended to impeach defendant as a witness. Code Civ.Proc. §§ 2052, 2055.

7. Witnesses ⇐388(10)

Where a witness is to be impeached, witness is entitled to know the circumstances of time, places, and parties present when the statements, which he has denied, were allegedly made, that he may explain them. Code Civ.Proc. § 2052.

8. Trial ⇐413

Where defendant's objection to plaintiff's question was sustained and plaintiff acquiesced in ruling by saying that he would proceed for the present and come back to matter later, plaintiff waived his claimed right to have question answered.

9. Trial ⇐49

Where defendant objected to testimony requested by plaintiff, a ruling that plaintiff would have right to offer the testimony later was not a ruling excluding offered testimony, but direction as to order of proof, so that on appeal plaintiff was not entitled to contend that the testimony was excluded. Code Civ.Proc. § 2042.

10. Appeal and error ⇐712

Matters which are no part of judgment roll cannot be considered on appeal unless they are otherwise made part of record.

11. Appeal and error ⇐616(3)

Where instructions were included in clerk's transcript without court's certificate, record was not so authenticated as to authorize the appellate court to review the instructions.

12. Appeal and error ⇐641

Where record is not properly authenticated, appellate court is authorized to deny motion under statute for order to have record authenticated, for insufficient showing, or grant motion, or review unauthenticated record and determine whether motion should be granted. Code Civ.Proc. § 473.

Appeal from Superior Court, Inyo County; Erwin W. Owen, Judge.

Action by J. R. Le Cyr against G. W. Dow for alleged slander. From an adverse judgment, plaintiff appeals.

Motion to have record authenticated denied. Judgment affirmed.

Fred W. Heath and Daniel A. Knapp, both of Los Angeles, for appellant.

Randall & Bartlett and Kenneth W. Kearney, all of Los Angeles, for respondent.

WARMER, Justice pro tem.

Plaintiff sought by the action here involved to recover damages for slander, and in his complaint alleged that defendant stated as follows:

"(a) That while the Santa Rosa Mines Development Company was being operated by this plaintiff, that large quantities of ore were mined therefrom and sent to smelters for reduction and refining, but that the proceeds received therefrom were retained by the plaintiff and used for his own personal benefit.

"(b) That the plaintiff operated the Santa Rosa Mine exclusively for his own use and benefit, to the utter disregard of the rights of creditors and stockholders of the Santa Rosa Mines Development Company.

"(c) That the plaintiff had squandered the money of the corporation, (meaning the Santa Rosa Mines Development Co.)

"(d) That the plaintiff had embezzled and converted to his own use the money and property of the company (meaning the Santa Rosa Mines Development Co.)

"(e) That plaintiff is inexperienced in the management and operation of mining properties.

"(f) That plaintiff had 'gutted' the mine * * *.

"(g) That the plaintiff is a crook.

"(h) That plaintiff carried all corporate records in his vest pocket * * *.

"(i) That plaintiff had sold corporate stock and had taken for himself on account thereof, both a commission and a bonus.

"(j) That plaintiff had committed crimes, and that he could be convicted thereof and sent to San Quentin.

"(k) That when the books of Santa Rosa Mines Development Co. were demanded of plaintiff he produced a brand new set of books, in which all the entries had been made at the same time. That while a bookkeeper made them up, he did so at the

request of plaintiff, who told the bookkeeper what to write in the books.

"(l) That Judge Dehy 'had so much on' the plaintiff that he, (Dehy) could not act as successor to plaintiff as trustee of the Santa Rosa Mines Development Co.

"(m) That if plaintiff wanted to avoid the penitentiary, he should leave the state at once, and stay out of it.

"(n) That plaintiff had 'robbed the people of Owens Valley'.

"(o) That plaintiff had spent company money to develop the mine, and upon the uncovering of ore bodies, had given a lease to himself to enable plaintiff to take for himself the ore so developed and uncovered."

Plaintiff sought both compensatory and exemplary damages. The claim for exemplary damages was added by amendment at the time of the trial, without objection on the part of the defendant.

The defendant filed an answer duly verified by his attorney, denying all but three of the alleged slanderous allegations contained in the above-mentioned subsections "c", "d", and "h" of paragraph II of the complaint, and alleged that defendant admitted making the statements set forth in said subsections, but denied that they were false, defamatory or scurrilous, and alleged the facts to be that the charges and words contained therein were, and each of them was true.

In a second, separate and affirmative defense, defendant alleged that he had been appointed trustee for the Santa Rosa Mines Development Company, a corporation, in a proceeding under section 77B of the Bankruptcy Act of the United States of America, 11 U.S.C.A. § 207; that he was a creditor and stockholder of said Santa Rosa Mines Development Company; that the statements and charges contained in plaintiff's complaint were made without malice by the defendant, in communications to persons who were interested in said statements and in the Santa Rosa Mines Development Company as creditors or stockholders of such company, who had requested defendant to give them the information set forth in the communications; that defendant had reasonable cause to, and did believe each and all of the statements therein to be true; that such statements and communications were privileged.

As a third, separate and affirmative defense, defendant alleged each and all of the supposed defamatory words contained in plaintiff's complaint were true when spoken; that the defendant was informed and believed that plaintiff had been and was guilty of each and every charge in said complaint alleged to have been made against him by the defendant; that whatever defendant had said of, or concerning the plaintiff, was said in the full belief of its truth and in warning to others, and not from any motive of malice toward the plaintiff.

At the trial, by leave of court first had and obtained, the defendant filed an amendment to his answer, denying generally and specifically all of the slanderous allegations included in said subsections "c", "d" and "h" of paragraph II of the complaint. The amendment was filed over the objection of the plaintiff.

It appears, therefore, that the pleadings raise the following issues: first, the making of the alleged slanderous statements; second, the truth thereof; and third, whether or not the statements, if made, were privileged.

The cause was tried before a jury and the jury returned a general verdict in favor of the defendant and against the plaintiff. The plaintiff does not raise the question of the sufficiency of the evidence to support the verdict.

[1] Plaintiff urges certain errors as a ground for reversal. He maintains that it was error to permit the defendant to file his amendment to the answer for the reason that said subsections "c", "d" and "h" had theretofore been specifically admitted and the amendment thus allowed specifically denied them. Amendments are within the sound discretion of the court. Bank of Woodland v. Heron, 122 Cal. 107, 54 P. 537; Harney v. Corcoran, 60 Cal. 314. In Cox v. Rosenberg, 58 Cal.App. 181, at pages 187, 188, 208 P. 377, at page 379, the court says:

"Appellant now insists that the court abused its discretion in permitting defendants to file these amended answers, and thereby deny the existence of facts which in their previous verified pleadings they had admitted and affirmed. It is not claimed that by reason of these amendments the plaintiff suffered any disadvantage in the presentation of the evidence, or that the evidence is any different from what it would have been if the issues newly suggested thereby had been raised by the original answer. We think that there was no abuse of discretion in the allowance of these amended pleadings.

"We are not unmindful of the fact that it has been declared to be the rule that a party will not be permitted on the trial to amend by denying a fact admitted in the answer. Bank of Woodland v. Heron, 122 Cal. 107, 110, 54 P. 537. But this is not an absolute rule which must be applied without use of discretion. We only hold that in this case the discretionary power of the court has not been abused, even though it may be that the court would have been justified in making a contrary ruling."

In Brown v. Aguilar, 202 Cal. 143, at page 149, 259 P. 735, at page 738, the court said: "An application for leave to amend is addressed to the sound discretion of the court and such application may be denied where no showing is made to justify the exercise of the court's discretionary power. 21 Cal.Jur. § 126, pp. 181, 182."

See also, Cox v. Rosenberg, supra; Tognazzi v. Wilhelm, 6 Cal.2d 123, 56 P.2d 1227.

[2] It therefore appears that it is the settled law of this state that the making of an amendment to a pleading under the circumstances here presented, is addressed to the sound discretion of the trial court. There is nothing in the record to indicate that the plaintiff was put to any disadvantage in meeting the issue presented by the amendment. In fact, he did not even ask for a continuance. When the matter was addressed to the sound discretion of the trial court, that court had the power to permit the amendment, or to refuse the amendment in the exercise of its sound discretion. We find no abuse of discretion in allowing the amendment hereinbefore referred to, even though it might be that the court would have been justified in making a contrary ruling.

[3-5] Courts should be and are liberal in the allowance of amendments to pleadings so that substantial justice may be done as between the parties, but ordinarily they will not permit the filing of an amendment that raises a new cause of action or a new defense. Usually, a party ought not to be permitted to amend an answer to deny a fact that had been theretofore specifically admitted. However, the whole subject of amendment to pleadings is addressed to the sound discretion of the trial court.

[6-8] Plaintiff urges that he called defendant under the provisions of section 2055 of the Code of Civil Procedure, and during the course of the examination under said section the objection was made, to certain questions calling for statements or conversations, that no foundation was laid as to time, place and parties present.

The record in that particular, addressed by counsel for plaintiff to Mr. Dow, the defendant is as follows:

"Q. Mr. Dow, in this complaint it is alleged that at various times and various places between July 1, 1935 and April 30, 1936, you made certain statements. I will ask you with reference to the following statement which you are alleged to have made concerning Le Cyr 'that while the Santa Rosa Mines Development Company was being operated by Mr. Le Cyr, that large quantities of ore were mined therefrom and sent to smelters for reduction and for refining, but that the proceeds received therefrom were retained by the plaintiff and used for his own benefit.' A. I didn't make that statement.

"Q. You never made it? A. No.

"Q. Did you make any statement substantially like the statement alleged?

"By Mr. Bartlett: Now, I object to that unless there is stated some time, place or person present.

"By the Court: I think counsel and witness have a right to know the time and place.

"By Mr. Heath: Well, then, we will come back to this matter later, and I will proceed for the present."

The defendant further testified (Question by Mr. Heath):

"It is further alleged here that you made the statement 'that when the books of Santa Rosa Mines Development Co. were demanded of Mr. Le Cyr he produced a brand new set of books, in which all the entries had been made at the same time. That while a bookkeeper made them up, he did so at the request of plaintiff, who told the bookkeeper what to write in the books.' Did you make such a statement? A. I did not.

"Q. Did you repeat such a statement made by anyone else? A. I don't think so. * * *

"Q. If you had made such a statement, wouldn't you remember whether you had made it or whether you hadn't? A. Well, I don't know. Quite often, you know, you discuss things back and forth. If I said anything of that nature or repeated something someone else said, it wasn't for malicious purposes at all."

Mr. Heath asked to have a portion of the answer stricken out, which was done. After a discussion between court and counsel relative to laying a foundation of the circumstances of time, place and parties present, the court said: "Well, fix your time and place and parties present and I will overrule the objection." The evidence then is as follows:

"By Mr. Heath: I think we will pass that for the present.

"By Mr. Bartlett: Well, if counsel will fix the time and place and parties present and let the witness know what he has in mind, I have no objection under those circumstances.

"By Mr. Heath: We will come back to that later.

"By the Court: All right, go ahead."

This excerpt from the record is sufficient to show what actually took place during the trial concerning the point now under consideration. Counsel have pointed to no provision of law that requires a foundation to be laid of circumstances of time, place and parties present before a party can be asked if he had a conversation or what the conversation was, or if he made a statement, what that statement was. However, if the witness is to be impeached as to any of his statements as a witness, section 2052 of the Code of Civil Procedure provides for the method. That section requires the laying of a foundation of the circumstances of time, places and parties present to be called to the attention of the witness with permission to explain them if he so desired. The witness had denied making the statements addressed to him, and if it was the purpose of counsel for plaintiff to impeach him as to that statement, it would have been incumbent upon him to lay the foundation as provided in said section. If he did not intend to impeach him, there was no requirement for him to lay the foundation so to do. However, it appears that when he was met with the objection he either acquiesced in the ruling by saying that he would come back to the matter later, or withdrew the question, or made some kindred statement, which we think is a waiver of his claimed right to have the question answered. However, it is not necessary to determine whether it constituted a waiver or not, for the reason that no objection was ever made when any impeaching testimony was offered, if any was offered, and if it was the intention of Mr. Heath, counsel for plaintiff, to impeach Mr. Dow by his own testimony, by showing that he had made different statements than the one he had made on the stand, or had in fact made the statement charged to him, to someone else, he was entitled to lay the foundation of circumstances of time, place and parties present, when he had theretofore stated he did not make the statement, or that he did not think so, or that he did not remember.

[9] Plaintiff further urges that the court refused to permit plaintiff to introduce evidence touching on defendant's financial standing and claims error on account thereof. The record on this point is as follows: (By Mr. Heath, addressed to Mr. Dow):

"Q. Are you in business there? A. Yes sir.

"Q. What business are you in? A. Lumber yard and hotel.

"Q. Interested in any other enterprises there? A. Not exactly."

It then appears an objection was made by Mr. Bartlett: "Objected to as immaterial about the affairs, business affairs, of Mr. Dow; is not an issue in this case.

"By the Court: It would appear the exception is good. I don't know the purpose. * * *"

It will be observed that there was no question pending unanswered at the time the objection was made and the court's statement was "It would appear the exception is good". Then followed an argument relative to the objection. The court sustained the objection. The record then continues:

"By Mr. Heath: If the court please, for the purpose of completing the record, we desire to show that Mr. Dow is one of the leading members of the community of Lone Pine, that he is engaged in various mercantile enterprises, runs a lumber yard, hotel, is widely known. * * *

"By Mr. Bartlett: Now, if the Court please, I desire to interrupt counsel. The making of these statements in the presence of the jury is misconduct on the part of counsel and we request the Court to instruct the jury to disregard those statements."

The court did instruct the jury in great detail as to the matter, whereupon, Mr. Heath stated: "I think that covers the situation, Your Honor.

"By the Court: Your offer, Mr. Heath, I am not going to grant at this time. I am going to let you have the right to offer within the presence of the jury later in the case to make that proof."

Such a ruling most certainly could not be considered as excluding the testimony offered, because the court expressly told counsel for plaintiff in that particular ruling that he was going to permit the offer to make proof thereof in the presence of the jury later in the case. Such was not a ruling excluding the testimony offered, but rather a direction on the part of the court as to order of proof. Sec. 2042, Code Civ. Proc.; More v. Finger, 128 Cal. 313, 60 P. 933.

[10] Plaintiff urges that there are certain errors in the instructions.

Defendant claims that any error in instructions cannot be considered because they are not properly authenticated, and plaintiff makes no claim that they can be considered on the record as made up, but simply says if they are not properly authenticated then under the provisions of section 473 of the Code of Civil Procedure he should be relieved for his oversight or failure and that this court should make a proper order to have the same properly authenticated.

The record discloses that the instructions are included in the clerk's transcript with no certificate of the trial judge contained therein.

Matters which are no part of the judgment roll cannot be considered on appeal unless they are otherwise made a part of the record. See Stoltenberg v. Harveston, 219 Cal. 406, 26 P.2d 833; Wulferdinger v. Pickwick Stages System, 105 Cal.App. 509, 288 P. 93; Shuey v. Bunney, 4 Cal. App.2d 408, 411, 40 P.2d 859.

[11] We think the record is not so authenticated as to permit this court to review the instructions appearing in the clerk's transcript.

Under the circumstances thus presented, should the record be returned for proper authentication on the motion made as above indicated?

We have, notwithstanding the lack of authentication as above determined, considered the instructions in the record as though they were duly authenticated. While we cannot always determine whether they were given at the request of plaintiff or defendant or by the court without suggestion of either party, yet, we are of the opinion that they constituted a correct statement of the law. When read as a whole, they are not subject to the claims of error urged by plaintiff.

[12] We think, when such a condition is presented by the record, the appellate court may either deny the motion for insufficient showing or grant the same, or if it elects, so to do, review the unauthenticated record and determine whether or not from a study thereof the motion should be granted.

We have chosen the last course and from such a study think the motion should be denied.

The motion is therefore denied.

For the foregoing reasons the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



30 Cal.App.2d 477

In re STURGES' GUARDIANSHIP.
THOMAS v. STURGES.
Civ. 2166.

District Court of Appeal, Fourth District, California.

Jan. 24, 1939.

1. Guardian and ward ⇐25

A duly appointed, qualified and acting guardian of a minor's person can be removed only for statutory causes. Probate Code, § 1580.

2. Guardian and ward ⇐25

"Incapacity" to perform duties suitably, as ground for removal of guardian of minor's person, may be proved by direct evidence of physical or mental condition of guardian or by circumstantial evidence of failure to properly perform obligations towards ward. Probate Code, § 1580.

"Incapacity" as the term is used without qualifying words denotes inefficiency, incompetency, lack of adequate power, etc.

[Ed. Note.—For other definitions of "Incapacity," see Words & Phrases.]

3. Guardian and ward ⇐25

Poverty which does not deprive a ward of the necessaries of life, or affect her health or well being, and which does not deprive her of proper training, does not furnish ground for removal of guardian, nor prove lack of capacity to perform duties suitably. Probate Code, § 1580.

4. Guardian and ward ⇐25

In proceeding by aunt of minor child for removal of child's stepmother as guardian and for appointment of aunt in stepmother's place, evidence was insufficient to justify removal on ground of incapacity to perform duties suitably. Probate Code, § 1580.

5. Guardian and ward ⇐25

In proceeding for removal of minor's stepmother as guardian of minor's person and for appointment of minor's aunt in stepmother's place, evidence of value of estate of minor's deceased father if offered in proper form was admissible. Probate Code, § 1580.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Proceeding in the matter of the guardianship of the person of Jane Elise Sturges, a minor, by Vesta Sturges, petitioner, against Ardis Elaine Sturges, now known as Ardis Elaine Sturges Conrad, for removal of defendant as guardian, and for appointment of petitioner in defendant's place. From an order removing her as guardian and appointing petitioner in her place, defendant appeals.

Reversed.

Goodspeed, McGuire, Harris & Pfaff, and G. Roy Pendell, all of Los Angeles, for appellant.

Sarau & Thompson, of Riverside, for respondent.

WARMER, Justice pro tem.

The appellant appeals from an order removing her as guardian of Jane Elise Sturges, a minor child, who is her stepdaughter, and appointing an aunt of said minor child guardian of her person.

There are many specifications of error. However, we will combine them under the general specification that the evidence is insufficient to sustain findings V and VI and the order entered in accordance with said findings. These findings are as follows:

"V. It is true that ever since the appointment of the said Ardis Elaine Sturges Conrad on the 9th day of August, 1933, the said Ardis Elaine Sturges Conrad has been and now is incapable of suitably performing her duties as the guardian of said minor, Jane Elise Sturges, in this: That said guardian has been, now is and will at all times in the future be unable to properly care for and provide for the support, health, education and general welfare of said minor. In this connection and in addition to the other facts found herein and in these findings of fact contained, the court expressly finds from the evidence that the mother of said Jane Elise Sturges died of tuberculosis, that her baby brother died of tubercular meningitis, that until the removal of her tonsils and adenoids, the said minor had been susceptible to colds and other contagious and infectious diseases. That the said Ardis Elaine Sturges Conrad is herself afflicted with glandular trouble and is not a well woman. That there has been during the last three years considerable sickness among the various members of the family of said Ardis Elaine Sturges Conrad with which said family, the said minor has been living. That the health of said minor will be endangered should she be allowed to remain with the said Ardis Elaine Sturges Conrad.

"VI. It is true that the best interests of said minor, Jane Elise Sturges, with respect to her temporal, mental and moral welfare will be served by the appointment of Vesta Sturges Thomas as one of the guardians of the person of said minor. It is true, and the court expressly finds, that under the circumstances of this case, it is for the best interests of said minor that Mabel English, assistant probation officer of the county of Riverside, State of California, be appointed as a co-guardian of the person of said Jane Elise Sturges with the said Vesta Sturges Thomas. It is true that the said Vesta Sturges Thomas is now and will at all times in the future be able to furnish to the said minor the necessary and suitable maintenance, support and education for said minor, and will provide the same watchfulness, care and discipline as will ordinarily be supplied by the parent of said minor."

The ward is the daughter of the deceased husband of the guardian by a former marriage. At the time of the commencement of these proceedings she was seven years of age. Her mother had died of tuberculosis

when she was approximately twenty months of age and she had been with her mother very little of the time following her birth. The only other child the issue of said marriage was a son older than said ward, who had died in early childhood of tubercular meningitis. The guardian, Ardis Elaine Sturges, and her deceased husband, A. E. Sturges, were married in April, 1932, and the ward, Jane, was taken to their home and remained there under the care and guidance of Mr. and Mrs. Sturges until the death of Mr. Sturges on the 29th day of May, 1933. There was born the issue of said marriage one son, Edward Arlen Sturges. On March 20, 1936, twelve days before the hearing herein, Ardis Elaine Sturges married one William O. Conrad. Mr. and Mrs. Conrad immediately took said ward Jane and Edward into their new home with them. After the death of her first husband the guardian filed her petition praying for her appointment as guardian of said minor child, to which petition an answer and objection were filed by certain members of the deceased husband's family. After a hearing thereon, the petition was granted and appellant herein was appointed guardian August 9, 1933, and the ward has resided with said guardian at all times up to the time of this hearing.

There appears to have been considerable litigation in which Mrs. Conrad in her individual capacity, and also as guardian, was involved, which took considerable of her time. In at least some of the litigation it appears by inference that the family of her deceased husband were her adversaries.

The guardian, Edward, and Jane lived with Mr. and Mrs. A. T. Stadler and three sisters of Ardis Elaine Sturges Conrad, in Riverside for some months. They then moved to South Gate, in Los Angeles county, in July, 1934, and lived with W. W. Stadler, a brother of Ardis Conrad, and his wife and baby. At other times Ardis Conrad and the children lived by themselves. The houses in which they lived were of varying sizes of from five to eight rooms, each furnished and equipped with a bath. After the guardian, Ardis Conrad, moved to Los Angeles, her father and mother and their family lived in generally the same neighborhood, whether she was living with them or not.

From the time of her appointment as guardian of Jane, until sometime after they moved to Los Angeles, the ward Jane was not very strong and was susceptible to colds. She was afflicted with bad tonsils and adenoids. When suffering from colds she was frequently kept in bed. Her tonsils and adenoids were removed at a hospital in Covina about August, 1934, since which time she has not been particularly susceptible to colds and very soon thereafter became a rugged, robust child and continued so up to the time of the hearing which resulted in the order herein appealed from.

Edward Arlen Sturges was born shortly before the death of his father, and it appears that the guardian, from the time of the birth of said child to the death of his father, was not very well, and while the record is not certain, it appears that she was relieved by some treatment at the White Memorial Hospital in Los Angeles, where she remained some twelve or fourteen days about in the month of October, 1935.

Jane also suffered from scarlet fever and certain children's diseases. For a period of time it appears that she was accompanied to and from school by her guardian or members of her immediate family, because the guardian believed that Jane might be picked up and taken away by some of her father's people, whom she regarded as unfriendly. The litigation between certain members of the deceased husband's family and herself and children was discussed more or less freely in the presence of the child, and sometimes statements were made that challenged the integrity of some of said relatives. Jane always exhibited a strong bond of affection toward the guardian, called her "Mama" and was very attached to her brother Edward. She had a pleasant and happy disposition.

For some months the guardian received from public sources a small allowance per month to assist her in the maintenance of herself and family. Her father, A. T. Stadler, was employed by the P. W. A. The guardian has received nothing from the members of the family of her deceased husband, A. E. Sturges, in the way of aid or assistance for the maintenance of herself or his two children, Jane and Edward.

Mrs. Vesta Sturges Thomas is an aunt of the ward and is the person who was appointed guardian of Jane by the order herein appealed from. Mrs. Thomas and her husband, Charles W. Thomas, live in Long Beach, California. Charles W. Thomas operates a barber shop. They have two adult sons, both single, but not living at home. Mr. Thomas does not own the barber shop nor his home, but lives in an apart-

ment. He is sixty-three years of age. He owns two houses in Yuma, Arizona, the rental of which amounts to $28 per month. The taxes are about $130 per year. Mr. and Mrs. Thomas have no other income than that provided by these houses and his earnings at the barber shop.

It is admitted that at all times subsequent to her appointment as guardian, and prior thereto, the guardian has been actively affiliated with church and school organizations; that Jane has received from said guardian religious training consisting in part of attending church and Sunday school, and musical training of a distinctly religious type. She was taught to return thanks for the food provided, and the customary never-to-be-forgotten infant prayer at her guardian's knee. The language, habits and moral character of both the ward and the guardian are not in question, and cannot be. The guardian's associates are such as a woman of fine character would choose.

Mae L. Barry was employed by respondent about December 22, 1935, to investigate the circumstances under which Jane Elise Sturges had been living during the preceding few months. She made four or five trips to the places where they were living between January 14, 1936, and March 25th of the same year and on some of these trips represented herself as a saleslady. On several occasions the guardian was not at home. Sometimes she saw Jane, the ward, and different members of the family. She had much conversation relative to the affairs of the family, particularly with the sister Roselyn, a young lady of about eighteen years of age. These conversations are in the record over the objection of counsel. We see no advantage in detailing the same and shall classify them generally as observations made by the witness. When she saw Jane she found her happy, quiet, and physically clean, although at times her hair was uncombed. Sometimes she had a slight cold. She was always clad with what might be termed faded shabby clothes. She found the dishes unwashed, piled up in the sink. The furniture was very poor, worn, and somewhat dilapidated. The beds were unmade and the clothing piled up on a sanitary cot in one of the rooms and hanging on hangers on top of the door. On one occasion a picture had fallen behind the piano. When the piano was moved out to secure the picture, it was found to be covered with dust. The back of the piano was dusty and there was dust on the floor behind the piano. She observed that when members of the family were not feeling well and desired to take a nap in the daytime, they would go and lie on the bed. The stove was not clean. None of the family used bad or profane language, or slang. The houses where they lived were, in the opinion of the witness, crowded because of the number of people who lived in them. The grounds were not well kept. However, the witness visited the home of W. W. Stadler and found that while it was poorly furnished and without luxury, it was clean.

It must be observed from the testimony of this witness, which of necessity must be summarized, that the guardian, her mother, and sisters, were what would be termed untidy; that they were careless housekeepers; and that the houses where they lived were not filthy but illkept and untidy. Their clothes were old and worn and they didn't keep their hair well dressed, but their persons were clean. The rugs were worn to the extent that the figures thereon were not distinguishable. The mattresses were old and hard.

As opposed to this evidence there is the testimony of the family, neighbors, friends, associates, including a former teacher, a trained nurse, two ministers, and a doctor, who all testified that the house was well kept, ordinarily furnished for people of moderate circumstances; that the children were well clothed, even though the clothing was not always new; that they were clean and tidy, and that the children were well fed, the meals consisting of wholesome food, meat, vegetables, milk, butter and bread, cookies, etc.

Dr. Gilliland testified in substance as follows: That he had been a practicing physician since September, 1930; was a graduate from Northwestern University Medical School, having taken special training as a physician in the pediatric department of St. Luke's Hospital, Chicago, under Dr. Joseph Apt. He testified that he was acquainted with the guardian, had examined the ward two days before the hearing, and that during the past year he had been at their home on San Gabriel street in South Gate on four or five occasions; that on April 6th of that year he gave the ward a complete physical examination and made the following finding: child seven years of age in good physical condition, eleven per cent above average

in weight, seven per cent above average in height, lungs suffering from slight cold but no finding typical of pulmonary tuberculosis, or any other disease, no condition whatever in any wise dangerous or that would require particular care or attention. The witness further stated that he had called to see the little boy Edward at one time when he was suffering from tonsilitis and some swelling of the ears; that he was separated from the rest of the family and recovered in two or three days. He stated that the house was well ventilated, had good lighting and was in good order and clean. He was called to see another member of the family, a girl about twelve years old, who was suffering from inflammation of the left ear drum. At that time everything in the house was in order and the beds were made. On these visits he saw the ward in the home once or twice, playing around the room. She looked to be an average child, but he made no examination of her. He observed her to the extent that he could see she was properly clothed and that she seemed to be an average child in her nutritional state.

Mae L. Barry's last visit to the home of Mrs. Conrad was on March 25, 1936, five days after her marriage. At that time she found the home moderately furnished. She was informed by Mrs. Conrad that just before that time they had been notified by their landlord that the house had been sold and that they would have to move. They moved on April 14, 1936, to 10030 Bowman street in South Gate. This house was well furnished, clean and orderly and above the average. Mr. William O. Conrad, the husband of the guardian, was buying two pieces of property, making substantial payments thereon considering his present earning capacity. He had been and was regularly employed and very much desired to have the ward and her little brother Edward live with the guardian and him. He was a man of good habits.

In addition to the above, it appears that during the time the guardian and Jane and Edward lived in Riverside county with her father and mother they lived at three different locations; that the houses in which they lived were somewhat abused, one being pencil marked and somewhat dirty throughout. The testimony in respect to this, however, is sharply conflicting.

In reviewing the record, an appellate tribunal cannot weigh the evidence presented on any issue, but must accept as true any evidence which will support the findings and judgment, together with all reasonable inferences that can be drawn therefrom. Estate of Lindner, 13 Cal. App. 208, 109 P. 101; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157. The findings and judgment must be deemed to be supported when there is any substantial evidence to warrant such findings and judgment. In re Lew Choy Foon's Guardianship, 173 Cal. 159, 159 P. 440. In reviewing a judgment appointing a guardian, an appellate court must resolve all intendments from conflicting evidence in favor of the judgment. In re Johnson, 101 Cal.App. 110, 281 P. 435.

"The jurisdiction of the superior court sitting in probate is both original and exclusive, but it is no larger than that of the former probate court. The extent of its jurisdiction has been defined by the sections of the Code of Civil Procedure (now Probate Code). * * * It also confers control over the person and estates of minors and the power to appoint their guardians, * * *" 7 Cal.Jur., pp. 696-697, sec. 80.

"The probate jurisdiction of the superior court is as separate and distinct from its jurisdiction in ordinary civil actions or in cases in equity, as if there were two separate and different courts exercising these powers. While the superior court is engaged in the consideration of a case belonging to one of these classes of cases, it cannot in the same matter hear and determine what is essentially a case of another class. Furthermore, while sitting as a court of probate, the superior court has only such powers as are given it by a statute and such incidental powers as pertain to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them, and in the exercise of these powers its jurisdiction is limited and special. * * *" 7 Cal. Jur., p. 698, sec. 81, and cases there cited.

Appellant contends that the sole jurisdiction of the court to remove a guardian is defined in section 1580 of the Probate Code, which, so far as applicable here, provides for removal of a guardian on account of incapacity to perform her duties suitably, and for continued failure to perform her duties. Courts have always, in the exercise of their chancery powers,

maintained the right to remove a guardian for cause. In re Campbell, 130 Cal. 380, 62 P. 613.

Probate courts, and the court in this proceeding exercising probate jurisdiction, are courts of special and limited jurisdiction, and while exercising probate jurisdiction are limited to the powers conferred by the Probate Code.

It is not here necessary to determine whether or not the court, in the exercise of its general jurisdiction, not sitting in probate, has jurisdiction to remove a guardian for cause other than that set out in section 1580 of the Probate Code. First, for the reason that all of the evidence in the case was presented to a court exercising its probate jurisdiction, and second, that all of the evidence on behalf of the petitioner was offered in an effort to establish incapacity on the part of the guardian to perform her duties suitably, or a continued failure on her part to perform her duties.

Respondent contends that because the guardian is not listed in one of those classes of persons who have the preference to the appointment as guardian, and that the aunt, who is the petitioner, falls within the last group of those classified under section 1407 of the Probate Code, that the aunt so classified has a preferential right to the appointment.

A study of such provision of the code shows that it does not apply in a case where a guardian has already been appointed. To permit such a construction would be tantamount to holding that there are two classes of general guardians, one of which falls within the preferred class mentioned in section 1407 of the Probate Code and the other does not, and the effect would be that a person who was appointed guardian and did not fall within the provisions of the preference named in section 1407, supra, would be subject to removal at the instance of anyone falling within the preferred class, no matter how well, or for how long a period of time, the appointed guardian had faithfully and completely performed his duties in such guardianship. It certainly could not have been the intention of the legislature to permit one who had been appointed guardian of a minor and who had performed the services as such in a proper manner, to be always subject to the attack of some relative without cause, save the lone fact that the relative had a preferential right under the statute in the first instance.

If we should assume that Mrs. "A" was a friend of Mrs. "B" and her husband Mr. "B"; that Mr. and Mrs. "B" had a very delicate child of the age of six months and that by virtue of some tragedy the child was left alone and Mr. and Mrs. "B" had no relatives in the immediate vicinity and there was no one except the public to care for the infant; that Mrs. "A", due to her friendship and kindliness, should file a petition for appointment as guardian of the person of the infant child and that she nursed her and cared for her as a very fine mother would care for such a child, until the child became eight years of age; that the child was a beautiful and brilliant girl, and, due to the care of the guardian, she was well trained and had overcome her physical handicaps, and at the end of seven years some aunt, uncle or other relative, in contemplation of the preference statute, filed a petition for appointment as guardian of said minor. Could it possibly be said that because of blood relationship, letters of guardianship to Mrs. "A" would have to be revoked without cause because she was not a relative? We think not. A statement of the assumption alone furnishes its own answer.

Furthermore, section 1580 of the Probate Code makes no such provision and cannot be construed as having any such intendment. A guardian once appointed by a probate court can be removed only for cause, and, so far as the probate court is concerned, such cause is determined by the provisions of said section 1580, supra. "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare * * *." Sec. 1406, Prob. Code. Where, as here, the parents are both deceased, the preference to which any other applicant for appointment may be entitled, must yield to the paramount consideration of the best interest and welfare of the child. By welfare is meant the child's permanent, not temporary, welfare, and the court is governed by that which, looking to the previous condition, and the future continued residence of the child, will contribute to its permanent good. The question is one of fact. 13 Cal.Jur., pp. 155–156, sec. 14. Wealth alone does not determine competency, nor does poverty

alone determine incompetency. General statements that the mother did not keep her house or child clean were not sufficient, in the absence of any showing of immoral conduct on her part, or of any neglect which injured the health or physical well-being of the child. Estate of Lindner, supra; In re Mathews' Estate, 174 Cal. 679, 682, 164 P. 8. It appears that by the order of the superior court of the state of California, in and for the county of Riverside, on August 9, 1933, the guardian herein was found to be a competent person to act as the guardian of said minor. Those findings and judgment have become final. A general guardian, so appointed, occupies a distinctive legal relationship against the whole world, and that relationship is permanent except when, by act of the guardian, it is forfeited for cause. Blood relationship of someone else establishes no right within such person to challenge the legal status of such guardian in the absence of misconduct on the part of the guardian such as would warrant a removal. In Guardianship of Howard, 218 Cal. 607, 24 P.2d 486, the Supreme Court, speaking through Mr. Chief Justice Waste, said [page 487]: "A guardian of the person of a minor stands in the place of a parent, whose duty it is to supply that watchfulness, care, and discipline which are essential to the young. Guardianship of Taylor, 3 Cof.Prob. Dec. 105; 13 Cal.Jur. 140, § 3." Hence, it appears that one who has been appointed general guardian occupies a legal status that can be attacked only for the same reasons and the same causes as though the general guardian was in fact a member of one of the preferred classes. The law having placed the guardian in loco parentis will not set aside that status for any other or different cause than it would in the case of a natural parent acting as guardian. The legal status is the same.

An interesting discussion as to evidence in a guardianship proceeding is found in Matter of Galleher, 2 Cal.App. 364, 84 P. 352, where the court found that Galleher had been seen under the influence of liquor on more than one occasion; that he borrowed household necessities and money, paid back the money but kept the necessities; that he owed bills over a considerable period of time for groceries, meat, and medical attendance and burial expenses of his wife; that this showing did not rise to the dignity and sufficiency required to sustain a refusal of his application for guardianship of a child three years of age who had resided with a maternal aunt. We recognize the fact that the application was by the father. However, the reasoning seemed particularly apropos to the instant case, particularly where it states, after discussing certain evidence, that he was not shown to have been incompetent by reason of the fact that he had some faults, or that he was shown not to have been an ideal parent. There must be such a showing as to make it appear that he would probably fail in a substantial degree to discharge his duties toward the child.

Appellant assigns as error the receipt in evidence of the probation officer's report and respondent claims the error, if any, was cured by a stipulation. The record relative thereto is as follows:

"At the conclusion of the testimony and arguments the court stated to respective counsel that he desired an opportunity to question the minor child; that in order to do so it would be necessary for him to become acquainted with the child so that she might talk freely; that in addition thereto the court further desired to have the probation officer of Riverside County and his assistant make an investigation of the homes of Vesta Thomas and Ardis Sturges Conrad, *to all of which each counsel stipulated.*" (Italics ours.)

"Whereupon, the court ordered that Jane Sturges be placed in the custody of Mabel English, assistant probation officer of the County of Riverside, State of California, and further that the probation officer of Riverside County, State of California, investigate the homes of Vesta Thomas, the petitioner, and Ardis Sturges Conrad, the respondent.

"That thereafter such investigation was made. The court considered the evidence and fixed Monday, April 20th, 1936 at eleven o'clock a. m. as the time for the court's decision and the report of the probation officer. When said matter came before the court on the date and at the time aforementioned, the report of the probation officer was presented to the court and ordered filed, and in rendering its decision, the court stated that he was glad to find that the recommendation of the probation officer was in conformity with the decision reached by the court from the evidence produced."

The written report of the probation officer was unquestionably hearsay and it was therefore improperly ordered filed, unless the stipulation permitted the introduction of the report or counsel failed to object. A perusal of the stipulation taken in connection with the court proceedings immediately preceding it discloses that nothing was said about the making or presentation of a written report or the filing thereof. However, the matter was continued by order of the court to April 20, 1936, for the court's decision and the report of the probation officer. The matter came before the court at that time. The report of the probation officer was presented and ordered filed. The record discloses no objection by counsel at that time, and we therefore deem that the report was properly admitted.

The report, excepting the conclusion and recommendation of the probation officer, is as follows:

"Report of Probation Officer

"On February 2, 1936, a petition was filed for removal of the guardian and appointment of a new guardian in the matter of the guardianship of the person of Jane Elise Sturges. On April 17, 1936, following a hearing in Department Two of the Superior Court, the matter was referred to the Probation Officer for investigation and recommendation. The Court having heard the testimony presented by counsel for the petitioner and counsel for the present guardian, directed the Probation Officers to investigate condition of homes, neighborhoods, schools and the families interested, with the view of ascertaining which would be the better environment for the child involved in this petition, this investigation to have in mind continuously the best interests, the welfare and home training for this little girl.

"The Court requested the Probation Officer to file his report on Monday, April 20th, 1936, at eleven a. m. in Department Two.

"Investigation: The Court is familiar with the outstanding facts concerning the death of the natural mother of this child and the death of her father as well as the continual litigation in Court since that time on the part of Mrs. Ardis (Stadler Sturges) Conrad and her father Mr. A. T. Stadler, guardians of the person and estate of Jane Elise Sturges.

"The litigation concerning the estate of Edward Sturges, deceased, the father of the minor named in this petition does not concern the question under submission at this time only in so far as it presents a background showing that the child has been an unconscious factor in this litigation and her well being has suffered because of it.

"In making our investigation of the homes of Mrs. Ardis Sturges Conrad since the death of her husband Edward Sturges, we find that she has lived at 3982 Oakwood Place in Riverside, California, 3056 Locust Street, Riverside, 6117 Brockton Avenue, Riverside, and 9730 Alexander Street, Southgate, California, 10500 San Gabriel Avenue, Southgate, 9809 San Gabriel Avenue, Southgate, 10127 San Gabriel Avenue, Southgate, and at the present time, 10030 Bowman Avenue, Southgate. At all of these places with one exception Mrs. Ardis Conrad lived with her parents and their family of three daughters and on one occasion with the addition of Mr. Woodrow Stadler and his family.

"On April 18, 1936, we visited Mrs. Ardis Conrad at her present home on Bowman Street, Southgate, where she has lived since April 14, 1936, and where she hopes to bring Jane Sturges. This home is a stucco house, consisting of five rooms, with all modern conveniences, furnished fairly well with furniture belonging to Mrs. A. T. Stadler. This home is better than any other which she has occupied in Southgate. At the time of our visit the place was clean. We met her present husband, Mr. William Conrad, who at present is employed by the Mueller Brass Company, working five days a week and receiving between $80.00 and $85.00 per month. They are paying $25.00 per month rent for this present home. There is rather a large lot surrounding this home and the house is one of the better type houses in this neighborhood as most of the homes are frame buildings and from one to five-room houses. It is located in a very sparsely settled neighborhood.

"If permitted to live with Mrs. Conrad, Jane will attend the McNerney School in Southgate, located very near this present home. It is a new school building and is classed as one of the best schools. Her school attendance in the past has been much interrupted and very irregular owing to illness and frequent moving of the family together with a suspicion on the part of Mrs. Conrad and her parents that Jane might be kidnaped.

"While visiting the home of Mrs. Conrad, much of the conversation pertained to family difficulties growing out of the death of Mr. Edward Sturges and efforts to collect money and property from his estate. Bitterness was expressed along this line but also a great affection for Jane was exhibited as well as an effort to show that the money received by her had been expended solely for Jane's benefit.

"We also learned from direct statements made by Mrs. Conrad that she has received sufficient money to have lived comfortably and to have fittingly supported her child and Jane. We also learned that she has expended life insurance amounting to $2,500.00 which she received as well as considerable other money, in an effort to gain, through the Court, more property and money from the Sturges estate, with the result that finally she had to resort to family and welfare relief which she received for at least seven months prior to her present marriage, all of which could have been prevented, we believe, had she conserved her resources.

"Mrs. Conrad expressed a great desire to have Jane with her and raise her as her own child and she feels that she is capable of doing so.

"After visiting the home of Mrs. Conrad, we called at the home of Mr. A. T. Stadler, the father of Ardis Conrad, and the guardian of Jane's estate in California. Upon our arrival, we found Mrs. Stadler, Verna Fay and *Lulla* Stadler at home. Later Mr. Stadler and Mr. Woodrow Stadler came into the home. We find the Stadler family living in a small garage house, the size of a double garage, owned by Mr. Steel, a brother of Mrs. A. T. Stadler. This garage is located on the rear of the lot and house numbered 9730 Alexander Street, where Mr. Woodrow Stadler lives. This little garage house was as neat and clean as the crowded conditions would permit.

"The conversation very naturally fell to the subject of the financial litigation between these two families, namely, the Sturges family and Mrs. Ardis Conrad and if we had not been familiar with the conditions as they exist, we would have been led to believe that the main litigants in this case were Mr. and Mrs. A. T. Stadler rather than Mrs. Ardis Conrad. They also expressed their affection and interest in Jane and gave us many evidences of the affection existing between Jane and her step-mother, Mrs. Ardis Conrad. Mr. and Mrs. Stadler as well as Mrs. Ardis Conrad stated that they wanted to raise Jane as their own child and she would always be one of them.

"Before leaving Southgate, we observed the different homes in which these people have lived in that vicinity with the conclusion that all are ordinary, small and very inadequate.

"We then called in the home of Mrs. Vesta Thomas who is now the petitioner for guardianship of the person of little Jane Elise Sturges. She is living at 952 Cedar Avenue, Long Beach. This is a modern apartment on the ground floor, well furnished and well kept and of sufficient size, located in a good residential neighborhood of Long Beach. Mrs. Thomas and her husband live there now as her two sons are grown and living away from home. These people have resided in Long Beach for fourteen years, having raised their children and maintained their home without any outside assistance. While in this home, the topic of all conversation indicated very positively a desire on their part to better the living conditions, environment and future training of little Jane to the extent that they are willing to bear all responsibility both morally and financially in caring for Jane.

"While calling in this home, we met Mr. Stephen Sturges, brother of Edward Sturges, deceased, and Mrs. Sturges, Jane's grandmother, who are remaining in California for the conclusion of this hearing. Their home is in Yuma, Arizona. Owing to the close family relationship existing among the Sturges brothers and sisters, we find that they still feel very keenly the loss of their brother and son, Edward Sturges, but at all times in the conversation, they were very considerate of Mrs. Ardis Conrad as the wife of their deceased brother and son.

"Mrs. Thomas voluntarily stated that if her petition should be granted by the Court, she would immediately consult a child specialist mentioning a Dr. Bliss of Long Beach, for direction and counsel in caring for Jane's physical needs. She further stated that she hoped to have the privilege of seeing Jane graduate from college and she particularly mentioned the outstanding talents which Jane may develop in the future, such as music and art, both of which may be inherited by Jane from her mother and father.

"From our visit in this home, we are impressed that this is a home of refinement and culture and one in which we, as persons interested in child welfare, would be very willing to place a child for permanent placement.

"The Court has visited with Jane and no doubt has gained much from these visits as we have from our contact with her, and we feel that it is unnecessary to review her temperament and present needs.

"We have also made some investigation concerning the home condition and environment of this child while Mr. and Mrs. A. T. Stadler, their family of three daughters, Mrs. Ardis Conrad, her son and Jane lived together in Riverside. The information which we obtained, and which we believe to be authentic and unprejudiced, is not favorable and indicates that Jane had, at that time, little or no home life. Jane spent much of her time in the homes of neighbors and acquaintances while Mrs. Conrad and her parents were at home as well as when they were away from home. The child, Jane, was left with other people by her stepmother as much as twelve days at one time.

"The Court has requested us to have Jane examined by our physician at the County Hospital. Any examination made in such a short time must be more or less superficial. Her weight is normal, and at the time of our first examination her throat was a little inflamed but did not indicate any serious trouble. A skin tuberculin test was negative and a throat culture was indicated as negative although at the time of writing this report, the final result could not be obtained. Any change in this medical report will be given to the Court in an attached report."

[Then follows conclusion and recommendation of Probation Officer.]

"Dated this 20th day of April, 1936.

"Respectfully submitted,

"C. W. Mathews,

"Chief Probation Officer."

It appears in the affidavit on motion for new trial that the trial judge under the stipulation heretofore referred to might interview said ward, which he did. It was found from such examination that she was deficient in arithmetic in that she did not understand it as well as a child of her age should; that she was deficient in manners, but that she had been trained religiously. This statement is undenied.

In Herbert v. Lankershim, 9 Cal.2d 409, at page 471, 71 P.2d 220, at page 251, the Supreme Court said:

"There must be more than a conflict of mere words to constitute a conflict of evidence. Contrary evidence must be of a *substantial* character, such as reasonably supports the judgment as applied to the peculiar facts of the case. The rule announced in Morton v. Mooney et al., 97 Mont. 1, 33 P.2d 262, 266, correctly states the rule which has been approved by this court in a number of our decisions. It is thus stated:

" 'While the jurors are the sole judges of the facts, *the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court* (Grant v. Chicago etc. Railway Co., 78 Mont. 97, 252 P. 382), and, in determining this question "the credulity of the courts is not to be deemed commensurate with the facility or vehemence with which a witness swears. 'It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude the judgment.' " '

"The rule in cases such as the one before us is that the court must view the transaction with the 'most scrutinizing jealousy.' *This means, of course, any court in which the issue may be raised.*" (Italics ours.)

Whatever may have been the rule heretofore as to what evidence is necessary to support a plaintiff's case, it is now well settled in this state that it must be supported by substantial evidence, and that whether or not there is substantial evidence is a question of law for the court. Herbert v. Lankershim, supra. While an appellate tribunal must accept the facts tending to support the judgment as true, yet when the question of their having sufficient substance to support the plaintiff's case comes in issue, it becomes a question of law alone, *as applied to the peculiar* facts of the case.

If we look to the world of physics we find that under the laws thereof mass or material has a tensile strength and that the effectiveness of that tensile strength is measured in relation to the burden or weight that it will bear. The beam of a building or structure will carry a certain weight according to its tensile strength, but when subjected to greater weight, it is broken and will not sustain it. The

substance of evidence in legal contemplation is akin to tensile strength in the physical world. When, in the administration of justice, the substance of the testimony in support of the judgment (weight or burden) is placed in issue, it must be interpreted in the light of the peculiar facts of the case, and the fiber or quality of the evidence must be sufficient to bear the burden to which it is subjected under those peculiar facts.

Thus, in the administration of justice, the courts of California at first determined if there was any evidence at all, "even a scintilla" that was sufficient to support a plaintiff's case and thereby left the responsibility finally and conclusively on the jury and the trial court. As they observed, studied and considered the administration of justice under such a rule, they determined that the exigencies arising in the practical application thereof necessitated a modified, different, or new interpretation thereof, and declared that in order for evidence to be sufficient to support a plaintiff's case it must be substantial evidence. That is, as we understand it, evidence that possesses a fiber, a quality, and a nature creating a substance in character that will sustain the property right or personal right represented in the plaintiff's case. That is, it must possess that substance that will support the burden placed upon it under the peculiar facts of the case. Herbert v. Lankershim, supra.

It appears that the ward was trained in the highest attributes of human character, spiritual and moral concept and all its relationship, complete and sufficient unto her years. While she was sick at times and the removal of her tonsils and adenoids may have been somewhat delayed, yet it cannot be wondered that such would be the case when this guardian and stepmother had lost her husband in a tonsilectomy resulting in a streptococcic infection shortly before her application for guardianship. Since said operation the ward has been physically strong and unimpaired. She was out of school only during such times as she had colds, children's diseases and at the time of the removal of her tonsils and adenoids. Taking the testimony most favorable to the respondent, and deeming the guardian to have been present at all times (which the record shows she was not), it appears that in part of 1933 and 1934 the houses in which she and the ward lived were dirty when she moved therefrom, and that there were some marks on the paint and some unusual wear on the walls and floors; the clothes were hanging upon hangers on the doors: clothing was placed in a pile on a sanitary cot in the living room; the beds were not always made up early in the day or before noon; the furniture was old and dilapidated to some degree; the ward sometimes appeared in the house without shoes; she wore old faded clothing; her hair was uncombed; her clothing was wrinkled; she was permitted to remain in the house with persons who were members of the family when they had the influenza; they lived between August 9, 1933, and the time of the initiation of this proceeding in some five or six different places, sometimes with the guardian's brother, his wife and baby, and sometimes with her father and mother and their three daugthers; the guardian always maintained the ward and the ward's little half brother Edward with her; the dishes were unwashed at times and the stove was not clean; she owed some bills; the houses in which she lived with her father and mother and brother were small considering the number of people residing therein; the ward was deficient in arithmetic and manners; the guardian was, at the time of the hearing of this proceeding, twenty-one years of age; her present husband has been continuously employed at a moderate wage, has some property and is of good character and desires that the ward and her half brother occupy his home as members of his family. All these facts, however, fall far short of being sufficient to constitute substantial evidence that she is either incompetent or incapable, or that she failed in her responsibility as guardian, notwithstanding the fact that the litigation took considerable of her time. The family of the father of the ward were adverse parties in at least some of the litigation and, so far as the record shows, they never raised a hand of assistance or offered a cent of aid. It further appears that there is an unusually fine tie or bond of affection between the guardian and her step-child, the ward, and between the ward and her little half brother. Furthermore, during a time when she was in delicate health shortly after the birth of Edward, the little half brother, her husband and father of the children was taken from her bosom by the hand of the Eternal. To whom would she go in the days of her distress? Naturally, to her father and

mother. Because of the fact that her father was without great means, being on the W. P. A. a little later, and that she had apparently expended the small resources that she had in defending the ties between herself and the step-child and her own child, she had to accept a small amount of charity.

So far as the ward is concerned, the deepest tie that she will ever know is the relationship between herself and her little half brother. If the guardian had any shortcomings—if she was not perfect, and none are—she did little or nothing but accept life's responsibilities as she met them and solved them, in the opinion of this court, well, without loss of faith in herself, the children, or her God.

It will be observed that from the death of her former husband, A. E. Sturges, down to the time of the filing of the probation officer's report, that the instruction given by the guardian to the ward, or the conduct of either of them, have not been challenged, so far as any question of morals is concerned. The guardian has made friendships among industrious, hard-working people and, at the time of the investigation by the probation officer, she was established in a home which was above the average for persons with moderate incomes. While evidence as to the investigation of prior periods of her guardianship was properly admitted and considered, the question of whether or not she was performing her duties as guardian related to the date of the judgment. That question always continues, in any guardianship, during the entire existence thereof. She is always responsible to the court for her acts as a guardian.

Regardless of all these things, and considering only the evidence tending to support the findings and judgment, it does not rise to the dignity and substantiality necessary to sustain the judgment under the peculiar facts of this case, but rather is a scintilla of evidence only.

The appellant offered testimony tending to show the nature of the litigation in which she was involved in Arizona and California in which the members of the Sturges family were her adversaries. An objection thereto was sustained. She also offered testimony of teachers and executives of the school system tending to show why the ward was out of school, or in other words, to show the basis of her fears that the ward would be taken away from her. Objection was made thereto and sustained.

We believe that even though Ardis Elaine Conrad is not the guardian of the estate of her minor child, that the evidence was competent to show what she possessed personally and what the ward possessed as her own, and the condition of their holdings, to determine whether or not the ward was being maintained in proper surroundings.

It appears that one of the elements relied upon in seeking her removal as guardian was the fact that the ward was not kept constantly in school. The offered testimony was in direct explanation of the admitted fact that she was out of school a small portion of the time. Furthermore, the Arizona record offered in evidence discloses that the respondent herein was a party to an agreement in which the respondent, the guardian and the ward had an interest. It was therefore competent to show motive of the respondent.

The appellant asks this court to direct that certain proceedings taken and had in the trial court, directed to the removal of the cause to the county of Los Angeles, be ordered transmitted by the county clerk of the county of Riverside to this court, and that the same be made a part of the record on appeal. It is contended that it was error for the trial court to deny this motion for transfer. The application is denied, as a review of such proceedings would serve no useful purpose and the appellants may, if so advised, renew the motion. Sec. 1603, Prob. Code.

The conclusion that we have arrived at makes it unnecessary to discuss numerous other points urged for the reversal of the judgment and order.

For the foregoing reasons the judgment is reversed.

MARKS, Justice (concurring).

I concur.

I concur in the judgment. In considering this case we must bear in mind that Mrs. Conrad had been appointed guardian of the person, not of the estate, of Jane Elise Sturges, a minor, and that this is a proceeding for the removal of Mrs. Conrad as such guardian and the appointment of Vesta Sturges Thomas in her place after such removal. As no appointment of a new guardian can be made until Mrs. Conrad is removed from her office it is obvious that if the evidence is not sufficient to support the judgment of removal we need give no consideration to the evidence of the fitness of Mrs. Thomas for appointment

[1] As Mrs. Conrad was the duly appointed, qualified and acting guardian of the person of the minor, the sole ground for her removal must be found in section 1580 of the Probate Code. In Estate of Atkins, 121 Cal.App. 251, 8 P.2d 1052, it was said [page 1054]:

"Section 1580 of the Probate Code, based upon former Code provisions, sets forth eight specific reasons for the removal of a guardian. All of these provisions were negatived by the trial court. When a guardian has once been appointed upon proper notice, it appears that the letters of guardianship cannot be revoked for other than the reasons specified in the Code.

"As stated in 13 California Jurisprudence, 170, § 27: 'The power of a court to remove a guardian is judicial and not arbitrary or capricious, and inasmuch as the guardian has an authority coupled with an interest, the court will not interfere and remove one who has been legally appointed, unless for sufficient cause. The causes of removal are specified by the statutes.' The different specifications of the Code are then set forth.

"In 28 C.J. 1101, § 140, we find the following text, supported by a long list of authorities, to wit: 'The grounds on which a guardian may be removed are frequently enumerated by statute, and it is usually held that the grounds so enumerated are exclusive, and that such an enumeration precludes removal on any other grounds.' To the same effect is the text in 12 Ruling Case Law, 1118, § 20." See, also, In re Raynor, 74 Cal. 421, 16 P. 229; Sakurai v. Superior Court, 65 Cal.App. 280, 223 P. 575.

Mrs. Conrad was not the guardian of the estate of the minor. Therefore, the grounds of removal of a guardian set forth in subdivision one, two and seven of section 1580 of the Probate Code are eliminated from consideration here. It was stipulated that she was not immoral and was of good character. This eliminates the ground for removal contained in the fourth subdivision. The facts of the case also eliminate the grounds for removal set forth in the fifth, sixth and eighth subdivisions. This leaves the third subdivision of the section as the sole remaining provision applicable here, and under which the judgment of removal must be supported. It is there provided that a guardian may be removed "for incapacity to perform his duties suitably."

[2] "Incapacity" has been defined in Travelers' Ins. Co. v. Richmond, Tex.Com. App., 291 S.W. 1085, as follows [page 1087]: "'Incapacity,' as the term is used without qualifying words, denotes 'inefficiency,' 'incompetency,' 'lack of adequate power,' etc. Webster; 22 Cyc. 40." Thus it would seem to follow that, generally speaking, such incompetency may arise from physical weakness, lack of mental capacity or training, or moral deficiency. In the instant case the moral question has been eliminated by the stipulation. It would also seem to follow that incapacity may be proved by direct evidence of the physical or mental condition of the guardian or by circumstantial evidence consisting of proof of her failure to properly perform her duties and obligations towards the ward. The evidence before us falls almost entirely under the latter classification. While there was some effort to prove the physical incapacity of Mrs. Conrad during the earlier years of the guardianship, it was established that an operation had corrected this condition and that her health was good at the time of the trial. The portion of finding number five that Mrs. Conrad "is herself afflicted with glandular trouble and is not a well woman" is only supported by evidence of her condition prior to her operation. It is contrary to the evidence of her state of health at the time of trial.

[3] The evidence in the case falls into three divisions, each relating to a separate period of the guardianship. The first relates to the period of residence in the city of Riverside. The second concerns itself with the residence of the guardian and ward with members of Mrs. Conrad's family in Southgate. The third describes conditions after the marriage of the guardian to William O. Conrad.

There is substantial evidence to the effect that while they were living in Riverside, the housekeeping of the guardian, her mother and sisters was very poor. There is little evidence of the health and condition of the ward during that period.

The evidence offered by Mrs. Thomas concerning the living conditions in Southgate is found almost entirely in the testimony of Mae L. Barry, a private investigator, who visited the homes of the guardian on about five occasions. Mrs. Barry described the houses as overcrowded, ill kept, the ward poorly dressed and not clean, and suffering with colds. Her evidence, if it was offered to establish a general and permanent condition, was flat-

ly contradicted by a large number of responsible and disinterested witnesses who were often in the homes in which Mrs. Conrad and Jane lived and very frequently observed conditions there. These witnesses were unanimous in stating that the houses were clean and well kept; that Jane had an abundance of good food; that she was clean and neatly dressed, was a courteous and well-behaved child, was healthy after her tonsils and adenoids had been removed, and evidenced the best of moral and religious training. In view of this overwhelming evidence, the effect of the testimony of Mrs. Barry, giving it its utmost weight, is, that on the occasions of her visits she found the conditions she described. The evidence of all the other witnesses shows the conditions described by Mrs. Barry to be unusual and that they did not ordinarily prevail in the home life of Mrs. Conrad and Jane. The only possible conclusion, based on all the evidence, that can be reached concerning the life of Jane and her guardian in Southgate prior to the marriage of Mr. Conrad is that the homes were overcrowded and that Jane had to wear clothes that were not new, but that in all other respects she was cared for as well as the financial conditions permitted and that she suffered no bad effects from her life there. The home was that of the poor, but, except on isolated occasions, was well kept and Jane was well trained and well cared for. Poverty alone which does not deprive a ward of the necessaries of life, nor affect her health or well being, and which does not deprive her of proper training, certainly can furnish no ground for the removal of a guardian nor does it prove that such guardian lacks capacity to perform her duties suitably.

[4] The third period covered by the evidence is that which follows the marriage of the guardian to Mr. Conrad. The home then provided for Jane is described in the fifth and sixth paragraphs of the report of the probation officer, quoted in the opinion of Mr. Justice Pro Tem WARMER. That this was a suitable home for the ward is clearly established by all of the evidence in the case. Mr. Conrad is an honest, industrious man of good habits and morals. He expressed his desire to take Jane into his family and to properly care for her. There is shown a deep and reciprocal affection between Mrs. Conrad and Jane and between the little girl and her half brother. That Jane will receive proper moral and religious training and instruction in proper conduct cannot be questioned.

This period shows an entirely new chapter in the lives of Mrs. Conrad and Jane. They will not live with Mrs. Conrad's father, mother and three sisters. The overcrowded conditions of those homes will not exist in this new environment. In fact the evidence describing the home life of Jane prior to the marriage of her stepmother can be given little weight in the ultimate decision of this case because there is an entire lack of any evidence showing that any of those conditions will be continued in the home life of Mr. and Mrs. Conrad. The evidence indicates that a wholesome, pleasant and congenial home life is to be expected free from the objectionable conditions described by Mrs. Barry.

The finding "that the health of said minor will be endangered should she be allowed to remain with Ardis Elaine Sturges Conrad" is not supported by any evidence and is contrary to all the evidence. After her operation Jane's health was excellent. A physician who examined her just before the trial testified as follows:

"The child weighed 53 and ½ lbs., and the average weight of a girl of seven years of age is 48 pounds. The child measured 47 and ½ inches in height, and the average height of a girl of seven years of age is 44 and ½ inches. The summary of the examination is, the child of seven years of age in good physical state, 11% above average in weight, 7% above average in height. I gave her a very careful examination of the lungs and I say she was suffering from a slight cold but no finding typical of pulmonary tuberculosis, or any other disease. I did not find any condition whatever which was in any wise dangerous or that would tend to danger, which would require particular care or attention."

Some point is made of the fact that Jane did not attend school regularly and was somewhat deficient in arithmetic. Prior to her operation she was at times absent from school because of childhood ills. Afterwards she missed schooling, because, as stated in the report of the probation officer, of the fear "that Jane might be kidnapped". An assistant supervisor of attendance with

the Los Angeles Board of Education testified that she had excused Jane from school. Mrs. Conrad attempted to prove the cause of this lapse in schooling. This evidence was excluded on objection of counsel for Mrs. Thomas. No proffer of proof was made and we cannot determine exactly what was to be proved by this excluded evidence. However, from a careful study of the record we have gained the distinct impression that these absences from school were caused by the fear of kidnapping by the relatives of Jane's deceased father and that the school authorities permitted her to remain away from school for that reason.

Some point is made of the fact that Mrs. Conrad spent the insurance on the life of her deceased husband in litigation instead of in the care of Jane and her half brother. In an affidavit of Mrs. Conrad it is stated she has been engaged in three contested matters in the probate court and in no other litigation. The first was her original petition for appointment as guardian of the person of Jane, which was granted, although contested by a sister of her deceased husband. The second was a contest of a will of her deceased husband. The third is the present proceeding to remove her as guardian.

We can find no reason to blame Mrs. Conrad for attempting to be appointed, and after her appointment, for resisting removal as guardian of the person of Jane. She had the exclusive care of Jane after she was two years of age. Strong bonds of mutual affection existed between the two. The little girl knew no other mother. It would have been an unusual and strange situation had Mrs. Conrad not been willing to spend her money to continue her custody of the child she loved and who loved her.

A. E. Sturges, Jane's father, left a purported last will and testament. This document left his widow and unborn child his life insurance. It left Jane nothing except life insurance that had been assigned to her. All the rest of his estate was left to his brothers and sisters. The widow was successful in her contest of this will, thereby establishing the right of herself, her son, and Jane to take the estate as heirs at law. We can find no reason to blame the widow for her contest of this unnatural will. Certainly Jane profited by this litigation. She became, as heir at law, entitled to share in the estate of her deceased father in addition to receiving the insurance which had been assigned to her.

[5] Counsel for Mrs. Conrad made repeated efforts to prove the value and amount of the estate of A. E. Sturges, deceased. All of this evidence was excluded on objection of counsel for Mrs. Thomas. A large majority of the objections were properly sustained for technical reasons and no proffers of proof were made. However, we do find in the record, marked for identification, an exemplified copy of a decree of foreclosure of a mortgage on property in Yuma county, Arizona, obtained by the administrators of the estate of A. E. Sturges, deceased. The decree shows principal in the sum of $11,500, and accrued interest to September 24, 1934, in the sum of $2,118.43, were due and unpaid on the note. There was also offered, and excluded, an agreement of compromise of the estate of A. E. Sturges, deceased, signed by his brothers and sisters, including Vesta Sturges Thomas, as parties of the first part, and Ardis E. Sturgis (Conrad) and the representatives of the minors and of the estate of A. E. Sturges, deceased, as parties of the second part. This contract indicates that A. E. Sturges, deceased, left real property in Arizona in addition to that described in the foreclosure decree.

Evidence of the value of the estate of A. E. Sturges, deceased, if offered in proper form, should be received in evidence and would be material in this proceeding. It would have a direct bearing on the ability of Mrs. Conrad to assist her husband in the maintenance of a suitable home in which Jane could live. It would also be evidence of the amount of the estate coming to Jane. She, through her guardian, now receives $25 per month from the insurance on the life of her deceased father. There is now no evidence of the value of the minor's estate nor of how long this allowance may be continued. If the financial condition of Mrs. Conrad and of Mrs. Thomas are to be considered in determining this guardianship contest (which they were) there should be disclosed to the trial judge the complete resources of those directly interested in the proceeding.

The judgment is reversed.

I concur: BARNARD, P. J.

30 Cal.App.2d 571

CLARY v. LINDLEY et al.

Civ. 10768.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1939.

1. Evidence ⇐53

A disputable presumption is a substitute for proof of facts, and is a species of "evidence" that may be accepted and acted upon when there is no other evidence to uphold the contention for which it stands.

[Ed. Note.—For other definitions of "Evidence," see Words & Phrases.]

2. Evidence ⇐89

A disputable presumption is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption. Code Civ.Proc. § 1961.

3. Evidence ⇐89

Where there is a conflict in evidence introduced by opposing parties, there is no room for a disputable presumption.

4. Automobiles ⇐246(60)

In action arising out of automobile collision, instructing jury that plaintiff was presumed to be entirely free from fault, until presumption is overcome by other evidence, without making similar instruction concerning defendants and cross-complainant, was erroneous.

5. Appeal and error ⇐1064(1)

Error in instructing jury that plaintiff was presumed to be entirely free from fault in automobile collision until presumption is overcome by other evidence, without making similar instruction concerning defendants or cross-complainant, was prejudicial, where reviewing court could not say, that without the erroneous instruction, the result would not have been different.

Appeal from Superior Court, Monterey County; Raglan Tuttle, Judge.

Action by Bob Clary against Albert Lindley and another, for injuries received in automobile collision, wherein named defendant filed cross-complaint. From a judgment on a verdict for plaintiff, defendants appeal.

Reversed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

John A. Murphy, of Salinas, for respondent.

WARD, Justice.

This is an action for personal injuries alleged to have been sustained as the result of a collision between two automobiles. Plaintiff was driving his machine on the state highway northerly between Spreckels and Salinas. Defendant Louis Rodrigo, a chauffeur for defendant owner Albert Lindley, was also driving northerly when Lindley, for the purpose of avoiding traffic, gave the chauffeur instructions to retrace part of the highway and turn off to another road. Defendant Rodrigo drove over to a space off the main part of the highway and attempted at a speed of approximately five miles an hour to make a "U" turn. Plaintiff, driving at about thirty-five or forty-five miles an hour, saw the movement of the defendants' car at some distance away. The collision occurred and plaintiff suffered certain injuries.

In the answer of the joint defendants, contributory negligence was alleged. The defendant Lindley cross-complained against plaintiff Clary, alleging negligence, and prayed for damages for the difference in the value of the Lindley car prior and subsequent to the accident. The cross-defendant answered and alleged contributory negligence on the part of the cross-complainant. The case was tried before a jury. A verdict was rendered in favor of plaintiff, and from the judgment upon the verdict this appeal has been taken.

The court, at the request of plaintiff, instructed the jury as follows: "The mere fact that a collision occurred in which the plaintiff Bob Clary was involved does not raise any presumption that he was guilty of contributory negligence. On the contrary, the law presumes, in the absence of evidence, that he was entirely free from fault and this is a presumption which follows him throughout the trial unless and until overcome by other evidence." There appears in the record no equivalent instruction with reference to defendants or to cross-complainant Lindley. The instruction singles out "plaintiff Bob Clary" as the only one whose evidence might possibly be reinforced by a presumption that he was "free from fault".

[1–3] "A disputable presumption is a substitute for proof of facts. It is a species of evidence that may be accepted and acted upon when there is no other evidence to uphold the contention for which it stands." Noble v. Key System, Ltd., 10 Cal.App.2d 132, 137, 51 P.2d 887, 889. It may be controverted by evidence. Code Civ.Proc. § 1961. It is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption. Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884. When there is a conflict in the evidence introduced by opposing parties, there is no room for the presumption (Kelly v. Fretz, 19 Cal.App. 2d 356, 65 P.2d 914), for the simple reason that one side or the other would be forced to introduce evidence to controvert other evidence, plus a presumption (Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709; Mundy v. Marshall, 8 Cal.2d 294, 65 P.2d 65).

[4] The instruction was erroneous. It becomes necessary, therefore, to determine whether the error may be disregarded upon the theory that under the facts of the case and the judgment rendered the instruction was harmless. Tuttle v. Crawford, 8 Cal. 2d 126, 63 P.2d 1128; Rogers v. Interstate Transit Co., supra.

In the Tuttle Case the injured party did not see the object of danger. In this case the plaintiff knew that defendants' car had started to cross the road and that it was in his immediate path. In the Tuttle Case, no reasonable inference could be drawn that plaintiff was guilty of contributory negligence except upon the theory that she should have seen the wet spot upon which she slipped. There is no doubt that Clary saw defendants' car ahead. He did not swerve; he did not increase his speed; he did not apply his brakes, and the impact occurred when defendants' car was partly over the white line. The front of plaintiff's car struck in the middle of the left-hand side of defendants' car. Assuming that defendants were negligent, the alleged contributory negligence of plaintiff is at least debatable.

In Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660, a case in which a father and a minor son brought suit against a minor and her parents who had signed the application of the minor to the state motor vehicle department for a driver's license, it was held that a similar instruction given in support of the contention that the parents were not guilty of negligence "was not directed to the acts of the minor and had no bearing whatever upon the claim that he was guilty of contributory negligence". [Page 663.] But the instruction complained of here was a part of an instruction directly dealing with the alleged contributory negligence of the plaintiff. In addition the court instructed as follows: "When a person, without fault on his part, is placed in a position of imminent danger, he is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in danger; so if the plaintiff, without fault on his part, was suddenly confronted with imminent danger by the negligent act of the defendants, and he failed to escape the impending danger by reason of insufficient time under the circumstances to choose the correct course of conduct on his part, then his action in preserving his person or property from injury, under the circumstances, is not contributory negligence on his part." This instruction is not a correct statement of the law. A person in sudden peril is required to select the course of action and use the same care that would be exercised by a person of ordinary prudence under like circumstances without being held to strict accountability as to whether the course chosen was the most judicious one. Carnahan v. Motor Transit Co., 65 Cal. App. 402, 224 P. 143; McPhee v. Lavin, 183 Cal. 264, 191 P. 23.

The latter instruction makes the test "without fault on his part", while in the previous instruction the jury was informed that the law presumes, in the absence of evidence, that Clary was free from fault, and that unless overcome by other evidence this presumption continued and followed him throughout the trial. The contributory negligence of Lindley and Rodrigo under the allegations of the answer to the cross-complaint was an issue to be determined. The failure to give a similar instruction covering the acts and conduct of Lindley and Rodrigo left the jurors under the impression that a less harsh rule was applicable to Clary than to Lindley and Rodrigo.

[5] We are not able to say that a different result would not have been obtained with the elimination of the erroneous instructions, and therefore, without noting appellants' additional as-

signments of error, we direct a reversal of the judgment and the order denying appellants' motion for a new trial, appellants to recover costs on this appeal.

We concur: TYLER, P. J.; KNIGHT, J.



30 Cal.App.2d 566

In re MAXSON'S ESTATE.

Civ. 10863.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1939.

Rehearing Denied Feb. 25, 1939.

Hearing Denied by Supreme Court March 27, 1939.

1. Taxation ⇐865, 866

One-half of proceeds from life policy in which widow was designated beneficiary was excluded from operation of inheritance tax statute, whether proceeds were community or were transferred to widow as her separate property by reason of her designation as beneficiary. St.1935, pp. 1266, 1268, §§ 1(2, 3), 2(9) (b, c, d).

2. Taxation ⇐865, 866

Where title to one-half of proceeds from life policy in which widow was designated beneficiary vested in widow as her share of the community, such one-half did not pass by insurance, as respects inheritance tax. St.1935, pp. 1266, 1268, §§ 1(2, 3), 2(9) (b, c, d).

3. Taxation ⇐856

An inheritance tax is imposed on transfer of property and not on the property itself. St.1935, pp. 1266, 1268, §§ 1(2, 3), 2(9) (b, c, d).

4. Taxation ⇐872, 895(6)

An "exemption" from inheritance tax is a deduction and its difference from other deductions becomes important only when it is necessary to compute the various blocks into which the total taxable property is divided for the application of different rates of taxes. St.1935, pp. 1266, 1268, §§ 1(2, 3), 2 (9) (b, c, d).

[Ed. Note.—For other definitions of "Exemption (From Taxation)," see Words & Phrases.]

5. Taxation ⇐872

Where language in inheritance tax statute excluding one-half of community property and excluding $50,000 from proceeds of life policy did not state that either exclusion affected the other, both were to be given full effect. St.1935, pp. 1266, 1268, §§ 1(2, 3), 2 (9) (b, c, d).

6. Taxation ⇐860

All parts of section in inheritance tax statute providing certain exemptions were to be so construed together as to give full effect to each. St.1935, p. 1268, § 2(9) (b, c, d).

7. Taxation ⇐866, 872

Where parties assumed that proceeds from life policy were community property, taxable part of proceeds received by widow was properly computed by first excluding one-half thereof as widow's community share and by then deducting from remainder, the widow's proportionate share of $50,000 exemption allowed by statute. St.1935, pp. 1266, 1268, §§ 1(2, 3), 2(9) (b, c, d).

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the estate of Herbert G. Maxson, deceased, wherein Grace Russell Maxson objected to computation of inheritance tax by the inheritance tax appraiser. From an order fixing the inheritance tax, Harry B. Riley, as Controller of the State of California, appeals.

Affirmed.

W. H. H. Gentry, T. H. Christiansen, and James W. Hickey, all of Sacramento, and Herbert Kaufman, of San Francisco, for appellant.

Edward Hale Julien, of San Francisco, and George W. Lupton, Jr., of Oakland, for respondent

F. Eldred Boland, Richard M. Sims, Jr., and Knight, Boland & Riordan, all of San Francisco, as amici curiæ in support of respondent.

GRAY, Justice pro tem.

The inheritance tax appraiser reported that decedent died intestate leaving (1) an estate which was insolvent after the payment of debts, administration expenses and a family allowance, (2) life insurance policies, payable immediately to his widow, in

the total sum of $72,366.81, (3) policies payable to her on a life mutual income basis, of the present value of $67,399.66, and (4) policies payable to his minor daughter upon the latter basis of the present value of $14,873.22. He allocated to the widow $46,000 as her share of the $50,000 deductible under subdivision 9, section 2, of the Inheritance Tax Act of 1935, Stats.1935, p. 1266, 1268. In computing the taxable part of the proceeds received by the widow from the policies, he added the sums of $72,366.81 and $67,399.66 and then subtracted from this total, first, the sum of $46,000, and secondly, one-half of the remainder. He also made other additions and subtractions not involved in this appeal. The widow objected to his computation, claiming that one-half of his total should have been first eliminated and that then the sum of $46,000 should have been deducted from the remainder. After a hearing the court decided her method of computation was correct and fixed her inheritance tax accordingly. The state controller appeals.

In their computations and arguments, both parties assume that the insurance proceeds are community property and agree that one-half of community property is not subject to an inheritance tax. But they differ as to legal method of computing such one-half. Respondent argues that the total proceeds are to be halved, while appellant urges that only the part of such proceeds remaining after the deduction allowed by subdivision 9, section 2, of the act is made, are to be so divided. The latter method, by decreasing the amount of the community exclusion by one-half of the other deduction, denies the widow the full amount of both deductions and increases the taxable proceeds, over the amount of her computation, by the sum of $22,862.34.

The parties agree that the following are the relevant portions of the act:

"Section 1. * * * (2) The words * * * 'property' * * * shall * * * mean * * * property * * * of the * * * insured, passing or transferred to individual * * * beneficiaries * * *; provided, further, the one-half of the community property which belongs to the surviving spouse * * * shall not be subject to the provisions of this act * * *; provided, further, that in case of a transfer of community property from one spouse to the other within the meaning of any subdivision of section 2 of this act, one-half of the community property so transferred to the wife * * * shall not be subject to the provisions of this act. * *

"(3) The word 'transfer' * * * shall * * * include the passing of property * * * by * * * insurance in the manner herein described. * * *

"Sec. 2. A tax * * * is hereby imposed upon the transfer of any property * * * to persons * * * not hereinafter exempted, * * * in the following cases: * * *

"(9) The proceeds of all life * * * insurance policies payable on account of the death of the insured shall be subject to the tax herein imposed, as follows: * *

"(b) The proceeds of all such policies hereafter issued payable to named beneficiaries.

"(c) The proceeds of all such policies now in force payable to named beneficiaries in which the insured has the right to change the beneficiary or under which he has cash surrender right.

"(d) The aggregate proceeds of all policies designated in paragraphs (b) and (c) * * * up to and including a total of fifty thousand dollars, shall not be subject to the provisions of this act. Said fifty thousand dollar exemption shall be prorated among all beneficiaries under such policies in proportion to the amount of such insurance payable to each of them, and shall be in addition to all other exemptions provided for in this act."

[1-3] The opening sentence of section 2 imposes a tax upon the transfer of any property, not afterwards exempted, in the cases subsequently specified. Subdivision 2 of section 1, in its definition of "property", provides that one-half of the community property, which belongs to the surviving spouse or which had been transferred by the husband to the wife within the meaning of any subdivision of section 2, shall not be subject to the provisions of the act. Whether the proceeds are community property, as the parties assume, or had been transferred to the widow as her separate property by reason of her designation as beneficiary (In re Dobbel's Estate, 104 Cal. 432, 38 P. 87, 43 Am.St.Rep. 123; Estate of Castagnola, 68 Cal.App. 732, 230 P. 188; Estate of Miller, 23 Cal.App.2d 16, 71 P.2d 1117), one-half thereof is excluded from the operation of the act. "Transfer", according to the third subdivision of the section, includes the pass-

ing of property by insurance. Since title to one-half of the insurance proceeds vested in the widow as her share of the community, such one-half did not pass by insurance. Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 26 P.2d 482. The tax is imposed upon the transfer of property and not upon the property itself. Estate of Letchworth, 201 Cal. 1, 255 P. 195.

[4] The forepart of subdivision 9 of section 2 states that the proceeds of all life insurance policies shall be subject to the tax imposed by the act. Clearly this tax is the tax imposed by the opening sentence of section 2 and the proceeds are one class of property, subjected to tax thereby. Since it is agreed that such proceeds are community property, one-half, as has been shown, is not subject to the tax. It will be assumed, as the parties have, that the proceeds fall within the terms of either paragraph (b) or (c), although the record does not contain the facts warranting the assumption. Therefore, paragraph (d) becomes operative. Appellant argues that the first sentence of this paragraph excludes from the tax $50,000 of such proceeds, while respondent contends the second sentence thereof exempts such part of the proceeds. An exemption is a deduction and its difference from other deductions becomes important only when it is necessary to compute the various blocks into which the total taxable property is divided for the application of the different rates of taxes. Estate of Steehler, 195 Cal. 386, 233 P. 972. No such necessity here arising, this difference is immaterial. Whether the widow's share of the $50,000 is excluded or exempted, it decreases the taxable part of her insurance proceeds by that amount.

[5-7] The opening sentence of section 2, in the light of the definitions found in section 1, excludes from taxation one-half of community property, without any expressed limitation as to the form in which it may be. Subdivision 9 of section 2 first sets forth that insurance proceeds, without distinction as to their separate or community nature, are one kind of property which is subject to the tax imposed by the opening sentence of the section, and then, in paragraph (d) thereof, excluded $50,000 thereof. Each exclusion is based upon a different fact. The first is given because of the community nature of the property and the second because of its amount. The language creating the two exclusions does not state that either limits or affects the other, and therefore both must be given full effect. All parts of the section must be so construed together as to give each full effect. Estate of Bull, 153 Cal. 715, 96 P. 366. So doing, the court correctly computed the taxable part of the insurance proceeds, by first deducting one-half thereof as the widow's community share, and then $46,000 as her share of the $50,000 exclusion or exemption. It properly decided that the second deduction, not being based upon the community nature of the proceeds, did not diminish the deduction allowed for that reason.

The order fixing the inheritance tax is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



30 Cal.App.2d 598

MORRILL v. BARNESON.

Civ. 10704.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1939.

1. Brokers ⇐43(3)

A memorandum, to be sufficient under statute of frauds relative to employment of an agent to sell realty must show an authority to negotiate sale for defendant. Civ. Code, § 1624, subd. 5.

2. Brokers ⇐43(3)

Where a real estate agent's authority to sell realty appears in a memorandum required by statute of frauds, identity of agent and agreement to pay him may be shown by parol. Civ.Code, § 1624, subd. 5.

3. Brokers ⇐40

Where instrument which allegedly authorizes an agent to sell realty for owner fails to show owner's employment of an agent, there can be no recovery on instrument, regardless whether it is a sufficient memorandum of employment under statute of frauds. Civ.Code, § 1624, subd. 5.

4. Brokers ⇐43(3)

Where an instrument shows the employment of a real estate agent and an authority to act for owner in closing a sale, instrument will satisfy the statute of frauds, notwithstanding instrument is not in itself sufficient as a contract. Civ.Code, § 1624, subd. 5.

5. Brokers ⇐84(1)

Broker to recover commission must show that owner has in writing recognized someone as his agent, to satisfy the statute of frauds, and show the broker's employment by the writing or other evidence. Civ.Code, § 1624, subd. 5.

6. Brokers ⇐40, 43(3)

A landowner's letter to broker, answering an inquiry concerning sale of land, describing land, giving terms of sale, and stating that regular commission would be paid, was insufficient under statute of frauds to show owner had authorized any one to act as his agent, or to show that owner had employed any one to sell the land, so as to authorize broker's recovery of commission. Civ.Code, § 1624, subd. 5.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by George E. Morrill against Lionel T. Barneson for commissions as a real estate broker. From a judgment dismissing the action, plaintiff appeals.

Judgment affirmed.

Richard A. Dunnigan, of Los Angeles, for appellant.

Pillsbury, Madison & Sutro, of San Francisco (Eugene M. Prince and Harold I. Boucher, both of San Francisco, of counsel), for respondent.

TYLER, Presiding Justice.

Action by plaintiff, appellant herein, to recover a real estate broker's commission for the sale of land under the provisions of a certain writing signed by defendant, respondent herein.

The complaint alleges two counts: the first is based upon the writing, the second upon a quantum meruit for the reasonable value of the service rendered to the defendant at his special instance and request in writing. Defendant interposed a general demurrer to the complaint which was sustained by the court without leave to amend. Judgment of dismissal followed, from which this appeal is taken. The only question involved in the appeal is, does the complaint state a cause of action.

The instrument relied upon is in the form of a letter, which reads as follows: "256 Montgomery Street San Francisco, California July 29, 1936 Mr. George E. Morrill 116 Hamlet Street Los Angeles, California Dear Sir: Answering your recent inquiry at my brother's office in Los Angeles concerning the sale of Bailey Ranch, following is the information requested. The ranch consists of approximately 3800 acres. The elevation in general is about 3500 feet, and does not extend into the desert. A copy of the legal description is enclosed, and I think the foreman has a plat at the ranch, which can be seen. Price $50,000, including between 500 and 600 head of cattle. Terms $30,000.00 cash, balance payable $5,000.00 annually, with interest at 6%. The regular 5% commission will be paid. The foreman of the ranch is Mr. Ed Rutledge, and he will show the place. Very truly yours, (signed) Lionel T. Barneson" Attached to and made a part of the aforesaid memorandum was the description of the real estate.

The complaint alleges the procurement by plaintiff of a purchaser, ready, willing and able to buy the property; that the plaintiff caused the purchaser and the defendant to be brought together; that the property was sold through plaintiff's efforts for the sum of $50,000, and concludes with a prayer for $2500, being 5 per cent, the agreed commission to be paid for the sale of the land. Appellant contends that the memorandum is a sufficient compliance with subdivision 5 of section 1624 of the Civil Code, and shows that he was authorized and employed to sell the property upon the terms and for the brokerage commission therein recited.

We cannot agree with the plaintiff in his contention. The letter relied upon contains no terms of employment; it was simply an answer to an inquiry concerning the property. The expression in the letter, "The regular 5% commission will be paid," was nothing more than additional information concerning the terms of sale and informed the broker of the exact amount for which the property could be purchased. That the letter did not constitute an employment is well established by the authorities.

In Heyman v. Stopper, 85 N.J.L. 128, 88 A. 946, the court held the following

writing handed to a broker by the owner of the property and relating expressly to commission, did not constitute an employment: "'February 23, 1912. This is to certify that I will pay two and one half per centum (2½%) commission on the sale of the property, #53 South Orange Avenue, Newark'", the court stating: "I find no authority in it for selling or exchanging this land or authorizing its sale, nor is the authority of any broker or real estate agent recognized by it. There is, in my opinion, no written authority for any broker to sell the land."

In Egan v. Pacific Southwest Trust & Savings Bank, 92 Cal.App. 1, 267 P. 719, plaintiff relied upon the following written instruments [page 720]: "'L. A., Cal., Sept. 1, 1923. Received of Mrs. E. S. Egan $500.00 (five hundred dollars) deposit on flats 3804-3806 Wall St. Price to be $11,000.00 (eleven thousand dollars). Rose E. Davis.' 'L. A., Cal. 1, 1923. I agree to sell flats located at 3806-3804 Wall St. Price to be $11,000.00 (eleven thousand dollars). $10,000.00 (ten thousand dollars) net to me. $1,000.00 (one thousand dollars) for Mrs. E. S. Egan, less escrow charges. Agreed $3500.00 (thirty-five hundred dollars) down. $7500.00 (seventy-five hundred dollars) first mortgage at 7 per cent for three years. Rose E. Davis.'" Mrs. Egan brought suit, contending the writings constituted an employment to sell the property. It will be noted that the writing specified "$1,000.00 (one thousand dollars) for Mrs. E. S. Egan, less escrow charges", which language was much stronger for the alleged broker than anything in the present case. The court held, however, that there was no employment of plaintiff, and denied recovery for the reason that the writings above set forth did not authorize plaintiff to act for said Rose Davis.

Again in Kleinsorge & Heilbron v. Liness, 17 Cal.App. 534, 120 P. 444, the plaintiffs were brokers, and defendant delivered the following writing to their agent: "'I hereby agree to sell my property described as follows, to wit: The east 20 feet of lot 1, in the block or square bounded by L and M, 8th and 9th streets, city of Sacramento, * * * for the sum of eighty-four hundred dollars ($8,400). The payments are to be made as follows: The first payment is to be made on or before August 3rd, 1909, and is to be five hundred dollars. All other payments are to be made once a month, $50.00 per month is to be paid from the date of the first payment, together with interest at the rate of 6 per cent. on the deferred payments. At the end of one year and one-half from the date of this agreement, the sum of $5,000.00 should be paid on the purchase price of the property. Dated July 24th, 1909, at Sacramento, Cal. (Signed) Wm. N. Liness. For Owner.'" The plaintiffs brought an action for commission. In holding the writing insufficient to constitute an employment, the court said: "It will be noted, by an inspection of the instrument which plaintiffs sought to sell the property, that said writing, while clearly enough disclosing a willingness on the part of the defendant to sell the property to some one upon certain specified terms, does not specifically or by express language authorize plaintiffs or any other particular person to sell or negotiate the sale of said property." The court further said: "In the case at bar, as we have shown and as is clear from the writing itself upon which plaintiffs rely for a recovery, there is absolutely no language used therein expressly or specifically employing plaintiffs to sell the property described in said writing. Indeed, as before suggested, there is nothing in the writing authorizing any person to sell the property. As already stated, the language of the writing is sufficient to support the inference that the defendant was willing to sell the property upon the terms specified in said writing, but the language falls far short of warranting the inference that the sale, if in point of fact one was contemplated or intended, was to be effected through the intervention of a broker or any other third party. Indeed, so far as the writing itself shows to the contrary, the proposition contained therein might have been directly submitted by the defendant himself to an intending purchaser."

In Patterson v. Torrey, 18 Cal.App. 346, 348, 123 P. 224, 225, where a writing stating the terms of sale had been given to the plaintiff, the court, in denying recovery of commission said: "While the court finds that the instrument was made and delivered by the defendant 'for the purpose of authorizing the plaintiff, as such real estate broker, to make such sale and exchange of said property of defendant with said Charles H. McFarland, for commission, on the terms and price specified by defendant,' nevertheless such purpose is wholly incon-

sistent with the plain import of the language used by the parties. The naked act of an owner of real estate in fixing a price at which he is willing to sell or exchange the same, given in writing at the request of a broker, does not constitute an employment of such broker by the owner, or bind him to pay the broker a commission for making a sale of the property."

[1,2] Several cases have been cited to us by appellant, but it is not necessary to review the same. The cases expressly request the agent to get an offer. It is well settled that a memorandum to be sufficient under the Statute of Frauds must show an authority to act, i. e., authority to negotiate a sale on defendant's behalf. If such authority appears, then the identity of the agent, and even the agreement to pay him, may be shown by parol, but if such authority does not appear, the writing is fatally defective as appears from the foregoing cited cases. See, also, Toomy v. Dunphy, 86 Cal. 639, 25 P. 130.

[3,4] Plaintiff argues as though the only question here involved is the sufficiency of the letter as a memorandum under the Statute of Frauds; assuming the first question in dispute, i. e., whether there was an employment. Clearly a contract of employment and a memorandum thereof are two distinct things. They may both appear in the same instrument if, as is alleged in the present case, the instrument is the contract. But if the instrument fails to show employment, there can be no recovery upon it, even apart from the Statute of Frauds. On the other hand, if there is an employment, then the memorandum which is not in itself complete or sufficient as a contract, may satisfy the Statute of Frauds, if and provided it shows authority to act for the owner in closing a sale.

In Moore v. Borgfeldt, 96 Cal.App. 306, 311, 273 P. 1114, 1117, it is said: "As we have pointed out, the writing need not be a complete contract, but only a note or memorandum, provided it shows authority to act. When this requirement is met in connection with a definite piece of property, the other terms may be shown by parol. The amount of compensation, and even the agreement to pay a commission, may be so shown."

[5,6] The plaintiff must show that the owner has in writing recognized someone as his agent. This is necessary to satisfy the Statute of Frauds. Further than this, and independently of the statute, the plaintiff must show an employment of plaintiff either by the writing or by other competent evidence. In the present case the complaint is doubly insufficient because the letter relied upon by plaintiff recognizes no one as defendant's agent, shows no authority in anyone to negotiate a sale on defendant's behalf and is, therefore, insufficient under the Statute of Frauds; and further, because the letter which is alleged to be the employment contract shows neither an employment nor an employment of plaintiff.

The judgment is affirmed.

We concur: KNIGHT, J.; WARD, J.



WATSON v. STOCKTON MORRIS PLAN CO. et al. (three cases). *

Civ. 6009, 6030.

District Court of Appeal, Third District, California.

Jan. 24, 1939.

Rehearing Granted Feb. 23, 1939.

1. Building and loan associations ⇐6(2)

Where assignment of savings and loan association passbook to secure assignee who paid assignor's note authorized sale of passbook on assignor's failure to pay note, surplus remaining after payment of note and costs of sale to be payable to assignor, assignment was a conditional assignment and did not constitute assignee owner of entire savings account represented by passbook but balance of proceeds after the sale belonged to assignor. Civ.Code, §§ 3000 et seq., 3336.

2. Pledges ⇐36

Where an assignment contract securing assignee specifies that assignee shall receive only limited interest in property sufficient to compensate him for money expended and costs, remainder to be paid over to assignor, in assignee's suit for conversion, assignee can recover only a sum which will fully compensate him for detriment sustained from the transaction. Civ.Code, §§ 3000 et seq., 3336.

*For subsequent opinion see 93 P.2d 855.

3. Building and loan associations ⇐6(2)

Where savings and loan association passbook was assigned pro tanto to secure assignee for expenses incurred in paying assignor's note, and depositary, with knowledge of assignment, issued duplicate passbook to assignor who withdrew entire deposit, assignee, in conversion action, could recover only amount of expenditures incurred in paying note and in selling passbook.

4. Judgment ⇐725(1)

Where savings and loan association passbook was assigned pro tanto to secure assignee for expenses incurred in paying assignor's note, and depositary, with knowledge of assignment, issued duplicate passbook to assignor who withdrew entire deposit, and assignee recovered for all expenditures in conversion action, assignor was thereafter precluded from making any claim against assignee for proceeds of sale of passbook in excess of expenditures.

5. Building and loan associations ⇐6(2)

In action for conversion of deposit, where savings and loan association passbook was assigned pro tanto to secure assignee for expenses incurred in paying assignor's note, evidence authorized finding that depositary wrongfully converted deposit by issuing duplicate passbook to assignor with knowledge of assignment and permitting assignor to withdraw entire deposit.

6. Trover and conversion ⇐4

Conversion lies against one who, without consent of owner, wrongfully exercises dominion or control over owner's property detrimental to and in conflict with right of possession or vested title which owner has therein.

7. Building and loan associations ⇐6(2)

Relationship between savings and loan association and its depositor is primarily that of debtor and creditor.

8. Trover and conversion ⇐2

Where relationship of debtor and creditor only exists, conversion of funds representing indebtedness will not lie against debtor unless he holds deposit in a fiduciary capacity and is bound to return identical money to owner.

9. Building and loan associations ⇐6(2)

In action against depositary for conversion of deposit, where savings and loan association passbook was assigned pro tanto to secure assignee for expenses incurred in paying assignor's note and depositary issued duplicate passbook to assignor who withdrew entire deposit, evidence supported finding that depositary had notice that assignee claimed title to passbook prior to issuance of duplicate.

10. Building and loan associations ⇐6(2)

An assignee of savings and loan association passbook who notified depositary of assignment at depositary's principal place of business was not required to notify depositary at its branch office where deposits were made as respects depositary's liability for conversion upon issuance of duplicate passbook to assignor who thereupon withdrew deposit.

11. Banks and banking ⇐301(1)

A savings account, being a "chose in action," may be assigned with or without a delivery of passbook.

[Ed. Note.—For other definitions of "Chose in Action," see Words & Phrases.]

12. Banks and banking ⇐301(1)

A delivery of passbook together with formal written assignment of account represented by passbook is the best evidence of assignment.

13. Banks and banking ⇐129

Assignment of bank account carries with it all remedies which assignor possessed, including right to sue bank for misappropriation of funds.

14. Banks and banking ⇐301(1)

The wrongful conversion of passbook carries with it no title to account represented thereby, since wrongful transfer of passbook is void.

15. Banks and banking ⇐301(1)

The real owner of converted passbook may maintain action, independently of his possession of passbook, to establish his title to account represented thereby.

16. Building and loan associations ⇐6(2)

In action by assignee of savings and loan association passbook against depositary for conversion of deposit, depositary, which had issued, upon an affidavit known to be false, a duplicate passbook to assignor and which had paid assignor entire deposit, thereby waived notice of proposed withdrawal of funds by assignee. St.1931, p. 483, as amended.

17. Banks and banking ⇐305

Notice of withdrawal of savings funds or presentation of passbook upon withdrawal may be waived by conduct of officers of savings bank.

18. Banks and banking ⇐154(1)

Trover will not ordinarily lie to recover money deposited in a bank where relationship between plaintiff and defendant is that of debtor and creditor.

19. Building and loan associations ⇐6(2)

In action by assignee of savings and loan association passbook against assignor and depositary to determine ownership of passbook and account represented thereby, allegations that assignee was real party in interest and that he was owner and holder of passbook and account represented thereby, no part of which had been paid, supported judgment for assignee for expenses incurred in paying assignor's note.

Appeal from Superior Court, Sutter County; Harry Deirup, Judge.

Suits for conversion of a savings account by Stanley E. Watson against the Stockton Morris Plan Company and others. From the judgment, the plaintiff appeals in the first action, and from the judgment in the second action, plaintiff and the Pacific States Savings & Loan Company appeal.

Affirmed.

Erling S. Norby and A. B. Reynolds, both of Marysville, for appellants.

Mace & Tuthill and John L. Mace, all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff and the defendant Pacific States Savings and Loan Company have separately appealed from a judgment which was rendered jointly against the defendants, except the Stockton Morris Plan Company, in a suit for conversion of a savings account of $4,994.26.

The plaintiff also gave separate notice of appeal from a judgment rendered against him after the demurrer of the defendant The Stockton Morris Plan Company had been sustained without leave to amend the pleading. That judgment was to the effect that plaintiff take nothing by his action against that company.

The court found that the pass-book, representing the amount of credit which Mary C. Thomas owned in a savings account with the Pacific States Savings and Loan Company, had been assigned to the plaintiff as a pledge, only, to secure the repayment to him of money advanced to pay a note of Mrs. Thomas in the amount of $2,000, together with interest and costs, and that the plaintiff was entitled to recover only the sum of money which he had expended on that account.

Mary C. Thomas owned a savings fund in the amount of $4,994.26, deposited with the Pacific States Savings and Loan Company, a corporation, of San Francisco, which account was represented by a passbook numbered 17–A–87. October 25, 1933, for value received, Mrs. Thomas and her son Roy S. Thomas executed and delivered to The Stockton Morris Plan Company, a corporation, their promissory note for $2,000, together with the pass-book and a written assignment of the savings account, to be held as a pledge to secure the payment of the note upon the terms therein expressed. The assignment reads in part:

"1. I/We hereby deposit with The Stockton Morris Plan Company, as collateral security for the payment of that certain promissory note in the sum of Two Thousand Dollars, * * * the following property, to-wit:—Pacific States Savings & Loan Company Pass Book #87, $4,994.26.

* * * * * *

"4. In case that I/we fail to make payment of said promissory note, or any installments thereon when due, * * *, then I/we hereby invest the payee hereof with the power irrevocable to sell at any time the whole or part of said pledged property, either at public or private sale, at its discretion, without the giving of notice of any kind in advance of such sale. * * * The proceeds of the sale of said securities, in whole or in part, shall first be applied to the expenses of making said sale, costs of collection and attorney fees; the balance thereof shall be applied pro tanto to the payment of said promissory note and interest accrued thereon, * * * the surplus, if any, being payable to the undersigned. * * *

* * * * * *

"6. On payment of the above note and interest according to its terms, and all charges in connection therewith, this agreement shall be void and the above specified pledged property shall be returned unto me/us."

Two days later the holder of the note and collateral security notified the Pacific

States Savings and Loan Company in writing of the assignment to the payee, as pledgee, of the ownership and possession of the pass book and savings account, and requested the transfer thereof on the books of the company in accordance therewith. The savings company acknowledged in writing the receipt of that notice and asserted that it had "caused an entry to be made upon the books of this corporation accordingly".

Mrs. Thomas, being unable to meet the payments on the promissory note, requested the plaintiff Stanley E. Watson to do so and he thereupon paid the entire note in ten instalments from January to November, 1934. April 10, 1934, Mrs. Thomas and her son executed and delivered to The Stockton Morris Plan Company, the payee and holder of the note, the written authorization to deliver to plaintiff the pass book and canceled note when the indebtedness was fully satisfied, which request reads as follows:

"By reason of Mr. Stanley E. Watson having made certain payments to you upon our obligation; namely, a $2,000.00 note dated October 25, 1933, and secured by assignment of Pacific States Savings & Loan Company Pass Book #87; we desire that upon full payment of the said obligation, that you deliver to Mr. Stanley E. Watson the aforesaid note and Pacific States Savings & Loan Company Pass Book.

"Signed this 7th day of Feb. 1934.

"(Signed) Mary C. Thomas
"Roy S. Thomas"

January 28, 1935, after the note had been paid, The Stockton Morris Plan Company endorsed the note as fully paid, and delivered it, to Stanley E. Watson, together with the pass book and an assignment to plaintiff of the entire savings account represented thereby. In February, 1935, the plaintiff notified the Pacific States Savings & Loan Company, in writing, that the Thomas pass book and assignment of account represented thereby had been transferred to him and that he was the owner thereof. The following month Mrs. Thomas and her son filed with the Savings and Loan Company their sworn affidavits averring that she was the owner of the savings account of the principal sum of $4,994.26; that the pass book number 17–A–87 was lost and that the account represented thereby had not been pledged, assigned or transferred. The bank possessed facts charging it with knowledge that Mrs. Thomas was not the owner of the account and that the affidavit was false. In spite of that knowledge, the Savings & Loan Company issued to Mrs. Thomas, on March 26, 1935, a duplicate pass book for the full amount of said account, and on application therefor, paid to Mary C. Thomas, on April 2, 1935, the sum of $4,108.98, in full for said account, receiving and canceling her duplicate pass book and the account represented thereby.

After fully paying the note and receiving from The Stockton Morris Plan Company the assignment of the pass book and account represented thereby, the plaintiff Stanley E. Watson demanded of Mrs. Thomas repayment of the money which he had expended on that account, which was refused. He then consulted his attorney, Erling S. Norby, who wrote to Mrs. Thomas three different letters, dated, respectively, February 21st, March 28th and June 2d, 1936, demanding of her repayment of the money expended by him in the aggregate sum of $2,287.87, or an absolute transfer and conveyance to him of her savings account held as collateral security therefor, which she failed and refused to do. The plaintiff then proceeded to sell the savings account as a pledge under the provisions of section 3000 et seq. of the Civil Code, and transferred and assigned the account to N. Swift, who is not a party to this suit. The pass book and account were thereafter reassigned to the plaintiff.

Upon formal demand in writing for Mary C. Thomas and her son to pay the indebtedness then amounting to $2,287.87, after learning of the previous issuance of the duplicate pass book, and the payment to Mrs. Thomas on April 2, 1935, of the sum of $4,108.98, in full for her account with the Pacific States Savings & Loan Company, this suit for conversion was brought March 19, 1937. The cause was tried by the court sitting without a jury. Findings were adopted in accordance with the preceding statement of facts. The court further found that plaintiff had paid the note at the request of Mrs. Thomas as alleged, and had received an assignment of the pass book and savings account which he held as pledgee to collaterally secure him for the money expended; that with full knowledge of the assignment, by subsequently issuing a duplicate pass book and paying to Mrs. Thomas the account in full, she and her son Roy and the Pacific States Savings and Loan Company, who participated in that transaction, thereby converted the savings fund to their own benefit. Judgment was accordingly rendered in favor of the plaintiff for the ten instalments paid by him on

the note, together with interest thereon and the costs incurred. From that judgment both the plaintiff and the Pacific States Savings and Loan Company have appealed.

[1] The plaintiff contends that he became the owner of the entire savings account of $4,994.26 by virtue of the title acquired at the sale of the pledge pursuant to sections 3000 et seq., of the Civil Code, and that he is therefore entitled to judgment for the full amount of the value of the savings account. We are of the opinion this is not true under the circumstances of this case. The plaintiff's contention is inconsistent with the language of the assignment, and with the specific finding of the court that the account was actually converted on March 26, 1936, three months before the purported sale. The language of the original assignment of the pass book and account authorizes the sale thereof for failure to pay the note according to its terms. From the proceeds of sale it is provided the costs shall be first paid and that "the balance thereof shall be applied pro tanto to the payment of said promissory note and interest accrued thereon, the surplus being payable to the undersigned" assignors, Mary C. Thomas and Roy S. Thomas. This language constitutes a conditional assignment to secure the pledgee for the amount of money paid by him on the note, together with interest and costs of sale, only, and that the balance of the proceeds of sale shall belong and be paid to the assignor of the account, Mary C. Thomas. The complaint alleges and the court found that the conversion occurred on March 26, 1936. Section 3336 of the Civil Code provides for the measure of damages in a suit for conversion as follows:

"The detriment caused by the wrongful conversion of personal property is presumed to be:

"First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; * * *."

In 21 California Jurisprudence 342, section 48, it is said regarding the measure of damages in a suit for conversion:

"A pledgee may maintain an action for damages against one converting property pledged. * * * He may, in an action against a stranger, recover the full value of the property, as he is answerable over to the pledgor for the surplus. But if the property is converted by the owner or by anyone acting in privity with him, he may recover only the value of his special interest in the pledge."

In the case of California Cured Fruit Association v. Ainsworth, 134 Cal. 461, 66 P. 586, which was a suit for conversion of a crop of prunes which was "sold and transferred to plaintiff", the court said with respect to the measure of damages:

"The rights of the plaintiff are to be measured by the terms of its contract. * * *

"The general rule in regard to the measure of damages for the conversion of goods when the plaintiff is the general owner, or is accountable over to another for the goods, is their value at the time of conversion; but, if the plaintiff has only a special interest or limited property in the goods, he can recover from the owner of the remaining interest, or from one claiming under such residuary owner, only to the extent of his interest therein. The amount of damages which he is entitled to recover is such as will indemnify him for the loss he has sustained in not obtaining the possession of the goods. Suth. Dam. § 1136; Benjamin v. Stremple, 13 Ill. 466; Sheldon v. [Southern Express] Co., 48 Ga. 625; Burk v. Webb, 32 Mich. 173; Fowler v. Gilman, 13 Metc. (Mass.) 267; King v. Bangs, 120 Mass. 514; White v. Allen, 133 Mass. 423."

Likewise, in the case of Goldberg v. List, 11 Cal.2d 389, 79 P.2d 1087, 116 A.L.R. 900, it is said with relation to a conditional sales contract for personal property [page 1090]:

"The rights and liabilities of the parties to a conditional sales contract are controlled by the terms of the particular contract under which they are bound. Some of such contracts contain provisions for continued liability after the retaking of possession of the property by the vendor. If so, the vendee therein should be permitted to recover against the converter of the personal property to the extent to which the vendee continues liable to the conditional sales vendor."

[2] Under a contract like the assignment in the present case which clearly

specifies that the assignee shall receive only a limited interest in the property sufficient to compensate him for the money expended and his costs, wherein it is expressly provided the remainder of the proceeds shall be paid to the assignor, in a suit for conversion against the vendor as distinguished from a suit to quiet title to the property, it appears to be just and in accordance with reputable authorities that the plaintiff should be limited in the amount he may recover under such circumstances to a sum which will fully compensate him for the detriment sustained on account of the transaction.

[3, 4] We therefore conclude the plaintiff in this case was not entitled to recover more than the sum which was awarded to him by the judgment. While it is true that under the terms of the contract the plaintiff was accountable to Mrs. Thomas for the balance of the proceeds of sale, after he had been fully compensated, he received no such balance. On the contrary she is in possession of the entire proceeds of the savings account wrongfully received by her upon unlawfully converting and transferring the account to the Pacific States Savings and Loan Company by fraudulent means. The judgment precludes her from thereafter making a valid claim against the plaintiff for further reimbursement. The terms of the contract and the equities of the case are entirely fulfilled by the judgment which was rendered.

The appellant, Pacific States Savings and Loan Company, contends that the evidence fails to support the finding and judgment that it was guilty of conversion of the pass book and account represented thereby; that the relationship of debtor and creditor which existed between it and the owner of that account precludes the maintenance of an action against the debtor for converting the account.

[5] We are of the opinion the evidence adequately supports the finding and judgment for damages against the Pacific States Savings and Loan Company for conversion of the pass book and for misapplying and paying to the wrong person the account represented thereby.

[6] Conversion lies against one who without the consent of the owner wrongfully exercises dominion or control over his property detrimental to and in conflict with the right of possession or vested title which the owner has therein. McCaffey C. Co. v. Bank of America, 109 Cal.App. 415, 424, 294 P. 45; Lusitanian-American Development Co. v. Seaboard D. C. Corp., 1 Cal.2d 121, 129, 34 P.2d 139; Hull v. Laugharn, 3 Cal.App.2d 310, 315, 39 P.2d 478. In Poggi v. Scott, 167 Cal. 372, 375, 139 P. 815, 816, 51 L.R.A.,N.S., 925, it is said that: "The foundation for the action of conversion rests * * * upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results."

[7] It is true that the relationship between the depositor in a savings and loan association and the institution with which the money is deposited, is usually and primarily that of debtor and creditor, similar to the deposits of funds in a savings bank. In re Western States Building-Loan Association, D.C., 50 F.2d 632; Aberdeen Savings & Loan Association v. Chase, 157 Wash. 351, 289 P. 536, 290 P. 697, 71 A. L.R. 232; 7 C.J. 863, sec. 900; Wells v. Black, 117 Cal. 157, 48 P. 1090, 37 L.R.A. 619, 59 Am.St.Rep. 162; City of Los Angeles v. State Loan & Trust Co., 109 Cal. 396, 42 P. 149.

With respect to the relationship which exists between a depositor and a savings bank, it is, however, said in 7 Corpus Juris, page 863, section 906: "It is difficult if not impractical to define accurately, for all purposes, the legal relation that exists between a savings bank and its depositors, for while the courts have frequently stated the character of this relation, it has usually been with respect to the particular circumstances presented by the particular case under consideration. Thus it has been said that the relation is simply that of debtor and creditor; but on the other hand a number of cases consider that the relation partakes largely of the character of a trust by the bank for its depositors; and it has also been considered that the relation of the depositor to the bank is analogous to that of stockholders in banks of discount or even in business corporations." (See 4 Cal.Jur. 190, sec. 83.)

[8] It has been held, as a general rule, that, where the relationship of debtor and creditor only exists, conversion of the funds representing the indebtedness will not lie against the debtor, unless he holds the deposit in a fiduciary capacity and is bound to return to the owner the identical money. Rothchild v. Schwarz, 28 Misc. 521, 59 N.Y.S. 527; Wright v. Holmes,

100 Me. 508, 62 A. 507, 3 L.R.A.,N.S., 769, 4 Ann.Cas. 583; note, 50 A.L.R. 1171; 26 R.C.L. 1102.

Under the circumstances of the present case, however, there existed something more than a mere relationship of debtor and creditor between the plaintiff and the Pacific States Savings and Loan Company. With notice and implied knowledge that the plaintiff held the pass book and an equitable assignment of the account of Mrs. Thomas represented thereby, to secure the repayment of the money he had expended in satisfaction of the note, the Pacific States Savings and Loan Company was a party to procuring from Mrs. Thomas a false affidavit upon which it wrongfully issued to her a duplicate pass book in lieu of the original one held by the plaintiff, representing funds on deposit in the amount of $4,994.26 and accumulated interest, and then discounted and wrongfully paid to her in full satisfaction of her claim the sum of only $4,108.98. The company profited by that transaction to the extent of several hundred dollars. It may reasonably be assumed the company and Mrs. Thomas conspired to defeat the plaintiff's just claim for reimbursement of $2,287.87, paid by him at the request of Mrs. Thomas to satisfy her promissory note, and to thereby destroy the effect of the equitable assignment of the pass book and account represented thereby, which were held by Mr. Watson as collateral security for the payment of her indebtedness. The conduct of Mrs. Thomas in that transaction was certainly reprehensible. Except for the aid which was given to her by the Pacific States Savings and Loan Company, she probably would not have thus succeeded in circumventing the valid security which she had given to the friend who was kind enough to pay her debt. It appears that the affidavit of the lost pass book was prepared for her by the company. That affidavit not only averred that Mrs. Thomas had misplaced or lost the pass book, but it also asserted that: "I have not transferred, assigned, pledged or set over said Certificate [pass book], either in whole or in part, nor any of the money represented thereby, to any person, firm or corporation, and that no person, firm or corporation (other than myself) has any interest or claim upon said certificate, or the money represented thereby."

The essential averments of that affidavit were false, as Mrs. Thomas well knew. Both the Pacific States Company and Mrs. Thomas knew she had assigned and transferred the pass book and the account represented thereby to The Stockton Morris Plan Company to secure her note. Mrs. Thomas also knew exactly where that pass book was. She had directed The Stockton Morris Plan Company in writing to deliver it, together with her canceled note and assignment, to the plaintiff. That transaction constituted an equitable assignment of the account to the plaintiff. There is ample evidence that the Pacific States Company also knew of the delivery of those instruments to Mr. Watson. Mr. Watson personally went to the principal place of business of the Pacific States Company at San Francisco, with Miss Engel, in March, 1935. He was first introduced to Mr. Kellogg, an agent of the company who occupied a desk in an outer office of the principal place of business. The manager of the company testified that Kellogg then represented the company, "to contact people on the outside of the office with respect to complaints which they may have". Kellogg, however, told the plaintiff that the transfer of the Thomas account on the books of the company was outside of his duties. He then took the plaintiff and Miss Engel into an inner office, and introduced them to a man who held himself out as an agent of the company with authority to transact the business of satisfying the plaintiff's claim to an assignment of the account to secure Mrs. Thomas' indebtedness to him. Neither of these witnesses remembered the name of that representative of the company. He did not advise them that they should present their claim to the branch office at Sacramento. That man informed the plaintiff the company could undoubtedly adjust the claim, but advised plaintiff that the best way to proceed to avoid controversy or trouble would be to secure a direct written assignment from Mrs. Thomas. The plaintiff then exhibited to that officer of the company the pass book and the original assignment of the account to The Stockton Morris Plan Company, upon which there was an endorsement signed by the last-mentioned company, dated January 28, 1935, as follows: "For value received, without recourse, we hereby assign our right, title, and interest in this Collateral Pledge Agreement to Stanley E. Watson."

The representative of the company then furnished the plaintiff with duplicate printed forms of assignment of the account from Mrs. Thomas to the plaintiff. The

name of the plaintiff as assignee and the principal amount of the account were written in the forms by the agent of the company.

[9, 10] The foregoing facts furnish evidence of sufficient notice to the company that the plaintiff claimed title to the pass book and account represented thereby. It was not necessary to also formally notify the company at its branch office at Sacramento as a prerequisite to the right to maintain this action. The San Francisco office was the principal place of business of the corporation.

[11-15] A savings account being a chose in action may be assigned with or without a delivery of the pass book though such assignment is best evidence by a delivery of the pass book together with a formal written assignment of the account. 2 Zollman's Banks and Banking, 356, § 1205. That is exactly what was done in the present case. The assignment of the account carries with it, and confers upon the assignee, all the remedies which the assignor possessed, including the right to sue the bank for a misappropriation of the funds. Winchester v. Howard, 136 Cal. 432, 445, 64 P. 692, 69 P. 77, 89 Am.St.Rep. 153; 2 Zollman's Banks and Banking, 358, § 1205. The wrongful conversion of a pass book carries with it no title to the account represented thereby. The wrongful or fraudulent transfer of a pass book is void. 7 C.J. 863, sec. 900. The real owner may maintain an action independently of his possession of the pass book, to establish his title to the account represented thereby.

[16, 17] It is contended the plaintiff is not entitled to judgment in this case against the Pacific States Savings and Loan Company, for the reason that he failed to give a written notice of his proposed withdrawal of the funds six months in advance, as required by section 6.01 of the Building and Loan Association Act of California. Stats. 1931, p. 483 and amendments, 1 Deering's Gen.Laws of Calif. of 1937, p. 554, Act 986. It is true that the plaintiff did not furnish the company with written notice of the withdrawal of the fund six months in advance. That notice, however, was waived by the conduct of the company in issuing, upon a false affidavit, the duplicate pass book and paying to Mrs. Thomas the sum of $4,108.98 in full satisfaction of her entire claim. It is apparent that the claim of the plaintiff would not have been recognized or paid under any circumstances with or without notice. When the pass book and claim were presented for payment at the principal place of business of the company in San Francisco it was refused, not for lack of notice, but for lack of a formal executed assignment from Mrs. Thomas and her son Roy to the plaintiff. More than a year elapsed after that demand for payment was made before this action was commenced. Notice of the withdrawal of savings funds or the presenting of the pass book, which is ordinarily required, may be waived by the conduct of officers of a savings bank. 7 C.J. 867, sec. 912; Mallett v. Tunnicliffe, 102 Fla. 809, 136 So. 346, 137 So. 238, 80 A.L.R. 785, 793; Ruffino v. Queen Ins. Co., 138 Cal.App. 528, 535, 33 P.2d 26, 883. In 7 Corpus Juris, supra, it is said in that regard:

"Among the usual rules of savings banks is one whereby they reserve to themselves the right to require of the depositor notice for a specified period of his intention to withdraw his deposit before he may become entitled to a return of his money. It has been said that such provision is not for the benefit of the bank solely, but that it is intended also to protect the depositor against fraud or forgery. The bank, through its appropriate officers, may waive the right to the notice of withdrawal stipulated for in the by-laws; and if a bank refuses to pay on the ground that the money already has been paid to another, such notice need not be given."

In section 919 of the last-cited authority it is further said: "Such a rule [that the bank is exonerated from liability by payment of funds to the person presenting the bank book) cannot, however, relieve a bank from its obligations to exercise care and diligence to prevent payment to the wrong person; and where the bank has been negligent in this respect, a payment does not release it from liability to the true owner of the deposit even though the person receiving payment presented the pass book."

Regarding the waiver of the ordinary rule requiring the presenting of the pass book when funds are withdrawn from a savings bank, it is said in the Mallett Case, supra, 137 So. 240: "The rule as to the presentation of the bank book was one that could be waived. We hold that it was waived in this case when the bank refused Mrs. Mallett's requisition for withdrawal of her deposit, not on that ground," but on another ground.

[18, 19] While it is true that trover will not ordinarily lie to recover money deposited in a bank where the relationship between the plaintiff and defendant is that of debtor and creditor, we are of the opinion the findings of the court in this case that the appellant, Pacific States Savings and Loan Company, was guilty of conversion is amply sustained by the evidence, since by either tort or design the bank wrongfully exercised dominion and control over not only the genuine pass book, but the account which it represents, and by discounting and cashing the account for a sum less than its real value, to the profit of the company. But, regardless of the application of that principle, the real action is one to determine the ownership and the right to possession of the pass book and the account represented thereby, to the extent of the plaintiff's indebtedness for the security of which he held an equitable assignment of both the book and the account. That was the theory upon which the cause was tried, and that is the effect of the findings adopted and the judgment which was rendered, which are adequately supported by the pleadings. The plaintiff pleaded that he is the real party in interest of the property in question and that he is the owner and holder of the pass book and the account which is represented thereby, no part of which has been paid. That is sufficient to support the judgment under the circumstances of this case, even though it be held that there was not a technical conversion of the account on the part of the Pacific States Savings and Loan Company.

There is no merit in the separate appeal of the plaintiff from the judgment which was rendered May 5, 1937, following the order sustaining the demurrer of the defendant The Stockton Morris Plan Company to the complaint without leave to amend. That separate appeal is evidently waived since it is not discussed in the briefs on appeal. The complaint alleges no cause of action against that defendant. That company merely loaned the money represented by the promissory note, to Mrs. Thomas and her son Roy, and took their assignment of the pass book and savings account as collateral security for payment of the note. The note was fully paid to that company by Watson, and transferred with the collateral security to him at the request of Mary C. Thomas. There is nothing in the allegations of the complaint creating a liability against The Stockton Morris Company on account of the transaction. The demurrer was properly sustained and the judgment dismissing the action against that company was properly rendered.

The judgments are affirmed.

We concur: PULLEN, P. J.; ROSS, Justice pro tem.



30 Cal.App.2d 447

KAINS v. FIRST NAT. BANK OF POMONA.

Civ. 12048.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1939.

1. Evidence ⇐376(1)

To lay foundation for admission of account books, preliminary proof must show books of account kept in regular course of business of a character which is proper or customary to keep books, and that entries are original entries or permanent entries of transactions, and that person making them had personal knowledge of transactions or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in regular course of business.

2. Witnesses ⇐165

In action by attorney's assignor against administrator for services rendered decedent, attorney's testimony that books sought to be introduced were his account books of original and permanent entry kept in conduct of his professional business did not violate statute providing that party or assignor to action against decedent's estate cannot testify as to any matter of fact occurring before death of deceased. Code Civ. Proc. § 1880, subd. 3.

3. Evidence ⇐20(1)

District Court of Appeal takes judicial notice that it is customary for an attorney to keep books of account.

4. Evidence ⇐354(1)

Attorney's books of account kept in regular course of business, entries of which were made by bookkeeper from information received in regular course of business from attorney, were admissible as books of account.

5. Attorney and client ⇐141

Evidence that attorney represented client in divorce action involving large sum of money and which was on trial for more than a week sustained finding that reasonable value of attorney's services was $7,500.

6. Appeal and error ⇐1010(1)

A judgment will not be reversed for insufficiency of evidence if it is sustained by one or more counts of the complaint, which counts in turn are supported by substantial evidence.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by M. W. Kains against the First National Bank of Pomona, as administrator with the will annexed of the estate of Anna Powell Crookshank, deceased, to recover a sum of money allegedly to be due plaintiff's assignor from the estate. From an adverse judgment, defendant appeals.

Affirmed.

Nichols, Cooper & Hickson, of Pomona, Cannon & Callister, Jerry Giesler, and Meyer M. Willner, all of Los Angeles, and Ward Sullivan, of San Francisco, for appellant.

Ben S. Hunter, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover a sum of money alleged to be due plaintiff's assignor from the estate of defendant's decedent, defendant appeals.

These are the material facts:

Oliver O. Clark, plaintiff's assignor, had acted as attorney for Anna Powell Crookshank for a long period of time prior to her death. After her death, which occurred September 10, 1936, he filed with defendant, the administrator of her estate, a verified claim in the amount of $22,350, which claim was rejected and the present suit instituted thereon. The complaint in six counts alleged among other causes of action, one, upon a book account for the sum of $22,350 and another for the reasonable value of services rendered to deceased subsequent to December 26, 1935, in the value of $10,000. The trial court gave judgment for $12,350 in favor of plaintiff on the count alleging the book account and for $7,500 on the count for professional services rendered subsequent to December 26, 1935.

Defendant relies for reversal of the judgment on these propositions:

First: The trial court committed prejudicial error in admitting in evidence, in support of the count of the complaint alleging a book account, the account books of plaintiff's assignor, for the reason that a proper foundation for their admission was not laid by competent testimony.

Second: There is no substantial evidence to sustain the trial court's finding as to the reasonable value of the services rendered by plaintiff's assignor to decedent subsequent to December 26, 1935.

[1] The first proposition is untenable. The law is established that there must be preliminary proof of the following elements in order to lay the foundation for the admission of account books:

(1) The books in question are books of account.

(2) They were kept in the regular course of business.

(3) The business is of a character in which it is proper or customary to keep such books.

(4) The entries in such books are either original entries or the first permanent entries of the transactions.

(5) The person making such entries had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of business. Chan Kiu Sing v. Gordon, 171 Cal. 28, 31, 151 P. 657.

Applying the foregoing tests to the facts of the instant case we find:

(a) An examination of the books discloses that they are undoubtedly books of account. This fact supplies the first element.

[2] (b) Mr. Clark testified that the journal and ledger received in evidence were his account books of original and permanent entry kept in the conduct of his professional business. This testimony was properly admitted, as it is the established law of California that section 1880, subdivision 3, of

the Code of Civil Procedure does not prevent a party from giving testimony relative to: (1) the identity of the books produced, and (2) the fact that he kept books of original entries, which were made at the time of the transactions. Stuart v. Lord, 138 Cal. 672, 678, 72 P. 142. This testimony supplies the second and fourth elements.

[3] (c) This court takes judicial notice of the fact that it is proper and customary for an attorney at law to keep books of account. This supplies the third element.

(d) Laura B. Billerbeck, a bookkeeper employed by plaintiff's assignor, testified that she kept the books for Mr. Clark, that the entries therein made by her were truthful and correct, and that they were made within a few days after she received the information in the regular course of business from Mr. Clark. This evidence supplies the first, second, fourth, and fifth elements.

[4] It is therefore evident that the trial court properly received in evidence the account books of plaintiff's assignor which sustained its finding that there was due plaintiff on a book account the sum of $12,350.

[5] Defendant's second proposition is likewise untenable. The evidence disclosed that subsequent to December 26, 1935, plaintiff's assignor represented decedent in a divorce action in the superior court of Los Angeles county which involved a large sum of money and which was on trial for more than a week. The judge who presided at the trial of that action testified herein that the reasonable value of the services rendered by plaintiff's assignor was the sum of $10,000. This of itself was substantial evidence to sustain the trial court's finding that the reasonable value of the services rendered was $7,500.

[6] In view of the well-established rule that a judgment will not be reversed for insufficiency of the evidence if it is sustained by one or more counts of the complaint, which counts in turn are supported by substantial evidence, as in the present case, it is unnecessary for us to discuss the other errors urged by defendant as to other counts in the complaint.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: CRAIL, P, J.; WOOD, J.

NEUWALD v. BROCK, Director of Department of Agriculture, et al.

S. F. 16094.

Supreme Court of California.

Jan. 31, 1939.

Rehearing Denied March 2, 1939.

1. Officers ⇐69

The provision of the civil service act that "the tenure of every person holding a position under the provisions of this act" shall be during good behavior and providing grounds on which civil service employees may be removed is applicable to probationary employees as well as permanent employees. St.1929, p. 252, § 14; Const. art. 24, adopted in 1934.

2. Officers ⇐69

An employee in department of agriculture, even though he obtained his status as a probationer under the constitution rather than under the civil service act, was subject to provisions of act in so far as power to dismiss him was concerned. St.1913, p. 1041, § 9; St.1929, p. 252, § 14; Const. art. 24, adopted in 1934.

3. Statutes ⇐205, 207

Generally, courts must construe a legislative act as a whole and bring conflicting provisions therein in harmony with each other, if they can reasonably be so construed.

4. Statutes ⇐206

In construing an act effect should be given to each and all of its provisions.

5. Officers ⇐69

In so far as provisions of section of civil service act relating to dismissal of all civil service employees are inconsistent with provisions of section containing procedure for dismissal of a probationary employee, the latter control. St.1913, p. 1041, § 9; St. 1929, p. 252, § 14; Code Civ.Proc. § 1859; Const. art. 24, adopted in 1934.

6. Officers ⇐69

A probationary civil service employee is subject to dismissal by appointive power as provided by section of civil service act containing procedure for dismissal of probationary employees, and provisions of section relating to dismissal of all civil service employees generally do not apply to dismissal of a probationary employee. St.1913, p. 1041, § 9; St.1929, p. 252, § 14; Code Civ. Proc. § 1859; Const. art. 24, adopted in 1934.

7. Officers ⇐69

It may not be presumed that the legislature intended to place probationary civil service employees and regular civil service employees on an equality with respect to tenure without the clearest and most positive indication of such intention. St.1913, p. 1041, § 9; St.1929, p. 252, § 14; Const. art. 24, adopted in 1934.

8. Officers ⇐69

Appointing officer's written statement filed with civil service commission, stating in language of commission's rule that reason for dismissal of probationary employee in department of agriculture was that employee's conduct and capacity had not been satisfactory, was sufficient. St.1913, p. 1041, §§ 8, 9; Const. art. 24, adopted in 1934; Rules of the Civil Service Commission, rule 9.

9. Officers ⇐69

The reason for discharging a probationary civil service employee is within sound discretion of appointing power in absence of power given to civil service commission to pass on sufficiency of reason given. St.1913, p. 1041, §§ 8, 9; Const. art. 24, adopted in 1934.

10. Officers ⇐69

The statutory provision, that discharged probationary employees may by unanimous vote of civil service commission be restored to list of eligibles for certification to any position within their class other than the one from which they were rejected, indicates that appointing power's action in discharging a probationer is final and that commission may not question that power's reason for dismissal. St.1913, p. 1041, § 9; Const. art. 24, adopted in 1934.

11. Officers ⇐69

Trial court's finding, that dismissal of probationary employee in department of agriculture on ground that his conduct and capacity were not satisfactory to appointing power was invalid because reason stated is not included in section of civil service act relating to dismissal of employees generally, was erroneous, since section specially applying to dismissal of probationers was controlling. St.1913, p. 1041, § 9; St.1929, p. 252, § 14; Const. art. 24, adopted in 1934.

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Edward B. Neuwald against A. B. Brock, as Director of the Department of Agriculture of the State of California, and others, for a writ of mandamus. From a judgment for petitioner, respondents appeal.

Judgment reversed with directions.

Rehearing denied; HOUSER, J., dissenting.

For prior opinion, see 79 P.2d 397.

U. S. Webb, Atty. Gen., Frank English, Deputy Atty. Gen., and John J. Dailey, of San Francisco, for appellants.

Eustace Cullinan, Eustace Cullinan, Jr., and Herbert E. Wenig, all of San Francisco, for respondent.

CURTIS, Justice.

Petitioner on March 1, 1932, was appointed to the position of supervising investigator in the division of weights and measures in the department of agriculture of the state of California, by the then director of that department. His position under said appointment was temporary for the reason that at the time of his appointment there was no appropriate eligible list of persons for the class or grade to which said position belonged, or from which the state civil service commission could certify to the director of the department of agriculture, the names and addresses of three or any number of persons standing highest on the eligible list of the class or grade to which the position of supervising investigator in the department of weights and measures belonged. There had not been up to the time of petitioner's discharge any such eligible list certified by the civil service commission to said director of the department of agriculture for the position held by petitioner under his said appointment. Petitioner continued to hold said position from the date of his appointment to January 26, 1935, when the director of the department of agriculture purported to dismiss him from his said position by notifying him of his dismissal and by filing a written statement with the civil service commission giving the reason for his dismissal.

At the general election held on November 6, 1934, article 24 was adopted and added to the constitution of the state. By this new section of the constitution petitioner was given the status of a probationary appointee and as therein provided "such probationary term to commence on the effective date hereof of not less than two months nor more than eight months in the class or grade assigned as it [the commission] may fix".

On January 24, 1935, Director Brock dismissed petitioner by a written communication in which he stated as his reason for such dismissal that petitioner's conduct and capacity as such probationary employee had not been satisfactory to him. Whereupon petitioner instituted this action for the purpose of having himself reinstated in such position, for the recovery of his salary from the date of his purported dismissal, and for damages sustained by him by reason of the alleged illegal action of the director of the department of agriculture in dismissing him from said position. The trial court found in favor of the petitioner and awarded judgment for the reinstatement of petitioner in his former position and for the recovery of his salary during the period of his dismissal. The respondents have appealed from said judgment. In our discussion of the case we shall continue to refer to the parties hereto as petitioner and respondents respectively.

The trial court found that the reason stated by the director of agriculture for the dismissal of petitioner was not a valid or sufficient reason for the dismissal of a civil service employee holding a position under the state civil service act, and it was not one of the causes, grounds or reasons specified in section 14 of the state civil service act (Stats. 1913, pp. 1035, 1044, as amended Stats. 1929, p. 252) for which a person holding a position under the provisions of said act may be dismissed, and is not a reason or cause for such dismissal sufficient to satisfy the requirements of section 14 of said act or of rule 9 of the state civil service commission. The court further found that the statement of the director of his reason was untrue and was a pretext to frustrate and defeat the intent and purpose of the recently adopted article 24 of the constitution, and to prevent the petitioner from acquiring a permanent status. (Finding XIV.)

It is contended by petitioner that he could be dismissed from his probationary position by the appointing officer only for one or more of the reasons enumerated in section 14 of said act, as the trial court found, or if he could be dismissed for any other reason, that specified by Director Brock was nevertheless insufficient; while respondents contend that the dismissal of

petitioner from his probationary position is provided for and was controlled by section 9 of said act, and that the reason given by the director of agriculture for such dismissal was sufficient in that it complied with rule 9 of said civil service commission.

Section 14 of said act in so far as here material, reads as follows: "The tenure of every person holding a position under the provisions of this act shall be during good behavior, but any such person may be removed, demoted, suspended without pay or with reduced pay, transferred to another position in the same class, reprimanded, or restored to his position with such pay as may be equitable under a procedure in conformity with the provisions of this section which shall be set up by the commission in its rules and regulations, for any of the following causes: Incompetency, inefficiency, insubordination, dishonesty, intemperance, immorality, profanity, discourteous treatment of the public or other employees, improper political activity, wilful disobedience, violation of the provisions of this act or of the rules and regulations of the commission, or for any other failure of good behavior or any other act or acts which are incompatible with or inimical to the public service." The section further provides that written charges must be filed against the employee with the commission and a copy served upon the employee who is given the right to answer said charge and to have a hearing before the commission. The decision of the commission is final.

[1] Evidently the principal question presented on this appeal is whether said section 14 of the state civil service act applies to a person who like the petitioner held only a probationary position under the state civil service act at the time of his dismissal by the director of agriculture. It is obvious that the general language found in this section, namely, "the tenure of every person holding a position under the provisions of this act", is sufficiently broad to include persons holding probationary positions as well as perons holding permanent positions under the provisions of said act.

However, section 9 of said act (Stats. 1913, pp. 1035, 1041) provides that: "Subject to the special provisions in this act as to laborers, appointments shall be made to all positions that are not filled by promotion, reinstatement, transfer or reduction, under the provisions of this act and the rules in pursuance thereof, by the appointing power: Said appointing power shall notify the commission of any vacancy to be filled, stating the duties of the position. The commission shall then certify to the appointing power the names and addresses of the three persons standing highest on the eligible list for the class or grade to which the position belongs; but in case there be less than three on such eligible list, the commission shall certify the number thereon; and the appointing power shall fill the position by the appointment of one of the persons certified by the commission therefor. The term of eligibility shall be fixed for each eligible list at not less than one year. Appointments shall be made from the eligible list most nearly appropriate for the position to be filled, and a new list shall be created for a stated position or a group of positions only when there is no appropriate list existing from which appointment may be made. No person shall be appointed under any title not appropriate to the duties to be performed, and no person shall be assigned to perform the duties of any other position than that which he legally holds, except by consent of the commission. All appointments shall be for a probationary period to be fixed by the commission but not to exceed six months. Unless such appointee shall have been dismissed within such probationary period by the appointing power, for reasons stated in writing and filed with the commission, his appointment shall become permanent, subject to the provisions of this act as to removals, suspensions and changes. Discharged probationers may by unanimous vote of the commission be restored to the list of eligibles for certification to any position within their class other than the one from which they were rejected."

[2] As we have seen, petitioner's status as a probationer was not attained under the provisions of this section but he was "blanketed in" by the adoption of article 24 of the constitution. The fact that he attained his status as a probationer by virtue of said section of the constitution rather than under the provisions of the state civil service act did not in any manner affect the provisions of said act relative to his dismissal or retention. As a person holding a probationary position, in so far as the power to dismiss him was concerned, he was subject to the provisions of the act, no matter how he attained said position.

[3, 4] Section 9 of said act in express terms makes reference to persons holding

probationary positions under said act. This section provides for their appointment, the length of their term of service, assignment of their duties, their dismissal, and the conditions under which they are advanced to permanent positions. In fact, this section of the act is devoted almost in its entirety to appointments for probationary periods, and no other section of the act deals to any extent directly with this class of employees. It will be noted, in providing for the dismissal of a person holding a probationary position, that no reference whatever is made by section 9 to any provision or requirement contained in section 14 respecting dismissal of employees. In fact, no reference is made to section 14 of the act at all. The two sections provide two independent and entirely distinct methods for the dismissal of civil service employees. As a rule it is the duty of the courts to construe an act of the legislature as a whole and to bring conflicting provisions therein in harmony with each other if said sections can reasonably be so construed. In this connection it is suggested that in construing these two sections, we should hold that while the appointive power has the authority to discharge a person holding a probationary position as provided by section 9, he can do so only for the causes enumerated in section 14, and after a trial before the civil service commission. To so construe the provisions of the act would eliminate entirely the dismissal provisions of section 9 of the act, for if section 14 governs the method of dismissing a probationer by the appointive power, then those provisions of section 9 authorizing such dismissal are of no effect whatever. Such a construction would be contrary to the well established rule that in construing an act, effect should be given to each and all of its provisions. 23 Cal.Jur. Sec. 133, p. 758.

The question then arises as to which of these two sections of the act is to govern the manner or mode of dismissing a person holding a probationary position in the state civil service. Section 14 of the act is a general provision and if it be given the meaning contended for it by respondent applies to every person holding a position under said act, while section 9 of said act specially applies to the dismissal of a person holding a position for a probationary period. It must be conceded that there is a direct conflict between the terms of the two sections, one authorizing the appointive power to dismiss a probationer by merely notifying him of his dismissal and by filing with the commission a written statement of the reasons for such dismissal. No hearing is provided for by said section as to the truth of said reasons or as to their sufficiency. Under section 14 of the act, written charges must be filed, limited to certain causes named in said section. A hearing is had before the commission upon these charges, and a decision is rendered by the commission and entered in its minutes.

[5, 6] It is a statutory rule of construction that when a general and a special provision are inconsistent, the latter is paramount to the former and controls the general provision. Section 1859, Code Civ. Proc. Undoubtedly section 9 of the act contains a procedure for the dismissal of a person holding a probationary position under the civil service act, while the provisions of section 14 by its terms, if construed literally, apply generally to all persons holding civil service positions. According to the rule of construction just referred to, it must be held that in so far as the provisions of section 14 are inconsistent with the provisions of section 9, the latter control. We are, therefore, of the opinion that a person holding a position in the civil service of this state as a probationer is subject to dismissal by the appointive power as provided by section 9 of said act, and that the provisions of section 14 of the act have no application to the dismissal of a person holding such a position.

[7] We think this is the only legal construction which may be given to these two sections of the state civil service act. Such a conclusion is in harmony also with the general intent and purpose of the civil service system. Applicants are first appointed from a selected list. They are given a temporary tenure, usually not exceeding six months and are designated as probationers, during which time they are on trial or probation to determine whether they are in fact fitted to discharge the duties of the particular position to which they are assigned. If in the opinion of the appointive power, they are not so fitted, a summary method is provided for their discharge. If they are found to be capable of discharging efficiently the duties of their respective positions during the probationary period, they are then given permanent positions from which they may be discharged only after formal charges are preferred against them and a trial upon these

charges is had before the commission as provided by section 14 of said act. To place these two different classes of employees upon an equality as to the tenure of their respective positions would be to destroy one of the fundamental principles of the civil service system, and it is not to be presumed that the legislature intended to do so without the clearest and most positive indication of such intention.

To hold that section 14 of the act applies to probationers, as well as employees of the state holding permanent positions, because its general language hereinbefore quoted is sufficiently broad to include probationers, would bring within its terms not only the two classes of employees just mentioned, but even temporary employees and emergency employees. By section 1, subdivision 2 of the act (St.1913, p. 1035) the term, "position" or "positions" as used in said act, includes all offices and employment under state authority. Section 11 of the act provides for temporary appointments and section 12 (as amended by St. 1919, p. 1346) for emergency appointments. Appointees under either of these two sections of the act are employed under state authority, and are therefore holding positions under the provisions of said act, and if petitioner's contention is to be sustained, the tenure of their positions is protected by section 14 of the act to the same extent and in the same manner as those of permanent employees of the state holding full civil service rights. Surely it was not the intention to put all these different classes of employees upon a parity as to the tenure of their respective positions.

This conclusion is in harmony with the recent decision of this court in Kennedy v. State Personnel Board, 6 Cal.2d 340, 57 P.2d 486. Kennedy was attorney for the board of dental examiners at the time of the adoption of article 24 of the constitution in 1934. Prior to the adoption of said amendment, his position was exempt from the state civil service system. Upon the adoption of said system, he was, like the petitioner in this case, blanketed in as a probationer. He was dismissed on April 15, 1935, from his position by the dental board for reasons filed with the personnel board which had succeeded to the powers and duties of the civil service commission. Kennedy thereupon brought proceedings in mandate against the board to be restored to his position claiming that under the provisions of the constitutional amendment, and particularly by virtue of subdivision (e) of section 5 of said amendment he could not be summarily dismissed from his position by the board of dental examiners. This court, after quoting in full said subdivision (e) of section 5 of said article of the constitution, held that his claim was without merit, and in so doing gave its conclusion as follows [page 488]: "Under this provision, which seems clearly to apply to petitioner, who had served in his position for more than six months prior to the amendment, he might have become a permanent civil service employee upon uninterrupted service of his probationary term. It is equally clear that he was subject to dismissal during the period of such probationary term, for otherwise the term 'probationary' would be meaningless, and the distinction between civil service employees with permanent status and probationary employees with temporary status would be obliterated. Hence the only question is whether in fact petitioner served his probationary period and obtained permanent status, or was dismissed during such period. Under the amendment, the state personnel board was empowered to fix the period at not less than two nor more than eight months. On June 24, 1935, six months after the amendment went into effect, the board by resolution fixed the term at eight months. It follows that petitioner was dismissed within the period of his probation, and was not entitled to the protection accorded to a civil service employee."

To place the construction upon section 14 of the act contended for by the petitioner would be to disregard settled rules of statutory construction and would result in eliminating and obliterating the distinction between civil service employees with permanent status and probationary employees with temporary status, and would place these two distinct classes of employees upon an equality in so far as the permanency and security of their respective positions are protected by the state civil service act. As stated in the Kennedy Case, a construction which would place these two classes of employees upon such equality would render the term, "probationary" meaningless, as it would give the persons holding probationary positions all the rights and privileges accorded to civil service employees with permanent status.

[8] It was further claimed by petitioner that the reasons stated by Director

Brock for the dismissal of petitioner was not a valid reason for his dismissal and did not satisfy the requirements of rule 9 of the civil service commission. Rule 9 of the civil service commission in part reads as follows: "If during the probationary period, the conduct or capacity of the probationer has not been satisfactory to the appointing power, the probationer may be dismissed, in the discretion of the appointing power, and the appointing power shall inform the executive member of the commission in writing of the reason for such dismissal. Otherwise the retention of the probationer in the service shall be equivalent to his permanent appointment."

The reason stated by Director Brock for the dismissal of petitioner, and filed in writing by him with the commission, was that the conduct and capacity of petitioner as such probationary employee during such probationary period had "not been satisfactory to me the appointing power". As the reason stated by the director and filed with the commission followed the precise language of rule 9 of the civil service commission, we fail to see upon what grounds the petitioner bases his contention that the reason assigned by the director in his written statement filed with the commission failed to satisfy the requirements of rule 9 of the commission.

[9] It is further contended that the reason stated by the director for the dismissal of petitioner, namely, that the conduct or capacity of petitioner as a probationary employee during the probationary period had not been satisfactory to the appointing power, is not sufficient to meet the requirements of section 9 of the act. As we have seen, section 9 states that unless the appointee shall have been dismissed within the probationary period by the appointing power, for reasons stated in writing filed with the commission, his position shall become permanent. Nowhere in the act is there to be found any requirement as to what would constitute a sufficient reason for the dismissal of a probationary employee. The reason assigned for petitioner's dismissal was one provided for in rule 9 of the commission, and the commission is given power by section 8 of said act (St. 1913, p. 1041) to make rules governing the appointment, etc., and including the removal of applicants for positions under said act. The reason given by Director Brock is the identical reason given by the board of dental examiners for the dismissal of Kennedy, serving a probationary term as attorney for said board. While no point was made in that case as to the sufficiency of such reason for the employee's discharge, and it is not discussed in the opinion of the court, undoubtedly counsel for the employee was of the opinion that there was no merit in such a contention and for that reason did not raise the point. As we have seen, the commission was given power by the act to make rules governing removals of employees, and we have been cited to no authority holding that this rule is not within the power of the commission to adopt. As no power is given to the commission to pass upon the sufficiency of the reason given, it may well be held that the reason for the discharge of a person holding a probationary position is within the sound discretion of the appointing power. State v. Williams, 6 S.D. 119, 60 N.W. 410.

Petitioner has cited in his briefs a large number of authorities which he contends support a contrary rule. Many of these cases concerned the removal of duly elected and appointed officers for definite terms of office, and did not in any manner involve civil service employees. In still others, the employee sought to be discharged was a permanent employee under rules of strict civil service regulations, and therefore those cases are readily distinguishable from the instant action which involves a person holding simply a probationary position. Obviously these cases are not controlling in the present controversy.

[10] In the latter sentence found in section 9 of the act, a discharged probationary employee is given the right to have his case considered by the commission, not for the purpose of restoring him to his former position, but that his name may be restored to the eligible list by unanimous vote of the commission, for certification to any position within his class other than the one from which he had been rejected. This provision of the section limits the powers of the commission to the one subject stated therein, and clearly indicates that the action of the appointing power in discharging a probationary employee is final and that the commission is without the power to question the reasons stated by the appointing power for such dismissal. In this respect, section 9 differs from section 14 of the act, as by the terms of the latter section the commission is vested with power to hold a hearing and pass upon the reason given for the discharge of the employee.

If it should be held that under the last sentence of section 9 of the act, a probationary employee may be dismissed only for the causes enumerated in section 14 of the act and in accordance with the terms of said section 14, then the persons holding probationary positions are upon their dismissal given a distinct advantage over permanent civil service employees. For under section 9 of the act, a dismissed probationary employee, in accordance with the provisions of the last sentence of section 9, may be restored to the eligible list for certification to any position within his class other than the one from which he was rejected. No such provision is to be found in section 14 of the act, nor would we expect to find any such provision in the last-named section, which provides for the removal of an employee for incompetency, inefficiency, insubordination, dishonesty, and other like causes specified in section 14. These are serious offenses, and one guilty of any of them would hardly be deemed fit for public service in any capacity, but if we are to construe section 9 and section 14 together, as contended by petitioner, a probationary employee discharged for any of these causes may be restored to the eligible list and given a position in his class, while no such right is given to a permanent employee removed for like causes. Evidently, it was not the intent of the act to bring about any such unjust, unreasonable and unworkable situation. It seems clear that it was intended not to limit the appointing power in the dismissal of a probationary employee to those serious offenses specified in section 14, but on the other hand, when in the opinion of the appointing power a probationary employee has been found to be unsuited for, or a misfit, in the position to which he was assigned, he might be dismissed and the commission was given the right to restore him to the eligible list for certification to another position, but not to the one in which he had been found wanting and for that reason dismissed therefrom.

It will be noted that in finding XIV mentioned above, the court found that the reason given by Director Brock in his statement to the commission for petitioner's dismissal was untrue, and was a pretext adopted by him in order to frustrate petitioner from acquiring a permanent civil service status. Relying upon this finding of the court, the petitioner contends that his dismissal was actuated by improper motives on the part of the director and was therefore illegal and should be declared so by this court. Practically the same position was assumed by the petitioner in the case of Kennedy v. State Personnel Board, 6 Cal.2d 340, 344, 57 P.2d 486, supra. The board of dental examiners had stated as the reason for Kennedy's dismissal that his conduct and capacity had not been satisfactory to the appointing power. The same reason, as we have seen, was given by Director Brock for petitioner's dismissal. Kennedy contended that this reason was untrue as the board of dental examiners had at the time of his dismissal adopted and passed a resolution that his services were satisfactory, although they subsequently passed another resolution declaring that his services were unsatisfactory and charging him with improper political activity. In passing upon this contention of Kennedy, the court said: "The only remaining contention of petitioner which requires mention is that his dismissal was for improper motives. In this connection he alleges that his services were declared satisfactory by the dental board in a resolution adopted at the time of his dismissal, and that subsequently another resolution was passed charging him with unsatisfactory conduct and improper political activity. In our opinion, these allegations do not present an appropriate case for judicial review. There is no sufficient affirmative showing of fraud or bad faith on the part of the board, and it has been a recognized rule that an inquiry into extraneous facts to determine the possible improper motive of an executive or administrative board in dismissing an employee is not justified. See Livingstone v. MacGillivray, 1 Cal.2d 546, 36 P.2d 622; State v. Kennelly, 75 Conn. 704, 55 A. 555."

[11] From the foregoing we conclude that finding XIV of the trial court that the reason given by Director Brock for the dismissal of petitioner was not a valid or sufficient reason for his dismissal from his probationary position is not supported by the evidence. This finding is based entirely upon the assumption that section 14 of the State Civil Service Act controls the dismissal of persons holding probationary positions in the civil service of the state, and that the reason stated by Director Brock for the dismissal of petitioner was not one of the causes, grounds, or reasons specified in said section 14 of the act. In this assumption the trial court was in error as section 9 of said act, and not section

14, is applicable and controls the dismissal of a person holding a probationary position in the civil service of the state. In the dismissal of petitioner, Director Brock, the appointing power under which petitioner was holding his probationary position, complied with all the requirements of said section 9 of said act in order to legally dismiss petitioner from his said position. His dismissal was, therefore, legal, and the judgment of the trial court herein is reversed with directions to enter its judgment that the alternative writ heretofore issued be discharged and that a peremptory writ be denied.

We concur: WASTE, C. J.; LANGDON, J.; EDMONDS, J.; SHENK, J.

HOUSER, Justice (dissenting).

I dissent.

After a decision of the above-entitled appeal had been rendered by the First Division of the First District of the District Court of Appeal, a petition for hearing of the cause by this court was granted. Following further study of the facts and the law that appertain thereto, I am convinced of the correctness of the reasoning that was employed by the District Court of Appeal and the conclusion of law that was reached thereon, as expressed in the opinion and ruling which were prepared by Mr. Justice Tyler of that court. Accordingly, the said opinion is adopted by me as correctly expressing my views with reference to the question that is presented on the appeal. It is as follows, to-wit, 79 P.2d 397:

"The petitioner, who had for several years held a temporary position in the state department of agriculture and, by virtue of an amendment to the state Constitution, approved and adopted by the electors at the election held on November 6, 1934, was given the status of a probationary employee, was during the term of probation dismissed from his position by A. A. Brock, as director of said department, by whom or by whose predecessor some years before he had been appointed to said temporary position. He brought this action against said director, joining the members of the state personnel board (successor to the civil service commission), William Brownrigg, the executive officer thereof, and Ray L. Riley as state controller, seeking a peremptory writ of mandate, commanding the several named respondents (except Ray L. Riley as controller) to restore him to his position, and commanding the last named to pay him the amount of salary he would have earned but for his removal up to the time of reinstatement, if such should be decreed. In addition he sought general damages for his removal.

"Included in the petition were allegations to the effect that at no time prior to his dismissal did A. A. Brock, the director of the department, nor any other of his superiors express or indicate to petitioner any dissatisfaction with or criticism of his conduct or capacity as such employee; that on January 24, 1935, Brock dismissed him by a written communication, in which he stated as his reason therefor that petitioner's conduct or capacity as such probationary employee had not been satisfactory to him; that on January 18, 1935, Brock, by letters couched in similar terms, dismissed two other probationary employees of the department, and on January 26th four others, and that, as in his own case, no dissatisfaction with their services had been expressed by Brock to them or either of them. No actions have been brought in the other cases. It was further alleged that the reason so stated by Brock for the dismissal of petitioner was not a valid reason for the dismissal of a civil service employee and it was not one of the causes, grounds or reasons specified in section 14 of the Civil Service Act, Stats. 1913, p. 1035, as amended Stats.1929, pp. 251, 252, as the only causes for which a person holding a position under the provisions of the act might be dismissed; and that the reason so stated was untrue and was a pretext adopted by said Brock in order to frustrate and defeat the intent of article 24 of the state Constitution and to prevent petitioner from acquiring a permanent civil service status in said department; also that Brock, in dismissing petitioner, was actuated by personal motives and political considerations and by malice. In connection with his demand for payment of salary it was alleged in the petition that at all times the director of the department of agriculture had under his control, and there was in the state treasury, a sum of money available for that purpose sufficient to pay said salary.

"The defendants filed an answer, unverified, in which they denied that the reason given by Brock for the dismissal of petitioner was untrue, or that it was a pretext resorted to in order to defeat the intent of said article 24 of the Constitution or to prevent petitioner from acquiring a civil service status, or that he was actuated by personal motives, political considerations or

malice. The allegations as to the availability of funds under the control of the director of the department of agriculture for the payment of petitioner's demand were also denied; and it was affirmatively alleged that the dismissal was made under and pursuant to the terms of rule 9, sections 1 and 2, of the civil service commission (board of personnel).

"The court made and filed findings of fact and conclusions of law. These were in favor of the petitioner with the exception of the charge that the dismissal was malicious, upon which the court found in favor of the defendants. It ordered a peremptory writ of mandate to issue reinstating the petitioner and that he be paid the amount of salary he would have earned but for his dismissal.

"The defendants have taken this appeal, and in support thereof attack as not supported by the evidence certain of the court's findings, namely, findings XIV and XXI, and also the refusal of the court to find that the principal reason for the rule contained in section 9 of the Civil Service Act, St. 1913, p. 1041, requiring the reasons for dismissing a probationary employee to be stated in writing and filed with the commission, to be in accordance with their contention, and its refusal to find that in dismissing petitioner, Brock was not actuated by personal motives or political considerations.

"The following is the material part of finding XIV: 'The reason so stated by A. A. Brock, as director of the Department of Agriculture, for the dismissal of Edward B. Neuwald * * * is not a valid or sufficient reason for the dismissal of a civil service employee * * * holding a position under the State Civil Service Act, and is not one of the causes, grounds or reasons specified in section 14 of the State Civil Service Act as the only causes for which a person holding a position under the provisions of the State Civil Service Act may be dismissed, and is not a reason or cause for such dismissal sufficient to satisfy the requirements of section 14 of the State Civil Service Act or of rule 9 of the State Civil Service Commission. The reason so stated by A. A. Brock, as director of the Department of Agriculture * * * and his statement of his reason, was and is untrue, and was and is a pretext adopted by respondent A. A. Brock, acting as director of the Department of Agriculture, in order to frustrate and defeat the intent and purpose of art. 24 of the Constitution of California and to prevent Edward B. Neuwald from acquiring a permanent civil service status. * * * In so dismissing Edward B. Neuwald the respondent A. A. Brock acted in violation of law but he was not actuated by personal malice.'

"It is conceded on behalf of the petitioner that being in a probationary period of service (created under the provisions of article 24 of the Constitution and granted to temporary employees who had undergone no competitive examination, and consequently had never had any status on an eligible list) he could be dismissed by the appointing officer; but it is contended, first, that he could be dismissed only for one or more of the reasons enumerated in section 14 of the Civil Service Act, as the trial court found; and second, if he could be dismissed for any other reason, that specified by Brock was nevertheless insufficient.

"Section 14 of said act, so far as here material, reads as follows: 'The tenure of every person holding a position under the provisions of this act shall be during good behavior, but any such person may be removed, demoted, suspended without pay or with reduced pay, transferred to another position in the same class, reprimanded, or restored to his position with such pay as may be equitable under a procedure in conformity with the provisions of this section which shall be set up by the commission in its rules and regulations, for any of the following causes: incompetency, inefficiency, insubordination, dishonesty, intemperance, immorality, profanity, discourteous treatment of the public or other employees, improper political activity, wilful disobedience, violation of the provisions of this act or of the rules and regulations of the commission. * * *

"'The appointing power * * * may file charges against any person employed by the state under and subject to the provisions of this act, for dismissal or other corrective action for any or all of the causes hereinbefore provided and suspend such employee from service until such time as the charges against him shall have been heard or investigated by the commission and a decision rendered. Such charges must be made in writing and clearly state the specific act or acts of the employee constituting such cause * * *.' The section goes on to provide for service of the charges upon the employee, and a procedure for their hearing and determination by the commission or a commissioner or the chief examiner or any agent of the commission, and that the decision of the commission shall be final.

"It is quite obvious that in respect to the general language found in the section, namely, 'the tenure of every person holding a position under the provisions of this act', it applies not only to the employees who have passed from their probationary period to permanent tenure, but is also applicable to probationary employees. When the statute prescribes the grounds upon which civil service employees may be removed, they are removable for one of those specified grounds. Here the language of the section points out for what offenses an employee may be removed, and the mere fact that petitioner was unsatisfactory to Brock is not a sufficient reason under the act for his removal. The trial court took evidence as to the conduct of petitioner during the long period of his employment and found him at all times prior to his dismissal to be without fault. We are of the opinion that the evidence fully supports the judgment.

"It is further claimed that there is no evidence supporting finding XXI, that there were funds in the treasury to meet the demand. Petitioner pleaded the existence in the state treasury of a sum of money sufficient for that purpose. While an unverified answer was filed to the verified petition, the trial court found that there was a sufficient sum in the state treasury available for the purpose, which the judgment orders to be used for that purpose. Under these circumstances the burden was upon the state officers to prove there was no fund as they had special knowledge of the facts."



30 Cal.App.2d 641

MATTOS v. SUPERIOR COURT IN AND FOR MERCED COUNTY et al.

Civ. 6173.

District Court of Appeal, Third District, California.

Feb. 3, 1939.

Rehearing Denied March 4, 1939.

Hearing Denied by Supreme Court April 3, 1939.

1. Contempt ⇐67

Certiorari will lie to vacate an order adjudging an individual to be guilty of contempt where it appears from the record that the court lacked jurisdiction or exceeded its jurisdiction.

2. Contempt ⇐40

Contempt proceedings are criminal in their nature and should be strictly construed.

3. Contempt ⇐67

An order adjudging an accused person to be guilty of contempt should be annulled on certiorari when record fails to show that court had jurisdiction or when it affirmatively appears that it lacked jurisdiction of the party or proceeding.

4. Contempt ⇐54(4)

In proceeding for constructive or indirect contempt committed without the presence of the court, the affidavit constitutes the "complaint" and unless it contains statement of facts showing commission of contempt, court is without jurisdiction to pronounce judgment of contempt.

[Ed. Note.—For other definitions of "Complaint," see Words & Phrases.]

5. Injunction ⇐212

In action against co-operative dairymen's union, president of union who appeared by attorney in proceeding and opposed application for injunction was deemed to have had notice of injunction and was bound thereby as officer of association.

6. Injunction ⇐221, 228

Generally, one may be guilty of contempt who violates injunction, although he is not party to original action provided he is included in injunction as officer, employee or agent of party defendant when he has either actual or constructive notice thereof.

7. Injunction ⇐228

Officers of corporations or associations may be punished in contempt proceedings for violation of an injunction.

8. Injunction ⇐192

It is proper practice to enjoin not only the corporation or association against which the action is brought, but also its officers, employees and agents.

9. Injunction ⇐221

A person need not be actually served with injunction in order to be guilty of contempt for violation thereof, but when he appears personally in court or is represented by attorney at time injunction is heard and granted, he is deemed to have actual notice thereof.

10. Injunction ⇐230(2)

Affidavit for contempt against officer of association against which injunction was granted in action in which officer appeared by attorney was sufficient to allege that officer had notice of injunction without express recital of such fact, since court which tried original action would take judicial notice of fact that officer was present and participated in hearing at which injunction was granted.

11. Contempt ⇐54(4)

Although contempt is specific criminal offense and judgment of conviction thereof the same as judgment in criminal case, contempt matter is prosecuted in cause or proceeding out of which it arose and not as separate proceeding with a title of its own, and hence pendency of cause or proceeding or provisions of order which has been violated need not be recited in affidavit, since court takes judicial notice of such matters.

12. Appeal and error ⇐447

A court which granted injunction in action against dairymen's association was not without jurisdiction to proceed against officer of association for contempt for violation of injunction, on ground that injunction became functus officio pending appeal from judgment in separate suit in which association and others unsuccessfully challenged constitutionality of statute under which injunction was issued. St.1933, p. 97, § 221 et seq.

13. Injunction ⇐223(1)

Officer of dairymen's association against which injunction was issued prohibiting refusal to permit resistance of administration of tuberculin test for cattle could not be punished for contempt for failure to place cattle in stanchions of corral as veterinarian representing animal industry division of Department of Agriculture had directed. St. 1933, p. 97, § 221 et seq.

14. Injunction ⇐211

An injunction prohibiting refusal to permit administration of tuberculosis test for cattle did not imply that cattle owners were required to affirmatively perform acts to personally aid or assist officers in testing cattle. St.1933, p. 97, § 221 et seq.

15. Injunction ⇐219

An accused person may not be found guilty of contempt for violating terms of injunction which is uncertain or ambiguous with respect to its provisions.

16. Injunction ⇐230(2)

An affidavit charging officer of dairymen's association with contempt for violation of injunction against interference with testing of cattle under Bovine Tuberculosis Act conferred no jurisdiction on court to try or convict accused of contempt for violating provision of Agricultural Code making it unlawful to neglect to properly restrain bovine animals being tuberculin tested. St.1933, p. 97, § 221 et seq.; St.1935, p. 1611, § 228(b).

Proceeding by Anthony Mattos against the Superior Court of the state of California and for Merced County, and the Honorable H. S. Shaffer and another, judges thereof, to annul an order adjudging the petitioner guilty of contempt for violation of an injunction.

Order annulled and petitioner discharged.

J. L. Royle, of Fresno, for petitioner.

U. S. Webb, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and F. A. Silveira, Dist. Atty., of Merced, for respondents.

Mr. Justice THOMPSON delivered the opinion of the Court.

The petitioner seeks by means of certiorari to annul an order of the Superior Court of Merced County, adjudging him to be guilty of contempt for violating an injunction issued in a suit to restrain certain associations and individuals named as defendants therein from interfering with the employees and agents of the department of agriculture of California in testing cattle under the provisions of the Bovine Tuberculosis Act of California. Agricultural Code, div. 2, chap. 3, art. 3, St.1933, p. 97, § 221 et seq.

The suit which was then pending before that court is entitled "The People of the State of California, Plaintiff, v. Western Cooperative Dairymen's Union, etc., et al., Defendants". This petitioner was acting as president of the above-named Dairymen's Union. The injunction was issued October 25, 1938, restraining the defendants, their "officers, agents, members, attorneys, servants and employees" from directly or indirectly resisting, obstructing or refusing to permit the administration of the tuberculin test to dairy cattle by the agents of the department of agriculture

of California, pursuant to the provisions of article III, chapter 3 of division 2 of the Agricultural Code of California.

The injunction was not personally served on the petitioner, but at the time of the application therefor he was represented in court by the attorney for the dairymen's association, of which he was president.

The contempt proceeding was presented to the court upon the affidavit of George Smallbone, a veterinarian in the employ of the animal industry division of the department of agriculture of California, which affidavit avers that the accused, Anthony Mattos, was a member of the Western Cooperative Dairymen's Union, who was possessed of a herd of dairy cows in Merced county, and that on September 24, 1938, the affiant visited his premises and notified him of the intention of the department to make a tuberculin test of his cattle the following day and that affiant then directed him to "have said cattle properly confined in stanchions, or otherwise, so that the said test could be administered"; that affiant visited the premises of the petitioner the following day for the purpose of administering the tuberculin test to said cattle, but that the petitioner failed and neglected to place the cattle in stanchions as requested.

The affidavit fails to aver that the petitioner received either actual or constructive notice of the injunction. It was not averred, nor is it contended that Anthony Mattos performed any act to obstruct or interfere with the testing of the cattle by the authorities. The only thing complained of in the conduct of the petitioner, upon which the adjudication of contempt depends, was his failure to place his cattle in the stanchions of his corral as the veterinarian requested him to do.

This petitioner filed in the contempt proceedings a counteraffidavit. Oral evidence was also adduced. From that showing it appears without conflict that the petitioner is the president of the Western Cooperative Dairymen's Union; that he owns a herd of twenty-two dairy cattle in Merced county, which were confined in a corral eighty feet square, equipped with several stanchions; that he also possessed a barn containing other stanchions, but that the barn was then temporarily filled with walnuts during the harvesting season, leaving no available space therein for the cattle. The evidence in uncontradicted that the petitioner did nothing to interfere with affiant's free use and control of the petitioner's cattle, his corral, the stanchions therein or of his premises for the purpose of tuberculin testing the animals pursuant to the Bovine Tuberculosis Act. All that appears from the record is that the petitioner failed to personally confine his cattle in the stanchions as requested, although they were enclosed in the corral. Upon that evidence the court adjudged the petitioner to be guilty of contempt for wilfully violating the terms of the injunction.

[1-3] Certiorari will lie to vacate an order of court adjudging an individual to be guilty of contempt where it appears from the record that the court lacked jurisdiction or that it exceeded its jurisdiction. 5 Cal.Jur., p. 955, sec. 50. Contempt proceedings are criminal in their nature, and should be strictly construed. When the record fails to show that the court had jurisdiction or when it affirmatively appears that it lacked jurisdiction of the party or proceeding, upon certiorari the order adjudging an accused person to be guilty of contempt should be annulled. Frowley v. Superior Court, 158 Cal. 220, 110 P. 817; 5 Cal.Jur., p. 956, sec. 50.

[4] In cases of constructive or indirect contempt committed without the presence of the court, the affidavit constitutes the complaint and unless it contains a statement of facts which show the commission of contempt by the accused person the court is without jurisdiction to pronounce the judgment of contempt and such an order should be vacated on certiorari. Frowley v. Superior Court, supra.

[5] Although the petitioner was not a personal party to the action upon which the contempt proceeding was based, he was the president of the defendant Western Cooperative Dairymen's Union, and as such appeared by attorney in the proceeding and opposed the application for the injunction. He is, therefore, deemed to have had notice thereof and as such officer of the association he is bound thereby.

[6-9] The general rule is that one may be guilty of contempt who violates an injunction, although he is not a party to the original action, provided he is included in the injunction as an officer, employee or agent of a party defendant, when he has either actual or constructive notice thereof. Golden Gate Cons. Hydraulic Min. Co. v. Superior Court, 65 Cal. 187, 3 P.

628; In re Morford, 137 Cal.App. 662, 666, 31 P.2d 406; In re Simoniello, 6 Cal.App. 2d 425, 44 P.2d 402; 5 Cal.Jur., p. 916, sec. 21; 15 A.L.R. 387, note. Officers of corporations or associations may be punished in contempt proceedings for violation of an injunction. It is common practice and proper to enjoin not only the corporation or association, but also its officers, employees and agents. 5 Cal.Jur., p. 894, secs. 5 and 6. It is not necessary to actually serve an injunction upon an accused person in order to hold him guilty of contempt for the violation of its terms. When the accused person appears personally in court or is represented by an attorney at the time the injunction is heard and granted, he is deemed to have actual notice thereof. Transbay Const. Co. v. Superior Court, 12 Cal.App.2d 565, 569, 55 P.2d 1237; Romine v. Cralle, 83 Cal. 432, 23 P. 525.

[10, 11] In the present case it is not claimed the petitioner had no actual notice of the injunction. It is merely asserted the affidavit for contempt fails to aver that he had notice thereof. The reciting of that jurisdictional fact in the affidavit was not necessary. The court which tries the original action will take judicial notice of the fact that the accused person was present in court personally or by attorney and participated in the hearing at which the injunction was granted. In the present case the injunction recites that the order to show cause came on regularly for hearing in open court on September 19, 1938, and that "the defendants, and each of them", were represented by their attorney, J. L. Royle, Esq. In the case of Ex parte Ah Men, 77 Cal. 198, 19 P. 380, 11 Am.St. Rep. 263, it is said:

"Although contempt of court is a specific criminal offense, and a judgment of conviction thereof the same as a judgment in a criminal case (Ex parte Hollis, 59 Cal. [405], 408), the practice has always been to prosecute a matter of contempt in the cause or proceeding out of which it arose, and not as a separate proceeding, with a title of its own. It is therefore unnecessary in the affidavit to set forth the pendency of the cause or proceeding, or the provisions of the order which has been violated. The court takes judicial notice of those matters."

Likewise, in the case of Mitchell v. Superior Court, 163 Cal. 423, 125 P. 1061, it is said [page 1062]:

"This proceeding, although partaking of some of the characteristics of a prosecution for a criminal offense, is properly entitled in the style of the divorce proceeding itself, and not as a separate action. The court takes cognizance of the pendency of the main cause, and there is no necessity of setting forth in the affidavit that fact or 'the provisions of the order which has been violated.'"

The jurisdictional requirement that the accused person must have had notice of the injunction as a necessary prerequisite to an adjudication of contempt sufficiently appears in this record.

[12] There is no merit in the petitioner's contention that the injunction which is the basis of this contempt proceeding became functus officio pending the appeal from a judgment in another suit in which the Dairymen's Union, of which he is president, and other parties challenged the constitutionality of the California Bovine Tuberculosis Act. That was an entirely different action. It had no bearing on the validity of the injunction which forms the basis of the contempt proceeding. That suit was decided against this petitioner. The constitutionality of the act was upheld, and the judgment has been subsequently affirmed. Affonso Bros. v. Brock, Cal.App., 84 P.2d 515.

[13, 14] It affirmatively appears, however, that the petitioner did not violate the express language of the injunction which prohibits him "from in any manner, or at all, directly or indirectly, refusing to permit or allow, or resisting the administration of the tuberculin test". It does appear that the petitioner failed and neglected to assist the officer in making the tuberculin test of his cattle by placing them in the stanchions as requested. But the injunction contains no such requirement to aid or assist the officers in that manner, or at all. The cattle were confined within an enclosure eighty feet square, which contains ten or more stanchions in which the petitioner had a right to assume the officers could easily place the cattle for the purpose of making the tuberculin test. At least the injunction required no affirmative action on the part of the petitioner.

It is true that section 228 of the Agricultural Code, St.1935, p. 1611, provides that:

"It is unlawful to:

* * * * * * * *

"(b) Neglect or fail to properly secure and restrain any bovine animal to be tuberculin tested, or under tuberculin test, for examination, injection, observation, or other procedures pertaining to a tuberculin test."

It is elsewhere made a misdemeanor for the owners of cattle to obstruct or prevent officers from the performance of their duties in testing cattle or for wilful failure to aid and assist them, when so requested, in administering tuberculin tests to animals. The injunction, however, made no reference to the above-quoted section, nor may any reasonable construction of the language of that injunction be said to imply that the petitioner or any other owners of cattle were required to affirmatively perform acts to personally aid or assist the officers in testing the cattle. The petitioner is not charged with violating section 228 of the Agricultural Code. He was merely charged with violating the prohibitory language of the injunction. The injunction does not include the offense of which the petitioner was found guilty.

[15] An accused person may not be held guilty of contempt for violating the terms of an injunction which is uncertain or ambiguous with respect to its provisions. To hold one guilty of contempt for violating an injunction, its terms must be clear and specific. Kelly v. City of Cape Girardeau, 230 Mo.App. 137, 89 S.W.2d 693; McKelsey v. Lewis, N.Y., 3 Abb.N.C. 61; Tinkey v. Langdon, N.Y., 60 How.Prac. 180; 13 C.J. 15, sec. 17. In the Kelly Case, supra, it is said [page 696]:

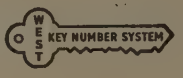
"It is an accepted legal proposition that for the decree of a court to suffice to be the basis of a charge of contempt by reason of a party's disobedience to or noncompliance with it, it must be specific and definite so as to inform the party to be bound thereby what he is to do or what he is not to do. Magel v. Gruetli Benevolent Society of St. Louis, 203 Mo.App. 335, 218 S.W. 704."

[16] Certainly one is not guilty of contempt who violates none of the acts prohibited by the injunction. The affidavit in this case conferred no jurisdiction on the court to try or convict the petitioner of contempt for violating section 228 of the Agricultural Code.

For the reason that it affirmatively appears without contradiction that the petitioner did not violate the terms of the injunction, the court exceeded its jurisdiction in finding him guilty of contempt and in punishing him therefor.

The order is annulled and the petitioner is discharged.

I concur: PULLEN, P. J.



30 Cal.App.2d 650

GOMES v. SUPERIOR COURT IN AND FOR MERCED COUNTY et al.

Civ. 6199.

District Court of Appeal, Third District, California.

Feb. 3, 1939.

1. Injunction ⇐230(3)

Evidence that member of dairymen's association would not permit testing of his cattle because association's veterinarian was not present was sufficient to support order finding member guilty of contempt for violation of injunction restraining association and members thereof from refusing to permit or resisting administration of tuberculin test. St.1933, p. 97, § 221 et seq.

2. Animals ⇐29

Although cattle owner is entitled to be present and participate in tuberculin testing of cattle, he may not refuse to permit test by officers and agents of Department of Agriculture at any reasonable time or place designated by them, merely for his own convenience. St.1933, p. 102, § 244.

3. Animals ⇐29

The officers of Department of Agriculture have a discretion in determining the time and place for tuberculin testing of cattle. St.1933, p. 102, § 244.

4. Animals ⇐29

Owners of cattle have duty to conform to reasonable rules and regulations of Department of Agriculture with respect to tuberculin testing of cattle. St.1933, p. 97, § 221 et seq.

5. Injunction ⇐230(1)

In proceeding against member of dairymen's association for violation of injunction restraining association and members

thereof from interfering with tuberculin testing of cattle, question whether member's refusal to permit testing of cattle on account of absence of veterinarian of association was in good faith was for trial court. St.1933, p. 97, § 221 et seq.

6. Injunction ⇐230(1)

A court which entered injunction restraining dairymen's association and members and employees thereof from interfering with testing of cattle under Bovine Tuberculosis Act had jurisdiction of member of association and subject matter in proceeding against member for contempt for violation of injunction. St.1933, p. 97, § 221 et seq.

Proceeding by Frank E. Gomes against the Superior Court of the state of California in and for Merced County and the Honorable H. S. Shaffer and another for a writ of review to annul an order adjudging the petitioner to be guilty of contempt of court for violation of an injunction.

Order affirmed.

James L. Royle and Bert M. Green, both of Fresno, for petitioner.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of review to annul an order of the Superior Court of Merced County, adjudging Frank E. Gomes, a member of the Western Cooperative Dairymen's Union, to be guilty of contempt of court for violation of an injunction restraining him from refusing to permit or allow or resisting the administration of the tuberculin test by the officers of the department of agriculture of California in testing his cattle for tuberculosis under division 2, chapter 3, article 3, of the Agricultural Code of California, St.1933, p. 97, § 221 et seq.

This proceeding is a companion case to the suit entitled Anthony Mattos, Petitioner, v. Superior Court of the State of California et al., Respondents, 86 P.2d 1056, in which an opinion of this court was this day filed, to which reference is here made for a more detailed statement of facts. Many of the issues of this case are determined in the Mattos Case.

It appears that the petitioner Frank E. Gomes is a member of the Western Cooperative Dairymen's Union and is possessed of a herd of dairy cattle in the county of Merced. A suit is pending in that county entitled "The People of the State of California, Plaintiff, v. Western Cooperative Dairymen's Union, etc., et al., Defendants". In that case an injunction was issued prohibiting the defendant Dairymen's Union, its officers, agents and members from "in any manner or at all, directly or indirectly, refusing to permit or allow, or resisting the administration of the tuberculin test" to their dairy cattle by the officers and agents of the department of agriculture of California, under the provisions of division 2, chapter 3, article 3 of the Agricultural Code.

The contempt proceeding against the petitioner was presented to the court upon the affidavit of George Smallbone, a veterinarian connected with the state department of agriculture. Oral testimony was also adduced at the hearing. The affidavit avers that the veterinarian visited the premises of the petitioner November 15, 1938, and informed the petitioner that he would call at his premises the following day at 11 o'clock a. m. for the purpose of administering the tuberculin test to his cattle under the provisions of the Agricultural Code and directed him to then have his cattle confined in stanchions for that purpose; that when he visited the premises of the petitioner on the last-mentioned date that "none of said cattle were confined in stanchions within said barn; that at said time said Gomes informed your affiant that he would not confine any of said cattle in said stanchions, nor would he permit the tuberculin testing of said cattle, or any of them". On oral examination, the veterinarian testified that the petitioner would not permit the testing of his cattle at that time for the reason that the Dairymen's Union had agreed to send its veterinarian to assist in the examination of the cattle; that they had not done so and that he was not then ready to proceed with the testing of the cattle. The petitioner himself testified that he then told the affiant "the veterinarian [of the Dairymen's Union] wasn't there so he didn't want to test his cows". The affiant further testified that the petitioner said "he wouldn't test, the veterinarian wasn't there, and he wouldn't test".

[1-6] Upon the foregoing evidence the court found that the petitioner violated the provisions of the injunction by resisting, obstructing and refusing to permit the test-

ing of his cattle pursuant to the provisions of the Agricultural Code. We are of the opinion the evidence supports the order of the court finding the petitioner guilty of contempt. In the case of Affonso Brothers v. Brock, 84 P.2d 515, we held that the owner of cattle was entitled to be present and participate in the testing of his cattle under the provisions of the Agricultural Code. This does not mean that an owner of cattle may refuse to permit the tuberculin testing of cattle by the officers and agents of the department of agriculture of California at any reasonable time or place designated by the officers of the department merely for his own convenience. The officers have a discretion in determining the time and place for such examination of cattle. Sec. 244, Agricultural Code, St. 1933, p. 102. It is the duty of the owners of cattle to conform to any reasonable rules and regulations of the department. The question of fact as to whether the petitioner was in good faith in refusing to permit the testing of his cattle on account of the absence of his veterinarian was solely for the determination of the trial court. The court had jurisdiction in the present case of the petitioner and the subject-matter. There is adequate evidence to support the finding that the petitioner violated the terms of the injunction. In that regard the facts of the present case are different from those determined in the Mattos Case.

The order is affirmed.

I concur: PULLEN, P. J.



30 Cal.App.2d 516

BRANNOCK et al. v. BROMLEY et al.

Civ. 5946.

District Court of Appeal, Third District, California.

Jan. 25, 1939.

Rehearing Denied Feb. 24, 1939.

Hearing Denied by Supreme Court March 23, 1939.

1. New trial ⇐105

In action for injuries wherein jury returned verdict for defendant, newly discovered evidence designed merely to impeach testimony of witness at trial would not justify court in granting plaintiff's motion for new trial. Code Civ.Proc. § 657, subd. 4.

2. New trial ⇐104(1)

Generally, newly discovered evidence as ground for new trial must not be cumulative. Code Civ.Proc. § 657, subd. 4.

3. New trial ⇐151

That newly discovered evidence as ground for new trial is cumulative is an affirmative proposition and, unless sufficiently appearing in moving papers, should be shown to be such by party opposing motion. Code Civ.Proc. § 657, subd. 4.

4. New trial ⇐104(1)

No presumption exists that newly discovered evidence offered as ground for new trial is cumulative but the mere presumption is to the contrary. Code Civ.Proc. § 657, subd. 4.

5. New trial ⇐99

Newly discovered evidence offered as ground for new trial must be material to the issues and so important as to satisfy the court that it may reasonably be inferred that verdict would have been different if evidence had been introduced. Code Civ. Proc. § 657, subd. 4.

6. New trial ⇐104(1)

New trial should not be refused for the reason that the evidence is cumulative, if the cumulation is sufficiently strong to render a different result probable. Code Civ. Proc. § 657, subd. 4.

7. Automobiles ⇐217(7)

A pedestrian's action in crossing highway diagonally and at point where there is no designated crosswalk is not "negligence per se" in absence of rule of statute or ordinance prohibiting "jay walking."

[Ed. Note.—For other definitions of "Jay Walking" and "Negligence Per Se," see Words & Phrases.]

8. Automobiles ⇐245(72)

Whether or not jay walking across highway would be negligence under given state of facts is fact question for jury.

9. Automobiles ⇐206

A pedestrian crossing highway in 25-mile per hour zone had the right in estimating time within which she might cross highway in safety to assume that approaching motorist would obey the law.

10. Appeal and error ⇐981
New trial ⇐104(2)

Question whether evidence offered as ground for new trial is cumulative becomes

matter of discretion when involved in doubt, and, in absence of manifest abuse of discretion, reviewing court will not interfere. Code Civ.Proc. § 657, subd. 4.

11. New trial 104(3)

In action for injuries received by pedestrian when struck by automobile while crossing highway 450 feet inside 25-mile per hour speed limit zone, granting plaintiff's motion for new trial after verdict for defendant, on ground of newly discovered evidence that speed of automobile was 45 miles per hour and that pedestrian started across highway when automobile was 300 feet from her, was not abuse of discretion, as against contention that evidence was merely cumulative. Code Civ.Proc. § 657, subd. 4.

12. New trial ⇐102(3)

"Diligence" required of movant for new trial on ground of newly discovered evidence is relative term incapable of definition and what would amount to due diligence under one state of facts may fall short of it under another state of facts. Code Civ.Proc. § 657, subd. 4.

[Ed. Note.—For other definitions of "Diligence," see Words & Phrases.]

13. Appeal and error ⇐981

The reviewing court should hesitate to disturb ruling granting motion for new trial on ground of newly discovered evidence on ground that due diligence to discover evidence has not been shown, where ruling has any substance whatever on which to rest. Code Civ.Proc. § 657, subd. 4.

14. Appeal and error ⇐981

Discretion of trial court in granting motion for new trial on ground of newly discovered evidence as against contention that diligence has not been exercised is presumed to have been properly exercised and presumption must be overcome by clear want of facts before order will be disturbed. Code Civ.Proc. § 657, subd. 4.

15. New trial ⇐150(4)

Affidavit attached to motion for new trial on ground of newly discovered evidence, that witness knew nothing of trial until it was over and that plaintiff discovered witness only after trial, notwithstanding diligent search before trial, was sufficient to show diligence in absence of showing of anything to put plaintiff on inquiry before trial.

16. New trial ⇐150(4)

On motion for new trial on ground of newly discovered evidence, there is no hard and fast rule that each step taken by movant in searching for witnesses must be detailed in a meticulous manner, although it is better practice to specifically enumerate such facts. Code Civ.Proc. § 657, subd. 4.

17. New trial ⇐150(4)

On motion for new trial on ground of newly discovered evidence, details of search for witnesses is more essential where showing is made that movant was charged with knowledge of existence of proposed evidence and its source before trial. Code Civ.Proc. § 657, subd. 4.

18. Appeal and error ⇐843(2)

On appeal from order granting plaintiff's motion for new trial on ground of newly discovered evidence in action for injuries, question of plaintiff's contributory negligence would not be determined, where order was affirmed and newly discovered evidence might disclose further proof of contributory negligence.

19. Automobiles ⇐217(3)

The statutory duty of pedestrian to yield right of way to motor vehicles while crossing street other than at regular crosswalk may call for higher degree of care on part of pedestrian than would be applied to pedestrian crossing at regular crosswalk. St. 1935, p. 188, § 562.

20. Automobiles ⇐245(72)

Question whether pedestrian exercised required degree of care crossing street at place other than regular crosswalk is for jury, unless pedestrian can be said to have been negligent as matter of law. St.1935, p. 188, § 562.

21. Automobiles ⇐217(6)

A person is not guilty of contributory negligence merely because he attempts to cross the street when an automobile is approaching. St.1935, p. 188, § 562.

22. Automobiles ⇐206

Pedestrian crossing street has right to expect that persons operating automobiles will operate them in manner and at speed customary at such particular place. St. 1935, p. 188, § 562.

23. Automobiles ⇐217(6)

Whether pedestrian is guilty of contributory negligence in attempting to cross

street in front of approaching automobile depends on all circumstances under which he acts. St.1935, p. 188, § 562.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Nellie Brannock and husband against William Bromley and another for injuries received when the named plaintiff was struck by an automobile, wherein the jury returned a verdict in favor of the defendants. From an order granting plaintiffs' motion for new trial, the defendants appeal.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

Rutherford, Rutherford & Rutherford, of Napa, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action brought by Nellie Brannock and her husband, Weldon Brannock, arising out of an automobile accident in which the wife, a pedestrian, was admittedly struck by an automobile driven by defendant, Tirzah Bromley, and belonging to defendant Bromley. The jury brought in a verdict somewhat unusual in form, which reads as follows:

"We, the jury in the above entitled cause, find for the defendants, William Bromley and Tirzah Bromley, and against the plaintiffs, Nellie Bromley and Weldon Bromley, her husband.

"We, the jury, find that both the plaintiffs and defendants were guilty of negligence."

This accident occurred at 7 p. m. on the state highway in the unincorporated town of Yountville, on August 11, 1936. The highway runs northwesterly and northerly through said town. One street crosses the highway immediately north of the twenty-five mile speed sign. Mrs. Brannock had been visiting a friend who lived on the west side of the highway, and returning home, it was necessary for her to cross the highway at a point opposite said home. She testified that she walked to the edge of the highway, looked both ways, and first saw defendant's car approaching at a distance of about 150 to 200 yards away. She started to cross the highway in a diagonal direction, and was struck by said automobile, receiving personal injuries for which she now seeks compensation. There was testimony to the effect that defendants first saw Mrs. Brannock just as they passed the twenty-five mile limit sign, and the point where she was struck is some 450 feet beyond said sign. There was evidence to the effect that there were skid or tire marks ninety feet in length and leading to the point of impact, from which it might be inferred that defendants were exceeding the legal speed limit.

[1] Plaintiffs moved for a new trial upon the ground of newly discovered evidence, and in support of said motion they filed three affidavits, one by Weldon Brannock, one by Maude Henninger, and one by James B. Bailey. A reading of the first two affidavits mentioned above indicates, with one exception, that they are designed merely to impeach testimony of witnesses given at the trial. Such evidence is not of a character which would justify the court in granting a new trial. 20 Cal.Jur., p. 98, sec. 63. The other affidavit by Bailey, however, is in an entirely different category, and what we have to say upon the question of newly discovered evidence will be based entirely upon the latter affidavit. In his affidavit the witness Bailey states as follows: "That he is a resident of the Town of Yountville; that he knows Mrs. Maude Henninger and her husband, Roy Douglas, and Mr. and Mrs. Brannock and knew them on August 11, 1936; that he was on the Southern Pacific railway tracks south of the Henninger place, between 7:00 and 7:30 p. m., on that date when Mrs. Brannock was injured; that he was west of the highway and about 300 feet from the bridge; that he saw the automobile involved in the accident traveling along the highway near the speed-limit sign, traveling at a high rate of speed, not less than forty-five miles per hour; that no horn was blown at the sign, or any other place; that Mrs. Brannock started across the highway when the automobile was at, or near such sign, when the automobile was at least 300 feet south of her; that Mrs. Brannock was walking rapidly, but not running; that the automobile gained on her very rapidly and when about 100 feet south of her, the car slowed down very rapidly, the tires, or brakes making a loud noise; the car swerved almost off the highway to the right, the left side of the car being just on the pavement going towards the large pole at the southeast end of the bridge, swinging again to the left just missing the pole and hitting Mrs.

Brannock when she was near the concrete wall of the bridge; such car running then across the bridge; it appearing to affiant that Mrs. Brannock was clear across the concrete pavement when the car ran over her."

When the word "plaintiff" is used in this opinion, reference is made to Nellie Brannock.

[2-11] It is contended by appellants that the newly discovered evidence is cumulative, and that, under such evidence, there is no reasonable probability that the result of a retrial would be different. In this connection appellants rely upon the case of Smith v. Hale, 3 Cal.App.2d 277, 39 P.2d 445, but we find nothing in that case relating to the question of cumulative evidence. "By the Act of 1851, one of the grounds on which a motion for a new trial could be made was, 'newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial'. The subdivision of the section has never been amended, and the corresponding provision of the Code of Civil Procedure is in the same language." Hayne on New Trial & Appeal, Revised Ed., Chap. XII, par. 87, on page 408. The code section mentioned is 657, subdivision 4. An early case states the rule pertaining to cumulative evidence as follows: "The general rule undoubtedly is that the newly-discovered evidence must not be cumulative. If it be of that character it will not ordinarily aid the moving party. That it is cumulative is, however, an affirmative proposition, and, unless sufficiently appearing in the moving papers, ought to be shown to be such by the party opposing the motion. There is no presumption that it is cumulative—the mere presumption is rather to the contrary." Hobler v. Cole, 49 Cal. 250, 251. The newly discovered evidence must be material to the issues, and of so important a character as to satisfy the court that it may reasonably be inferred the verdict would have been different if the newly discovered evidence had been introduced at the former trial. Stoakes v. Monroe, 36 Cal. 383. But a new trial should not be refused for the reason that the evidence is cumulative, if the cumulation is sufficiently strong to render a different result probable. 20 Cal.Jur., p. 96, sec. 62. A careful consideration of the proffered evidence indicates that the position of appellants in this respect cannot be sustained. There was no direct evidence in the plaintiff's case as to the speed of the automobile. The new evidence shows the speed, at the point of impact, to have been forty-five miles per hour, in a 25-mile zone. This bears directly upon the matter of contributory negligence of plaintiff. It also tends to prove negligence on the part of defendants. If the jury should find that the car was actually going forty-five miles per hour when plaintiff was struck, and if, at the lawful speed of twenty-five miles per hour, they might reasonably find that she could have crossed in safety, it must be conceded that such evidence is not cumulative, and that it might have affected the result of the trial. The driver of the car testified that she first saw plaintiff when the latter started to cross, just as her car passed the "speed-sign", which was some 450 feet from the point where the accident occurred. The lawful speed, after the sign was passed, was twenty-five miles an hour. Assuming that the brakes of the car complied with the law, the automobile, moving at twenty-five miles an hour, could have been brought to a stop within fifty-eight feet. Vehicle Code, sec. 670, St.1935, p. 222. Although plaintiff may have crossed the highway diagonally and at a point where there was no designated crosswalk, "there is no rule of statute or ordinance which prohibits 'jay walking,' and it therefore is not negligence per se. Whether or not it would be negligence under a given state of facts is a question of fact for the jury." Gett v. P. G. & E. Co., 192 Cal. 621, 221 P. 376, 378. Here, the jury might reasonably have found that plaintiff had ample time to cross the road in safety, providing that the speed of the automobile did not exceed the lawful speed of twenty-five miles per hour, and plaintiff had the right, in estimating the time within which she might cross in safety, to assume that defendant would obey the law. Collom v. Bloch, 70 Cal.App. 33, 232 P. 486. Furthermore, affiant Bailey would be the only disinterested eye-witness to the entire episode. We say "disinterested" in the sense that the record before us discloses him to be such. This is another fact which may have moved the trial court to exercise its discretion in the granting of the motion. Concluding the discussion of this phase of the case, we refer to Kenezleber v. Wahl, 92 Cal. 202–208, 28 P. 225, 226, where it is held "that, where the question as to whether the evidence is cumulative is involved in doubt, it then becomes a matter of discretion, and, unless there has been a manifest abuse of it by the trial court, this

court will not interfere". A reading of all the briefs in the case would, in any event, justify the conclusion that here the question is certainly "in doubt".

[12-17] It is also contended that the showing of diligence is insufficient. " 'Diligence' is a relative term incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed. * * * The materiality of this evidence, as above suggested, is not denied, but appellant claims that with any sort of diligence defendant could have informed himself of it in time to produce it at the trial. But it does not appear that there was anything to put defendant upon inquiry for any such evidence. The witness, it seems, said nothing about the circumstance, and very likely thought little, if anything, of it. She lived, at the time, it is true, in the same house with defendant but he was confined to his room, and the next day or so was taken to San Francisco, where it appears he has since resided, while the witness, we infer from the record, has continued to have her home in Monterey. The lower court might well say, under all the circumstances, that there was not an absence of diligence on the part of defendant; and having found against him upon the issue to which the newly-discovered evidence is addressed, have felt constrained, in view of the conflict as to the value of the services rendered, to grant the motion for a new trial." Heintz v. Cooper, 104 Cal. 668, 669, 670, 38 P. 511, 512.

In the instant case the affidavit of Bailey alleges that he knew nothing about the trial until it was over—April 27th; that he did not talk to plaintiffs or their attorney until that time, when he called upon one of them to "learn why he had lost his case". There is also, in the affidavit by plaintiff Weldon Brannock, an allegation "that prior to the trial, affiant looked long and diligently for, and had others seeking, witnesses who might have seen the automobile of defendants traveling along the highway through Yountville, and could not find such persons apparently, and it so appeared to affiant, no other person than Nellie Brannock saw the automobile before the accident. It was not until Tuesday, April 27, 1937, after the case had been decided against plaintiffs, that affiant was informed by James B. Bailey that he had actually seen the accident and the automobile while being driven along the highway. That his affidavit is attached hereto. That plaintiff has heard of other persons who have said they saw the automobile involved in the accident, while it was traveling along the highway in Yountville, but has been unable to learn their names or places of residence, although plaintiffs have used great diligence over a long period of time to find them." As stated in the Heintz Case above, "It does not appear that there is anything to put defendant on inquiry for such evidence." While the affidavit of Weldon B. Brannock contains conclusions, we believe that, read with the affidavit of Bailey, there was a sufficient showing of diligence under the circumstances. There is no hard and fast rule to the effect that each step taken by the moving party in searching for witnesses must be detailed in a meticulous manner, though admittedly it is the better practice to specifically enumerate such facts. Such details would no doubt be more essential where a showing was made to the effect that the moving party would be charged with some knowledge of the existence of the proposed evidence and its source. He would then be put upon notice, and it would be incumbent upon him to be more explicit in detailing a search for such witness. As stated by Hayne in his work on New Trial and Appeal, revised edition, page 432, section 92: "What would amount to diligence, or due diligence, in one case, might fall short, perhaps far short, in another."

[18] The contention is made by appellants that respondent was in law, guilty of contributory negligence. It is unnecessary to pass upon that question on this appeal. If the newly discovered evidence would disclose further proof of contributory negligence (and we have so held), the case must be retried upon additional facts bearing upon this issue, and a determination of the point on the record of the first trial would be useless and futile. We might add, however, that we have examined the cases

cited by appellant upon this point,—particularly those in their "Supplementary Memorandum". In each of them the pedestrian is held to have been negligent as a matter of law. We believe, however, that the factual structure of each of them can be readily distinguished from the case before us. In the case of Gaston v. Tsuruda, 5 Cal.App.2d 639, 43 P.2d 355, the pedestrian watched the approaching automobile and did not yield the right of way by stopping when she could have been safe, but continued forward, and actually walked into the side of the moving truck while its driver was vainly trying to avoid her. In the case of Gibb v. Cleave, 12 Cal.App.2d 468, 55 P.2d 938, the court held the pedestrian to have been guilty in law of contributory negligence upon the following ground [page 939]: "The only rational analysis of the circumstances is that plaintiff became confused because of his intoxication and walked directly into a path of danger without taking any precautions for his own safety." In the case of Francis v. Riddle, 15 Cal.App.2d 282, 59 P.2d 532, the court held the pedestrian to have been negligent in law because "she did not remember that she looked for approaching cars in the directions from which they would come, but only that she gained the impression she had plenty of time to get across the street. Had she looked, she must have seen defendant's car approaching a few feet away, for she had taken only a step or two from her position of safety when she was struck." [Page 534.]

[19, 20] The duty of a pedestrian to "yield" the right of way while crossing a street other than at a regular crosswalk, as imposed by section 562 of the Vehicle Code, St.1935, p. 188, may call for a higher degree of care upon the part of such pedestrian than would be applied to one crossing at a regular crosswalk, but the question as to whether or not such care was exercised in a given case is one for the jury, unless he is so careless that it can be said he is negligent as a matter of law.

[21-23] The rule applicable to the facts of this case is found in Flach v. Fikes, 204 Cal. 329, 267 P. 1079, where it is said [page 1080]: "It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street when an automobile is approaching. If that were so, he never could attempt to cross a street upon which automobiles are being operated, and consequently, where there is almost always an approaching machine. He has a right to expect that those operating automobiles upon a public street will operate them in the manner and at the speed customary at the particular place. Whether such a person is guilty of contributory negligence in attempting to cross a street in front of an approaching automobile would depend upon all the circumstances under which he acted. * * * He may well have reasoned that defendant was traveling at a lawful rate of speed and therefore he could cross the street before defendant's automobile would reach the point in the street over which deceased would be required to pass in crossing the same. Had defendant been traveling at a lawful rate of speed, decedent might have crossed the street in safety. Under the circumstances, whether he acted negligently or not was for the trial court, and its findings as to his negligence will not be disturbed on appeal."

We are unable to say that the trial court abused its discretion; accordingly, the order granting the motion for new trial is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



30 Cal.App.2d 653

GALLO et al. v. BOYLE MFG. CO., Inc.

Civ. 6107.

District Court of Appeal, Third District, California.

Feb. 3, 1939.

1. Appeal and error ⇐790(1)
Venue ⇐77

A defendant filing answer and cross-complaint subsequent to appeal from order denying change of venue did not thereby waive right to change of venue, and issue on appeal did not become moot, where answer and cross-complaint were necessary to protect defendant's rights. Code Civ.Proc. §§ 395, 442, 963; Const. art. 12, § 16.

2. Appeal and error ⇐801(4)

Where motion to dismiss appeal was not presented in the alternative, reviewing court denying motion would not determine the appeal on its merits.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by E. Gallo and J. Gallo, copartners doing business under the firm name and style of E. & J. Gallo Winery, against the Boyle Manufacturing Company, Inc., for damages for a breach of the warranty of sale of certain casks containing wine. From an order denying a motion for change of venue, the defendant appeals.

Motion to dismiss appeal denied.

Gibson, Dunn & Crutcher, of Los Angeles, and Hawkins, Hawkins & Cardozo and J. W. Hawkins, all of Modesto (Ira C. Powers, of Los Angeles, of counsel), for appellant.

Edward T. Taylor, of Modesto, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has moved to dismiss the appeal in this case on the ground that the issues have become moot. The plaintiffs filed suit in Stanislaus county for damages for a breach of the warranty of sale of certain casks containing wine, "f. o. b. Modesto". The defendant is a corporation. It moved for a change of venue to Los Angeles county, which is its principal place of business. At the same time a demurrer to the complaint was filed. The motion was made under the provisions of section 395 of the Code of Civil Procedure and denied, pursuant to article 12, section 16, of the Constitution, on the theory that the contract was to be performed in Stanislaus county. The Constitution provides in that regard: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

At the time the motion for a change of venue was denied the defendant's demurrer to the complaint was also overruled. From the order denying the change of venue, the defendant promptly appealed. Subsequent to the perfecting of the appeal, to preserve its legal rights the defendant filed an answer and cross-complaint. Pending the appeal, at the time the cause was set for trial, by leave of court first obtained, the defendant filed an amended answer and cross-complaint.

[1] On this motion to dismiss the appeal it is contended the appellant waived its right to a change of place of trial to Los Angeles county by amending its answer and cross-complaint after the appeal was perfected, and that the issue to be determined on appeal thereby became moot. There is no merit in this motion to dismiss the appeal. Goss v. Brown, 64 Cal.App. 381, 221 P. 683. In the case cited, in which a hearing was denied by the Supreme Court, under similar circumstances, it was held the subsequent filing of an answer and cross-complaint does not constitute a waiver of the right to change the place of trial. Quoting with approval from the case of Pittman v. Carstenbrook, 11 Cal. App. 224, 104 P. 699, it is said in the Goss Case: "'It would be a very harsh rule to hold that by following the statute the defendant waives a privilege conferred by the statute. * * * It is true that the privilege (to have the place of trial changed) may be waived impliedly as well as expressly, but in order to do so there must be some act of the moving party tending to show his intent to invoke the jurisdiction of the court of first instance for the trial of questions of the fact or of law. The filing of the amended demurrer does not indicate this intention, although it might just as well have been filed after the cause was transferred.' In the case at bar the defendant, in order to protect his rights under the cross-complaint, was required to either file his cross-complaint with his answer or to trust to the discretion of the trial court to permit him to file it after the cause had been transferred."

The preceding declaration of principle is determinative of the issue on this motion to dismiss the appeal.

In the present case after the motion for a change of venue had been denied, and the demurrer was overruled, it became necessary for the defendant, in order to protect its lawful rights, to answer the complaint. It is evident that it did not thereby intend to waive its claim to the right of a change of place of trial to the county in which its principal place of business was conducted. Section 442 of the Code of Civil Procedure authorizes a defendant to file a cross-complaint at the time of answering the complaint. If he seeks to file a cross-complaint later than that time he runs the risk of having that privilege denied, for the same section declares that he may file a cross-complaint

subsequent to the filing of his answer, only by permission of court.

It would be a harsh rule to imply a waiver of the asserted right to a change of venue, merely because a defendant followed the statutory requirement of protecting his right to a defense on the merits by filing an answer and a cross-complaint, pending the determination of his appeal from an order denying the transfer of the case. Such a construction of the law would amount to a virtual denial of the right of appeal from an order wrongfully refusing to change the place of trial, although section 963 of the Code of Civil Procedure specifically grants that privilege.

We therefore conclude the mere amending of an answer and cross-complaint, under the circumstances of this case, does not constitute a waiver of the right to a determination of a pending appeal from a previous order denying a motion for change of venue.

[2] Since the motion to dismiss the appeal in this case is not presented in the alternative we may not be permitted to here determine the appeal on its merits.

The motion to dismiss the appeal is denied.

I concur: PULLEN, P. J.



WEBER v. SANTA BARBARA COUNTY.*

Civ. 10939.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1939.

Hearing Granted by Supreme Court March 27, 1939.

1. Taxation ⇐543(6)

A complaint not alleging a prior demand on the county was insufficient to state a cause of action for the recovery of taxes paid under protest. Pol.Code, §§ 3819, 4075.

2. Taxation ⇐543(2)

A statute requiring that claim against county be presented to board of supervisors before institution of suit thereon requires presentation of claim for taxes paid under protest before institution of suit thereon, notwithstanding statute authorizing suit to recover such taxes. Pol.Code, §§ 3819, 4075.

3. Constitutional law ⇐70(1)

A court cannot, under guise of judicial construction, declare that statute providing that "no suit shall be filed" unless claim has been first presented, permits filing of "some suits" without prior claim, notwithstanding that such procedure seems more reasonable to court. Pol.Code, § 4075.

4. Statutes ⇐174, 190

Plain words used in statute in their common and accepted meaning do not need judicial construction, and when the express declarations of the legislative body are nullified by what is termed "interpretation," it becomes "judicial legislation" rather than "judicial construction."

[Ed. Note.—For other definitions of "Judicial Legislation," see Words & Phrases.]

Appeal from Superior Court, Santa Barbara County; Albert F. Ross, Judge.

Suit to recover taxes paid under protest by Hilda Olsen Boldt Weber against Santa Barbara County. From the judgment the plaintiff appeals.

Affirmed.

Griffith & Thornburgh, of Santa Barbara, for appellant.

Percy C. Heckendorf, Dist. Atty., and Rigmor O. Carlsen, Deputy Dist. Atty., both of Santa Barbara, for respondent.

Stater & Dawson, John H. Dawson, Holbrook & Tarr, W. Sumner Holbrook, Jr., Miller, Chevalier, Peeler & Wilson, and Melvin D. Wilson, all of Los Angeles, amici curiae in support of appellant.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, all of Los Angeles, amici curiae in support of respondent.

NOURSE, Presiding Justice.

[1] Plaintiff sued to recover taxes paid under protest. The county's demurrer was sustained without leave to amend. In affirming the judgment we confine our reasons to the single ground that the complaint fails to state a cause of action because it does not allege a prior demand upon the county.

*For subsequent opinion see 98 P.2d 492.

Section 3819 of the Political Code provides the method for payment of taxes under protest and authorizes a suit against the county to recover. Section 4075 of the Political Code, as amended in 1931, St. 1931, p. 197, provides that *"All claims* against any county * * * whether such claim be founded upon contract, express or implied, or upon any act or omission of the county or any officer or employee thereof, * * * *shall be presented* to the board of supervisors as herein provided *before any suit may be brought* on any such claim, *and no suit shall be brought* on any such claim until said claim has been presented as herein provided and rejected in whole or in part. * * *" (Italics ours.)

By this amendment the legislature has changed the rule of Birch v. County of Orange, 186 Cal. 736, 200 P. 647, and similar cases decided before the amendment to section 4075 and when no statute made the presentation of a demand a condition precedent to suit filed. The amended section is just as sweeping and just as explicit as the provisions of section 24 of the old County Government Act, which was construed in McCann v. Sierra County, 7 Cal. 121, and of the provisions of the Los Angeles city charter construed in Farmers' & Merchants' Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795. The code section involved in the McCann Case read: "no person shall sue a county in any case, for any demand, unless he or she shall first present his or her claim to the board * * *." St.1855, p. 56, § 24. The court simply held that "in any case" meant that demands must be made in all cases, and that the court could not read an exception into the section. The charter section involved in the Farmers' Bank Case read [page 796]: "No suit shall be brought upon any claim for money or damages * * * until a demand for the same has been presented * * *." The court there held that the language of the charter did not admit of judicial exceptions.

Following the McCann Case come People v. Supervisors, 28 Cal. 429; Alden v. Alameda County, 43 Cal. 270; Rhoda v. Alameda County, 52 Cal. 350, and Arbios v. County of San Bernardino, 110 Cal. 553, 42 P. 1080; all holding that under those provisions of the County Government Act the filing of a claim was a condition precedent. Then come Keyes v. San Francisco, 177 Cal. 313, 173 P. 475, and Birch v. Orange County, 186 Cal. 736, 200 P. 647; after the repeal of those provisions, holding that the statutes did not then require such claim to be filed. Following these cases come Rhoda v. County of Alameda, 134 Cal.App. 726, 26 P.2d 691, and Johnson v. City of Glendale, 12 Cal. App.2d 389, 55 P.2d 580, both decided after the 1931 amendment to section 4075 and both applying the rule of the early cases herein cited; and Phillips v. Huntington Beach Elementary School Dist., 8 Cal.2d 553, 66 P.2d 657, where a similar requirement in the General Statutes was recognized as jurisdictional. Upon this historical review it follows necessarily that the "rule of decision" is that stated in Spencer v. Los Angeles, 180 Cal. 103, 119, 179 P. 163, 170, as follows: "It has been decided, and must now be considered as settled, that where the charter of a city provides that demands must be presented to its council or some officer of the city for approval or rejection, and that no payments can be made nor suit be brought thereon until after such presentation and rejection, that the cause of action does not accrue until such presentation has taken place."

[2-4] The argument contra is that, since 3819 authorizes the taxpayer to sue the county to recover taxes paid under protest, this should be treated as a complete declaration of his rights, unlimited by any other statutory restrictions. But it is common in municipal charters to provide simply that the city "may sue and be sued". Suits against cities and other public corporations for certain classes of torts are permitted by the general statute—Deering's Gen. Laws, Act 5149, and by section 400 of the Vehicle Code, St.1935, p. 153. It would be as reasonable to say that these statutes are not governed by other statutory and charter restrictions relating generally to suits against these public corporations.

In the final analysis the question resolves itself into the simple one of the powers of the legislative and the judicial departments—whether the latter may substitute its views as to what would appear the more reasonable mode of procedure. When a statute in clear terms provides that "no suit shall be filed" unless a claim has been first presented, the courts may not, under the guise of judicial construction, or judicial interpretation, declare that the statute means that "some suits" may be filed without prior claim, though it may

appear to judicial minds that that would be a more reasonable mode of procedure. Plain words used in a statute employed according to their common and accepted meaning do not call for judicial construction, and when the express declarations of the legislative body are nullified by what is termed "interpretation" it becomes judicial legislation, rather than judicial construction.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



30 Cal.App.2d 594

In re STEWART'S ESTATE.

STATE v. COFFEE et al.

Civ. 6165.

District Court of Appeal, Third District, California.

Jan. 30, 1939.

1. Adoption ⇐21

Under statutes relating to adoption, succession, and escheat, no authority is given to an adopted person to inherit through an adoptive parent from a collateral kindred of the latter. Civ.Code, §§ 228, 229; Probate Code, §§ 226, 231, 257.

2. Descent and distribution ⇐71(4)

The presumption of law that every intestate has left some one entitled to claim as his heir however remote must be restricted to those entitled to succeed by reason of a blood relationship.

3. Descent and distribution ⇐1

The right to succession is entirely statutory.

4. Adoption ⇐21

Under statutes relating to adoption, succession, and escheat, the sole right of an adopted child to succeed is restricted to the estate of the one who has adopted him. Civ. Code, §§ 228, 229; Probate Code, §§ 226, 231, 257.

5. Adoption ⇐21

Adopted children of predeceased cousin of deceased intestate who died without leaving either issue, foster brother, sister, or descendant of a deceased brother or sister, nor any blood kindred, were not entitled to succeed as heirs to the estate of decedent as his next of kin. Civ.Code, §§ 228, 229; Probate Code, §§ 226, 231, 257.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Proceeding in the matter of the estate of James J. Stewart, also known as J. J. Stewart, also known as J. Stewart, deceased, wherein Harold Craig Coffee and another filed a petition opposed by the State of California praying that they be determined to be the next of kin of the deceased and be entitled to succeed to his estate. From a judgment for petitioners, the State appeals.

Reversed with directions.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the State.

Bush & Ackley, of Oakdale, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal from a judgment to the effect that respondents are the next of kin of James J. Stewart, deceased, and the only persons entitled to the distribution of the estate of said decedent.

On February 13, 1937, James J. Stewart died intestate, and the public administrator was appointed to administer his estate.

The record shows without dispute that Stewart died without leaving either issue, spouse, parent, brother, sister, or descendant of a deceased brother or sister, nor any blood kindred whatsoever. The record further shows that the respondents are children by adoption of Stewart's predeceased cousin, Mary Lancaster Coffee. These two adopted children petitioned the trial court that they be determined the next of kin of said Stewart, and therefore, entitled to succeed to his estate, The attorney-general appeared at the trial in opposition to the petition, claiming that the said estate escheated to the State of California, under the provisions of the Probate Code, § 231, for the reason that the petitioners were not the next of kin of said deceased. The trial court found that petitioners were entitled to succeed as heirs to the estate of decedent as his next of kin.

It is the contention of the state on this appeal that the evidence is insufficient to support the finding to the effect that respondents were the next of kin of said decedent.

The case involves the construction to be placed upon our statutes of adoption and succession, and the statutes on escheat. The pertinent code sections relative to adoption are the following:

Civil Code, § 228: "A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation."

Civil Code, § 229: "The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it."

Probate Code, § 257: "An adopted child succeeds to the estate of one who has adopted him, the same as a natural child; and the person adopting succeeds to the estate of an adopted child, the same as a natural parent. An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by the adoption, nor does such natural parent succeed to the estate of such adopted child."

The statute on succession which is here involved is as follows:

Probate Code, § 226: "If the decedent leaves neither issue, spouse, parent, brother, sister, nor descendant of a deceased brother or sister, the estate goes to the next of kin in equal degree, excepting that, when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote."

The statute on escheat, under which the state lays claim to the estate of decedent, is the following:

Probate Code, § 231: "If the decedent leaves *no one* to take his estate or any portion thereof, under the laws of this state, the same escheats to the state as of the date of the death of the decedent." * * * (Italics ours.)

[1] It will be noted from an examination of these provisions that there is no statutory authority giving an adopted person a right to inherit *through* an adoptive parent from a collateral kindred of the latter. It is our opinion that the position of appellant is sustained by the statutes and decisions in this state which are directly in point on the question involved. In re Estate of Jones, 3 Cal.App.2d 395, at page 398, 39 P.2d 847, the court held that an adopted daughter had no right to share in the estate of a brother of the predeceased adoptive parent. We quote from that decision [page 848]: "In the case of In re Darling's Estate, 173 Cal. 221, 159 P. 606, 608, after a comprehensive survey of the authorities from this and other jurisdictions on the question of the right of an adopted child to inherit from blood and adoptive parents and the kin of such parents, the court says: 'So far as we have been able to find, *there is no decision given under statutes anything like ours, to the effect that the adopted child has any right of inheritance as to the ancestors or collateral kindred of the adopting parents,* or is deprived by the adoption of any right of inheritance that he had as to the ancestor and collateral kindred of his parents by blood.' This limitation of relation, so far as it affects the right of inheritance, has been given recognition by the commonly expressed declaration that *an adopted child may inherit from his adoptive parent but not through him.*"

The same conclusion was reached in Re Estate of Pence, 117 Cal.App. 323, 4 P.2d 202, wherein the court held that an adopted son has no right to share in the estate of a sister of a predeceased adoptive parent, on the ground that the claimant was not an heir of his aunt by adoption, because, by the provisions of the Statutes of Adoption and our laws of Succession, the right of inheritance was limited to the estate of his adoptive parent. The following language in that case is pertinent to the issues here involved [page 206]: "The rights of inheritance of an adopted child, although complete with respect to the adopting parent, do not extend to the collateral relative of that parent."

[2-4] An examination of the several cases relied upon by respondents shows that each of them related to the right of an adopted child to inherit as a lineal descendant of the adopting parent. The position of respondents seems to be that because their right to succeed is not opposed by any heirs of the blood, and only by the State of California, by reason of the Statute of

Escheat, that therefore, rather than have the estate escheat to the State of California, the court should distribute the estate to respondents. "It is, they state, a presumption of law that every intestate has left someone on earth entitled to claim as his heir, however remote". As an abstract statement the foregoing quotation is doubtless correct, but this quotation must certainly be restricted to those entitled to succeed by reason of a blood relationship. It is an elementary principle that the right to succession is entirely statutory, and consequently, we hold that the entire matter here has been fully dealt with by the legislature under the provisions of the Probate Code, § 257, quoted above. Had the legislature intended to enlarge the right of succession of an adopted child to inherit *through,* and not *from* the adopted parent, it would have so provided. As the law now stands, the sole right of an adopted child to succeed is restricted to the estate of the one who has adopted him. Were we to hold otherwise, we would be attempting to legislate by judicial opinion. If the matter presents the inequities and hardships suggested by respondents, relief must be sought through legislative channels and not through the judiciary.

[5] We are of the opinion that the findings of the trial court to the effect that respondents were next of kin of the decedent, and entitled to succeed to his estate, is not supported by the evidence.

The judgment is reversed and the trial court directed to enter findings and judgment in accordance with this opinion. Appellant to recover costs on appeal.

We concur: PULLEN, P. J.; THOMPSON, J.



30 Cal.App.2d 629

MORTGAGE GUARANTEE CO. v. KOLKEY et al.

Civ. 12063.

District Court of Appeal, Second District, Division 2, California.

Feb. 1, 1939.

Appeal and error ⇐781(4)

Where it was shown by affidavit filed in support of motion to dismiss appeal from order discharging writ of execution that writ was levied against moneys of defendants in possession of insurance company by reason of three policies, that subsequent to order all of moneys were released to one of defendants, that no writ of supersedeas or stay of execution was obtained by plaintiff upon taking appeal, and that policies were surrendered to insurance company and canceled, appeal was dismissed as involving a moot question.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Mortgage Guarantee Company against Nathan Kolkey, Sarah Kolkey, and Herman Zoler. From an order releasing and discharging the writ of execution, the plaintiff appeals.

Appeal dismissed.

Thomas M. Parrington, of Los Angeles, for appellant.

Abe Richman, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal by the plaintiff from an order of the superior court releasing and discharging a writ of execution levied upon certain funds in the hands of a life insurance company. The matter comes before us on the motion of the defendant to dismiss the appeal upon the ground that the subject-matter of the appeal has become moot.

In support of the motion is filed an affidavit which states that the writ of execution was levied against moneys in the possession of the New York Life Insurance Company arising by reason of the existence of three policies of life insurance; that subsequent to the granting of said order releasing and discharging said moneys from the effect of said writ of execution, all of said moneys were released to the defendant; that no writ of supersedeas or stay of execution of any kind was obtained by plaintiff upon taking the appeal; and that on December 6, 1938, for a valuable consideration the defendant surrendered each and all of said policies of life insurance to said insurance company and said policies were cancelled. The motion is not contested and is granted.

Appeal dismissed.

We concur: WOOD, J.; McCOMB, J.

30 Cal.App.2d 656

SPALETTA v. KELLY, Director of Department of Public Works, et al.

Civ. 6014.

District Court of Appeal, Third District, California.

Feb. 3, 1939.

Rehearing Denied March 4, 1939.

Hearing Denied by Supreme Court April 3, 1939.

1. States ⇐53

A state highway employee may, for good cause, be transferred from one portion of a highway district to another or from one portion of the state to another in the manner provided by law. St.1913, p. 1035, as amended.

2. States ⇐53

The attempted transfer of highway maintenance foreman from one part of the state to another by principal personnel technician without the consent of the state personnel board was void. St.1913, p. 1035, as amended.

3. States ⇐67

Adoption by state personnel board of rule that no employee after serving stated time should be transferred to another part of the state without the consent of the board was not in conflict with constitutional provision stating powers of executive officer of state personnel board reserving to board power to make rules and regulations. St. 1913, p. 1035, as amended; Const. art. 24, § 2(c).

4. States ⇐68

Executive officer of state personnel board was without authority to delegate important duties of his office to the principal personnel technician. St.1913, p. 1035, as amended; Const. art. 24, § 2(c).

5. States ⇐57

Where highway maintenance foreman of district held himself in readiness to perform usual duties after void attempt to transfer him to another part of the state, he was entitled to his salary until time of his reinstatement. St.1913, p. 1035, as amended.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Petition by John C. Spaletta against Earl Lee Kelly, as Director of the Department of Public Works of the State of California, and others for a writ of mandamus directing respondents to reinstate petitioner as highway maintenance foreman at Laytonville in district No. 1 of the State of California, and directing payment of petitioner's salary during the time he was excluded from his position. From a judgment for petitioner, the respondents appeal.

Judgment modified, and, as modified, affirmed.

Hearing denied by Supreme Court; SHENK and HOUSER, JJ., dissenting.

U. S. Webb, Atty. Gen., Wilmer W. Morse, Deputy Atty. Gen., and C. C. Carleton and Robert E. Reed, both of Sacramento, for appellants.

E. H. Christian, of Oakland, Ira J. Darling, of Sacramento, and Fred B. Wood, of San Francisco, amici curiæ, for appellants.

H. L. Preston and Lilburn Gibson, both of Ukiah, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The respondents have appealed from a judgment rendered by the superior court of Mendocino county on a petition for a writ of mandamus, compelling the reinstatement of John C. Spaletta as highway maintenance foreman at Laytonville in district No. 1 of the state of California, which comprises a portion of the Redwood state highway, and directing the payment of his salary during the period of time he was excluded from his position.

The petition alleges that Spaletta has been employed as such highway maintenance foreman in said district No. 1 at a salary of $180 a month and has attained civil service status pursuant to the provisions of the civil service act of California (Stats.1913, p. 1035 and amendments, Deering's Gen. Laws of Calif. of 1931, p. 621, act 1400); that ever since said time he has efficiently performed the duties of his office without criticism; that no charges of unfitness or insubordination have ever been presented against him; that he has never been discharged nor has he resigned, but at all times has been and still is entitled to retain said position; that for administrative purposes the state of California is divided into highway districts designated by numbers, each of which districts is maintained under the supervision of a district engineer who is in charge of the work and of the highway staff; that Mendocino county is located in highway district No. 1, which includes the territory extending along the Redwood highway for a distance of eighty-

eight miles and which is subdivided into four different sections, one of which sections is located at Laytonville over which the petitioner had supervision; that another section of the district is located at Bridgeville, near Eureka; that without authority of the state personnel board the petitioner was directed to leave his employment at Laytonville and report for similar service at Bridgeville. Pursuant to that order the following written communication was given to the petitioner, October 24, 1936:

"Under the authority of Section 3, Rule 18, of the Rules and Regulations of the State Personnel Board, approval is hereby granted to the transfer of John C. Spaletta, Highway Maintenance Foreman, from Laytonville to Bridgeville.

"Very truly yours

"William Brownrigg
"Executive Officer
"By Louis J. Kroeger
"Principal Personnel
"Technician"

It is also alleged that because his transfer from Laytonville to Bridgeville was not duly authorized by the state personnel board, the petitioner failed and refused to report for duty in the last-mentioned section, and continued to report for work at Laytonville, holding himself in readiness at all times to perform his service, but was refused permission to continue the work; that after the lapse of ten days from his notice of transfer the petitioner was notified of the termination of his services on the theory that for failure to report for work at Bridgeville for a period of ten days under the provisions of rule 15, section 2, he was deemed to have resigned, and that thereafter the payment of his salary was refused. The petition for a writ of mandamus was filed in Mendocino county, December 31, 1936, demanding the reinstatement of petitioner as highway maintenance foreman and the payment of his salary from August 9, 1936.

A demurrer to the petition was overruled. The respondents answered, denying the material allegations of the petition. The cause was heard and the court adopted findings favorable to the petitioner in every respect, determining that he had been employed under the state civil service for several years as highway maintenance foreman at Laytonville in division No. 1 and that he thereby attained civil service status; that no charges of unfitness had ever been presented against him; that the petitioner was not lawfully transferred to the Bridgeville district; that he did not resign, but on the contrary was ready and willing at all times to continue to perform his services as such employee at Laytonville or elsewhere. Thereupon the court rendered judgment directing the reinstatement of the petitioner and the payment of his salary from August 9, 1936. From that judgment the respondents have appealed.

[1] There can be no doubt that for good cause a state highway employee may be transferred from one portion of a highway district to another or from one portion of the state to another, in the manner provided by law. It follows that for the welfare and interest of the highway service the transfer of the petitioner from Laytonville to Bridgeville may be authorized and that he may not arbitrarily refuse to accept such transfer. It does not appear there was any arbitrary, discriminatory or unreasonable action in assigning the petitioner to his service at Bridgeville, but upon the contrary that order appears to have been made in the exercise of reasonable discretion vested in the highway authorities to transfer an employee from one position to another in the same class or grade which he occupies in the service. Such transfer, however, must be made pursuant to law and the authorized rules adopted by the state personnel board. Rule 18, section 3, of the rules and regulations of the state personnel board provides that: "No employee who has occupied a position for thirty days after appointment from the eligible list and whose services during that time have been satisfactory shall be compelled by the appointing power to report for duty in another part of the State without the consent of the board."

[2] It is conceded that the transfer from Laytonville to Bridgeville is a change from one part of the state to another, since those districts are located a considerable distance apart. The record clearly shows and the court found the transfer of the petitioner from Laytonville to Bridgeville was attempted to be made without the approval or authorization of the state personnel board; in fact, that transfer does not even purport to have been authorized by Mr. Brownrigg, the executive officer of the board. On the contrary, it appears to have been directed by Mr. Kroeger, who was then the principal personnel technician. The principal personnel technician has no authority of law to perform administrative

or executive duties of the executive officer of the board. The effort to transfer the petitioner from Laytonville to Bridgeville was, therefore, ineffectual and void.

[3] The appellants contend that the executive officer of the board is authorized to transfer a highway officer from one portion of the state to another without the approval of the state personnel board, under the provisions of article 24, section 2(c) of the Constitution of California, adopted November 6, 1934, which reads:

"The board shall appoint and fix the compensation of an executive officer who shall be a member of the State civil service but not a member of the board.

"Said executive officer shall perform and discharge all of the powers, duties, purposes, functions and jurisdiction hereunder or which hereafter by law may be vested in the board except that the adoption of rules and regulations, the creation and adjustment of classifications and grades, and dismissals, demotions, suspensions and other punitive action for or in the State civil service shall be and remain the duty of the board and a vote of a majority of the members of said board shall be required to make any action with respect thereto effective."

It will be observed that the adoption of rules and regulations are specifically reserved to the board. The executive officer is given no power to adopt rules or regulations affecting administrative affairs or otherwise. That is the exclusive province of the board. Pursuant to that constitutional provision, rule 18, section 3, was duly adopted by the board, authorizing the transfer of an employee from one part of the state to another only with the consent of the board. We are of the opinion the adoption of that reasonable regulation is authorized by law. It is not in conflict with the provisions of article 24 of the Constitution.

Certainly neither the Constitution nor rule 18 of the board authorizes the delegation of authority to transfer an employee from one part of the state to another to the principal personnel technician, even though the executive officer be deemed to possess such power, which we seriously doubt. The appellants contend the executive officer of the board is invested with unusual and extraordinary power and authority under the constitutional provision above quoted, including discretionary and administrative authority on his part. This would mean that the executive officer is invested with concurrent power and authority to perform many duties which evidently were intended solely as the province of the board. It seems inconsistent to confer upon so important a tribunal as the state personnel board executive and administrative functions and then divest the board of its power by transferring those functions to an executive officer. It is equally inconsistent to assume that both the board and the executive officer were invested with concurrent jurisdiction and authority to perform the same important functions. This would necessarily lead to a conflict of authority.

[4, 5] In the able brief which was filed in this proceeding by attorneys appearing amici curiae, it is contended that article 24, section 2, of the Constitution does not confer upon the executive officer the authority to perform the duties or functions granted to the board except in accordance with its direction and approval; that the executive officer, after all, is an officer and agent of the board and subject to its direction. It is unnecessary for us to determine that far-reaching question. It is sufficient to say that by no stretch of construction may the constitutional provision referred to be deemed to authorize the principal personnel technician to perform the important functions conferred upon the executive officer of the board. He is not a deputy of the executive officer. It appears from the record that at the time this purported transfer occurred, Mr. Brownrigg, the executive officer, was out of the state, and that he had merely authorized Mr. Kroeger, the principal personnel technician, to perform his duties during his absence. Certainly the executive officer had no authority to delegate the important duties of his office to another individual. There is no authority of law for such delegation of power. It follows that the effort to transfer the petitioner from Laytonville to Bridgeville was ineffectual and void and that he was neither discharged nor did he resign, but he held himself in readiness at all times to perform his duties as highway maintenance foreman and is therefore entitled to his salary at the rate of $180 a month from August 9, 1936, as determined in the judgment rendered by the trial court. It is stipulated between the parties that the judgment for salary should be reduced in the amount of $15 per month on account of rental paid for the petitioner's dwelling house at Laytonville. It is accordingly so ordered.

As so modified, the judgment is affirmed.

I concur: PULLEN, P. J.

30 Cal.App.2d 630

O'DONNELL et al. v. MARKET STREET RY. CO. et al.

Civ. 10791.

District Court of Appeal, First District, Division 2, California.

Feb. 2, 1939.

Rehearing Denied March 4, 1939.

Hearing Denied by Supreme Court April 3, 1939.

1. Street railroads ⇐114(6, 21)

Evidence *held* to support jury's implied finding that street car motorman was guilty of negligence, constituting the or a proximate cause of collision with automobile at street intersection, in quickly increasing speed without warning after slowing down.

2. Courts ⇐121(4)

The superior court had jurisdiction of a count of a cause of action against street railway company to recover amount expended by plaintiff for treatment of injuries sustained by her daughter in collision between automobile and street car though amount sought was below its jurisdictional requirements, where the daughter, by another count, sought to recover in amount that was within the jurisdiction of the superior court.

3. Street railroads ⇐113(1, 4), 118(16)

Evidence that no warning signal was given before street car quickly increased speed after slowing down and being seen by automobile driver was competent evidence on issues of motorman's negligence and proximate cause of collision with automobile, and court properly refused instruction that failure to sound such signal cannot be considered proximate cause of collision with automobile, driver of which knew of street car's approach.

4. Trial ⇐296(12)

Error, if any, in instruction that "What is ordinary care is a question of fact to be decided by you from all the evidence" was not prejudicial to defendants in personal injury suit, in view of preceding sentence correctly defining "ordinary care."

Appeal from Superior Court, City and County of San Francisco; Donald W. Geary, Judge.

Action by Virginia O'Donnell, a minor, by her mother and guardian ad litem, Cecelia O'Donnell, and the latter, individually, against the Market Street Railway Company and another to recover damages for personal injuries to minor plaintiff and amount expended by last-named plaintiff for treatment of such injuries. Judgments for plaintiffs, and defendants appeal.

Affirmed.

William M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

William M. Malone, of San Francisco (Raymond L. Sullivan, of San Francisco, of counsel), for respondents.

SPENCE, Justice.

Plaintiff, Virginia O'Donnell, a minor, sought to recover damages in the sum of $7,520 for personal injuries sustained as the result of a collision of a street car of the defendant company and an automobile in which said plaintiff was riding as a guest. Plaintiff Cecelia O'Donnell, the mother of said minor, sought to recover damages in the sum of $334.43, which was alleged to have been the amount necessarily expended by her for the treatment of her daughter's injuries. The complaint, which was filed in the superior court in the city and county of San Francisco, set forth two counts, the first embracing the alleged cause of action of the injured minor and the second embracing the alleged cause of action of her mother. Upon a trial by jury, the injured minor had judgment in the sum of $1,500 and her mother had judgment in the sum of $334.43. The defendant company and defendant Highstreet, its motorman, appeal from said judgments.

The collision occurred at the intersection of Eighteenth avenue and Balboa street in San Francisco on May 4, 1935, at about the hour of 5 o'clock p. m. The defendant company operates a double track street railway on Balboa street, which runs in a general easterly and westerly direction. The car involved in the collision was being operated in an easterly direction along the southerly track. The automobile in which the injured plaintiff was riding was being driven by her cousin, Mary McHugh, in a northerly direction along Eighteenth avenue. There were no signals or stop-signs of any kind at any of the corners of said intersection. The collision occurred about ten feet west of the easterly curb line of said Eighteenth avenue and the evidence showed that the street car carried the automobile from 50 to 65 feet eastward along the track before coming to a stop.

[1] Appellants first contend that "the evidence demonstrates that the negligence of Mary McHugh was the sole proximate cause of any damages sustained by plaintiff". Under the circumstances before us, this appears to be the equivalent of a claim that the evidence was insufficient to support the implied finding that the appellant motorman was guilty of negligence which was the proximate cause, or a proximate cause, of the collision. We find no merit in this contention. It may be conceded that there was ample evidence from which the jury might have determined that Mary McHugh was guilty of negligence, but it also appears that there was ample evidence from which the jury might have determined that both Mary McHugh and the appellant motorman were guilty of negligence and that the concurring negligence of both was the proximate cause of said collision.

There is some conflict regarding the speed of the street car and the speed of the automobile at the time of the collision, but all of the evidence shows that both the street car and the automobile had slowed down upon approaching the intersection. The defendant motorman's own testimony regarding his actions upon approaching and crossing the intersection was as follows: That he threw off the power and put on the brake as he approached the intersection and "then I continued to throw it back, to wind it up again, to put full power on"; that his view was unobstructed but he did not see the automobile until he was out in the intersection beyond the curb line; that he did not thereupon throw off the power or put on the brake in the intersection before the impact but "simultaneously with the collision, I reversed my car; I threw off the power and reversed, pulled it back to slug and pulled more power to turn the wheels backward in motion"; that his car was traveling only eight miles per hour at the time of impact but it proceeded approximately 30 feet after the impact before stopping notwithstanding he made an emergency stop in the fastest and most efficient manner. His testimony regarding the automobile was that it was traveling slowly when he first saw it near the southerly curb line; that he thought it was coming to a stop; that it was constantly in his view thereafter and that "the machine literally, practically jumped; it looked as if it picked up an awful lot of speed right quick"; that nevertheless when the automobile got to the south rail of the track, "Well, I will say she was going about—oh, approximately ten or twelve miles an hour." While we believe that the unsatisfactory testimony of the motorman was in itself sufficient to support the jury's implied findings against him and his employer, we may state that the testimony of respondent's witnesses fully supported said findings. It showed that the automobile did not increase its speed after slowing down but that the motorman did quickly increase the speed of the street car after slowing down; that said increased speed of the street car exceeded that permitted by ordinance in crossing such intersections and that said increase was not accompanied or preceded by any warning.

[2] Appellants further contend that "the superior court did not have jurisdiction of the subject-matter of the separate cause of action of plaintiff Cecelia O'Donnell". This contention may not be sustained in view of the conclusions reached by the Supreme Court in Emery v. Pacific Employers Insurance Co., 8 Cal.2d 663, 67 P.2d 1046.

[3] Two other contentions of appellants are discussed under the heading "the court erred in refusing to instruct the jury concerning alleged failure of motorman to sound warning signal and in admitting evidence that no gong was sounded". The refused instruction read as follows: "I instruct you that where the driver of an automobile knows that a street car is approaching, any alleged failure on the part of the motorman to sound a warning signal of the approach of the street car cannot in law be considered a proximate cause of any collision between the automobile and the street car." In support of said contentions appellants cite and rely mainly upon Starck v. Pacific Electric Ry. Co., 172 Cal. 277, 156 P. 51, L.R.A.1916E, 58. They also cite Lambert v. Southern Pacific R. Co., 146 Cal. 231, 79 P. 873, and numerous cases involving railroads rather than street railways. Appellants cite no authority holding that the admission of such evidence constituted error and we are of the opinion that neither the admission of such evidence nor the refusal of said instruction constituted error under the circumstances before us. There was evidence here to show that the street car had slowed down as it approached the intersection and that after it was seen by the driver of the automobile, it quickly increased its speed without warn-

ing as above stated. Under those circumstances, we believe that the evidence that no warning signal was given was competent evidence for the consideration of the jury on the issues of negligence and proximate cause and that said proposed instruction was properly refused.

[4] The final contention of appellants is that "the court erred in instructing the jury as to the meaning of the term 'ordinary care' ". The challenged instruction read as follows: "By 'ordinary care' is meant that degree of care which would be used by a person of ordinary prudence under the same or similar circumstances. What is ordinary care is a question of fact to be decided by you from all the evidence." Appellants concede that the first sentence of said instruction contained a correct statement of the law, but they claim there was prejudicial error in the giving of the second sentence thereof. The wording of said second sentence cannot be approved but when it is read with the first sentence, we are of the view that the jury must have understood it to mean that the question of whether any party exercised ordinary care was a question of fact to be decided by the jury from all the evidence and under the definition given in the preceding sentence. We therefore conclude that the error, if any, in the giving of said second sentence was not prejudicial to appellants.

The judgments are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



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